

FRAP 40

PETITION FOR REHEARING

(a) Time for filing; content; answer; action by court if granted. A petition for rehearing may be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order or by local rule. The petition shall state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires to present. Oral argument in support of the petition will not be permitted. No answer to a petition for rehearing will be received unless requested by the court, but a petition for rehearing will ordinarily not be granted in the absence of such a request. If a petition for rehearing is granted the court may make a final disposition of the cause without reargument or may restore it to the calendar for reargument or resubmission or may make such other orders as are deemed appropriate under the circumstances of the particular case.

(b) Form of petition; length. The petition shall be in a form prescribed by Rule 32(a), and copies shall be served and filed as prescribed by Rule 31(b) for the service and filing of briefs. Except by permission of the court, or as specified by local rule of the court of appeals, a petition for rehearing shall not exceed 15 pages.

(As amended Apr. 30, 1979, eff. Aug. 1, 1979.)

CIRCUIT RULE 40-1

OPPORTUNITY TO RESPOND

Rehearing will not be ordered without giving all parties an opportunity to respond in writing on whether rehearing is appropriate.

CIRCUIT RULE 40-2

FORM OF PETITION AND ANSWER

A petition for rehearing shall have a cover the same color as the party's first brief. An answer, when permitted, to a petition for rehearing shall have the same color cover as that party's first brief.

Cross Reference: FRAP 28, Briefs; FRAP 31, Filing and Service of Briefs; FRAP 32, Form of Briefs; and FRAP 35, Determination En Banc.

CIRCUIT ADVISORY COMMITTEE NOTE TO RULE 40-2

Where a petition for rehearing does not include a suggestion for a rehearing en banc, an original and 3 copies shall be filed. Where a petition for rehearing does include a suggestion for a rehearing en banc, an original and 40 copies shall be filed.

FRAP 41

ISSUANCE OF MANDATE; STAY OF MANDATE

(a) Date of issuance. The mandate of the court shall issue 21 days after the entry of judgment unless the time is shortened or enlarged by order. A certified copy of the judgment and a copy of the opinion of the court, if any, and any direction as to costs shall constitute the mandate, unless the court directs that a formal mandate issue. The timely filing of a petition for rehearing will stay the mandate until disposition of the petition unless otherwise ordered by the court. If the petition is denied, the mandate shall issue 7 days after entry of the order denying the petition unless the time is shortened or enlarged by order.

(b) Stay of mandate pending application for certiorari. A stay of the mandate pending application to the Supreme Court for a writ of certiorari may be granted upon motion, reasonable notice of which shall be given to all parties. The stay shall not exceed 30 days unless the period is extended for cause shown. If during the period of the stay there is filed with the clerk of the court of appeals a notice from the clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that court, the stay shall continue until final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari the mandate shall issue immediately. A bond or other security may be required as a condition to the grant or continuance of a stay of the mandate.

CIRCUIT RULE 41-1

STAY OF MANDATE

In the interest of minimizing unnecessary delay in the administration of criminal justice, a motion for stay of mandate pursuant to FRAP 41(b), pending petition to the Supreme Court for certiorari, will not be granted as a matter of course, but will be denied if the Court determines that the petition for certiorari would be frivolous or filed merely for delay.

In other cases including National Labor Relations Board proceedings, the Court may likewise deny a motion for stay of mandate upon the basis of a similar determination.

CIRCUIT ADVISORY COMMITTEE NOTE TO RULE 41-1

Only in exceptional circumstances will a panel order the mandate to issue immediately upon the filing of a disposition. Such

circumstances include cases where a petition for rehearing, suggestion for rehearing en banc, or petition for writ of certiorari would be legally frivolous; or where an emergency situation requires that the action of the Court become final and mandate issue at once. The mandate will not be stayed automatically upon the filing of an application to the Supreme Court for writ of certiorari. However, a stay may be granted upon motion.

When the Court receives a motion for stay or recall of mandate, the Clerk sends it to the author of the disposition or if the author is a visiting judge, to the presiding judge of the panel. The author or presiding judge rules on the motion. The motion will not be routinely granted; it will be denied if the Court determines that the application for certiorari would be frivolous or is made merely for delay.

FRAP 42

VOLUNTARY DISMISSAL

(a) Dismissal in the district court. If an appeal has not been docketed, the appeal may be dismissed by the district court upon the filing in that court of a stipulation for dismissal signed by all the parties, or upon motion and notice by the appellant.

(b) Dismissal in the court of appeals. If the parties to an appeal or other proceeding shall sign and file with the clerk of the court of appeals an agreement that the proceeding be dismissed, specifying the terms as to payment of costs, and shall pay whatever fees are due, the clerk shall enter the case dismissed, but no mandate or other process shall issue without an order of the court. An appeal may be dismissed on motion of the appellant upon such terms as may be agreed upon by the parties or fixed by the court.

CIRCUIT RULE 42-1

DISMISSAL FOR FAILURE TO PROSECUTE

When an appellant fails to file a timely record, pay the docket fee, file a timely brief, or otherwise comply with rules requiring processing the appeal for hearing, an order may be entered dismissing the appeal. In all instances of failure to prosecute an appeal to hearing as required, the Court may take such other action as it deems appropriate, including imposition of disciplinary and monetary sanctions on those responsible for prosecution of the appeal.

CIRCUIT RULE 42-2

TERMINATION OF BAIL FOLLOWING DISMISSAL

Upon dismissal of an appeal in any case in which an appellant has obtained a release from custody upon a representation that he

is appealing the judgment of the district court, the Clerk will notify the appropriate district court that the appeal has been dismissed and that the basis for the continued release on bail or recognizance no longer exists.

FRAP 43

SUBSTITUTION OF PARTIES

(a) Death of a party. If a party dies after a notice of appeal is filed or while a proceeding is otherwise pending in the court of appeals, the personal representative of the deceased party may be substituted as a party on motion filed by the representative or by any party with the clerk of the court of appeals. The motion of a party shall be served upon the representative in accordance with the provisions of Rule 25. If the deceased party has no representative, any party may suggest the death on the record and proceedings shall then be had as the court of appeals may direct. If a party against whom an appeal may be taken dies after entry of a judgment or order in the district court but before a notice of appeal is filed, an appellant may proceed as if death had not occurred. After the notice of appeal is filed substitution shall be effected in the court of appeals in accordance with this subdivision. If a party entitled to appeal shall die before filing a notice of appeal, the notice of appeal may be filed by that party's personal representative, or, if there is no personal representative by that party's attorney of record within the time prescribed by these rules. After the notice of appeal is filed substitution shall be effected in the court of appeals in accordance with this subdivision.

(b) Substitution for other causes. If substitution of a party in the court of appeals is necessary for any reason other than death, substitution shall be effected in accordance with the procedure prescribed in subdivision (a).

(c) Public officers; death or separation from office.

(1) When a public officer is party to an appeal or other proceeding in the court of appeals in an official capacity and during its pendency dies, resigns or otherwise ceases to hold office, the action does not abate and the public officer's successor is automatically substituted as a party. Proceedings following the substitution shall be in the name of the substituted party, but any misnomer not affecting the substantial rights of the parties shall be disregarded. An order of substitution may be entered at any time, but the omission to enter such an order shall not affect the substitution.

(2) When a public officer is a party to an appeal or other proceeding in an official capacity that public officer may be described as a party by the public officer's official title rather than by name; but the court may require the public officer's name to be added.

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

FRAP 44

CASES INVOLVING CONSTITUTIONAL QUESTIONS WHERE UNITED STATES IS NOT A PARTY

It shall be the duty of a party who draws in question the constitutionality of any Act of Congress in any proceeding in a court of appeals to which the United States, or any agency thereof, or any officer or employee thereof, as such officer or employee, is not a party, upon the filing of the record, or as soon thereafter as the question is raised in the court of appeals, to give immediate notice in writing to the court of the existence of said question. The clerk shall thereupon certify such fact to the Attorney General.

FRAP 45

DUTIES OF CLERKS

(a) General provisions. The clerk of a court of appeals shall take the oath and give the bond required by law. Neither the clerk nor any deputy clerk shall practice as an attorney or counselor in any court while continuing in office. The court of appeals shall be deemed always open for the purpose of filing any proper paper, of issuing and returning process and of making motions and orders. The office of the clerk with the clerk or a deputy in attendance shall be open during business hours on all days except Saturdays, Sundays, and legal holidays, but a court may provide by local rule or order that the office of its clerk shall be open for specified hours on Saturdays or on particular legal holidays other than New Year's Day, Birthday of Martin Luther King, Jr., Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, and Christmas Day.

(b) The docket; calendar; other records required. The clerk shall maintain a docket in such form as may be prescribed by the Director of the Administrative Office of the United States Courts. The clerk shall enter a record of all papers filed with the clerk and all process, orders and judgments. An index of cases contained in the docket shall be maintained as prescribed by the Director of the Administrative Office of the United States Courts.

The clerk shall prepare, under the direction of the court, a calendar of cases awaiting argument. In placing cases on the calendar for argument, the clerk shall give preference to appeals in criminal cases and to appeals and other proceedings entitled to preference by law.

The clerk shall keep such other books and records as may be required from time to time by the Director of the Administrative

Office of the United States Courts with the approval of the Judicial Conference of the United States, or as may be required by the court.

(c) Notice of orders or judgments. Immediately upon the entry of an order or judgment the clerk shall serve a notice of entry by mail upon each party to the proceeding together with a copy of any opinion respecting the order or judgment, and shall make a note in the docket of the mailing. Service on a party represented by counsel shall be made on counsel.

(d) Custody of records and papers. The clerk shall have custody of the records and papers of the court. The clerk shall not permit any original record or paper to be taken from the clerk's custody except as authorized by the orders or instructions of the court. Original papers transmitted as the record on appeal or review shall upon disposition of the case be returned to the court or agency from which they were received. The clerk shall preserve copies of briefs and appendices and other printed papers filed.

(As amended Mar. 1, 1971, eff. July 1, 1971; Mar. 10, 1986, eff. July 1, 1986.)

FRAP 46

ATTORNEYS

(a) Admission to the bar of a court of appeals; eligibility; procedure for admission. An attorney who has been admitted to practice before the Supreme Court of the United States, or the highest court of a state, or another United States court of appeals, or a United States district court (including the district courts for the Canal Zone, Guam and the Virgin Islands), and who is of good moral and professional character, is eligible for admission to the bar of a court of appeals.

An applicant shall file with the clerk of the court of appeals, on a form approved by the court and furnished by the clerk, an application for admission containing the applicant's personal statement showing eligibility for membership. At the foot of the application the applicant shall take and subscribe to the following oath or affirmation:

I, , do solemnly swear (or affirm) that I will demean myself as an attorney and counselor of this court, uprightly and according to law; and that

I will support the Constitution of the United States.

Thereafter, upon written or oral motion of a member of the bar of the court, the court will act upon the application. An applicant may be admitted by oral motion in open court, but it is not necessary that the applicant appear before the court for the

purpose of being admitted, unless the court shall otherwise order. An applicant shall upon admission pay to the clerk the fee prescribed by rule or order of the court.

(b) Suspension or disbarment. When it is shown to the court that any member of its bar has been suspended or disbarred from practice in any other court of record, or has been guilty of conduct unbecoming a member of the bar of the court, the member will be subject to suspension or disbarment by the court. The member shall be afforded an opportunity to show good cause, within such time as the court shall prescribe, why the member should not be suspended or disbarred. Upon the member's response to the rule to show cause, and after hearing, if requested, or upon expiration of the time prescribed for a response if no response is made, the court shall enter an appropriate order.

(c) Disciplinary power of the court over attorneys. A court of appeals may, after reasonable notice and an opportunity to show cause to the contrary, and after hearing, if requested, take any appropriate disciplinary action against any attorney who practices before it for conduct unbecoming a member of the bar or for failure to comply with these rules or any rule of the court.

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

CIRCUIT ADVISORY COMMITTEE NOTE REGARDING SANCTIONS

Under existing authority, the Court may impose monetary sanctions as follows:

(1) Against a party, its counsel, or both, under FRAP 38, where the Court determines that "an appeal is frivolous, it may award just damages and single or double costs to the appellee."

(2) Against a party, its counsel, or both under 28 U.S.C. Section 1912, "[w]here a judgment is affirmed by . . . a court of appeals, the court in its discretion may adjudge to the prevailing party just damages for his delay, and single or double costs."

(3) Under 28 U.S.C. Section 1927, where counsel "so multiplies the proceedings in any case unreasonably or vexatiously" counsel "may be required by the court to satisfy personally the excess costs, expenses and attorneys' fees reasonably incurred because of such conduct."

(4) Under Circuit Rules 17-3 and 30-2, against counsel who "vexatiously and unreasonably increases the cost of litigation by inclusion of unnecessary material in the excerpts of record."

(5) Under Circuit Rule 42-1, against counsel for "failure to prosecute an appeal to hearing as required" by FRAP and the Circuit Rules.

(6) Against counsel for failure to comply with the requirements of FRAP 28 and Circuit Rules 28-1 through 28-3, dealing with the form and content of briefs on appeal. See e.g., *Mitchel v. General Electric Co.*, 689 F.2d 877 (9th Cir. 1982).

(7) Under FRAP 46(c), against counsel for failure to comply with the Federal Rules of Appellate Procedure or any Circuit Rule.

(8) Against counsel for conduct which violates the orders or other instructions of the Court.

(9) Under the inherent powers of the Court.

See e.g., *Roadway Express v. Jossy*, 853 F.2d 736 (9th Cir. 1988) and *Golden Eagle v. Burroughs Corp.*, 809 F.2d 584 (9th Cir. 1987).

CIRCUIT RULE 46-1

ATTORNEYS

46-1.1 Admission and Fees

An attorney may be admitted upon written or oral motion of a member of the bar of the Court. Written motions shall be on the form approved by the Court and furnished by the Clerk.

46-1.2 Time for Application

Any attorney who causes a case to be docketed in this Court or who enters an appearance in this Court, and who is not already admitted to the Bar of the Court, shall simultaneously apply for admission.

46-1.3 Fees

Each attorney shall pay to the Clerk an admission fee. The amount of the admission fee may be periodically adjusted by the Court.

CIRCUIT RULE 46-2

DUTY OF COUNSEL TO PROSECUTE APPEAL DILIGENTLY

It is the duty of counsel representing an appellant to see that the appeal is perfected in the manner and within the times prescribed in the Federal Rules of Appellate Procedure and in these rules, and to prosecute the appeal with diligence. In this connection, the attention of counsel, whether appointed or retained, is directed specifically to the Revised Provision for the Representation of Defendants Financially Unable to Obtain Representation, adopted by the Court pursuant to the Criminal Justice Act of 1964, as amended, copies of which are available upon request to the Clerk. Failure of counsel to perform the

duties prescribed in this rule and in the Revised Provisions for Representation where applicable will be grounds for discipline under FRAP 46.

CIRCUIT RULE 46-3

CHANGE OF ADDRESS

Changes in the address of counsel and pro se litigants must be reported to the Clerk of this Court immediately and in writing.

CIRCUIT RULE 46-4

PARTICIPATION OF LAW STUDENTS

An eligible law student acting under the supervision of a member of the bar of this Court may appear on behalf of any client in a case before this Court with the written consent of the client if the Requirements for Student Practice before this Court are met. The Requirements for Student Practice are available from the Clerk of Court.

CIRCUIT RULE 46-5

RESTRICTIONS ON PRACTICE BY FORMER COURT EMPLOYEES

No former employee of the court shall participate or assist, by way of representation, consultation, or otherwise, in any case that was pending in the Court during the employee's period of employment. It shall be the responsibility of any former employee, as well as the persons employing or associating with a former employee in the practice of law before this Court, to ensure compliance with this rule.

If it is shown that this rule would cause a substantial hardship with reference to a particular case, an attorney who is a former employee may apply to the Court for an exemption. The application must demonstrate that there has been a strict compliance with the rule with reference to the particular case and in all other matters, that the attorney had no direct or indirect involvement with the case during employment with the Court, and that the attorney was not employed or assigned in the chambers of any judge who participated in the case.

FRAP 47

RULES BY COURTS OF APPEALS

Each court of appeals by action of a majority of the circuit judges in regular active service may from time to time make and amend rules governing its practice not inconsistent with these rules. In all cases not provided for by rule, the courts of appeals may regulate their practice in any manner not inconsistent with these rules. Copies of all rules made by a

court of appeals shall upon their promulgation be furnished to the Administrative Office of the United State Courts.

CIRCUIT RULE 47-1

EFFECTIVE DATE OF RULES

The Clerk shall cause these rules to be republished on January 1 and July 1 of each year. Amendments to these rules shall be effective on January 1 or July 1 following their adoption, unless otherwise directed by the Court.

FRAP 48

TITLE

These rules may be known and cited as the Federal Rules of Appellate Procedure.

CIRCUIT RULE 48-1

TITLE

The rules of the United States Court of Appeals for the Ninth Circuit may be known as Circuit Rules.

Updated January 1, 1993

APPENDIX OF FORMS

Form 1. Notice of Appeal to a Court of Appeals From a Judgment or Order of a District Court

United States District Court for the

District of

File Number

A.B., Plaintiff

vs.

Notice of Appeal

C.D., Defendant

Notice is hereby given that C.D., defendant above named, hereby appeals to the United States Court of Appeals for the Circuit (from the final judgment)(from the order (describing it)) entered in this action on the day of , 19 .

(s)

(Address)

Attorney for C.D.

Updated January 1, 1993

Form 2. Notice of Appeal to a Court of Appeals From a Decision of
the Tax Court

TAX COURT OF THE UNITED STATES Washington, D.C.

A.B., Petitioner

vs.

Docket No.

Commissioner of Internal Revenue, Respondent.

Notice of Appeal

Notice is hereby given that A.B. hereby appeals to the United
States Court of Appeals for the Circuit from [that part of] the
decision of this court entered in the above captioned proceeding
on the day of , 19 [relating to].

(s)

(Address)

Counsel for A.B.

Form 3. Petition for Review of Order of an Agency, Board,
Commission or Officer

United States Court of Appeals for the Circuit

A.B., Petitioner

vs.

Petition for Review

XYZ Commission, Respondent

A.B. hereby petitions the court for review of the Order of the XYZ Commission (describe the order) entered on , 19 .

Attorney for Petitioner

Address:

Form 4. Affidavit to Accompany Motion for Leave to Appeal in Forma Pauperis

United States District Court for the

District of

United States of America

vs.

No.

A.B.

Affidavit in Support of Motion to Proceed on Appeal in Forma Pauperis

I, , being first duly sworn, depose and say that I am the in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress; and that the issues which I desire to present on appeal are the following:

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed?

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or

in the form of rent payments, interest, dividends, or other source?

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

Form 4. Continued

3. Do you own any cash or checking or savings account?

a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

SUBSCRIBED AND SWORN TO before me this day of
19 .

Let the applicant proceed without prepayment of costs or fees or the necessity of giving security therefor.

District Judge

Form 5. Notice of Appeal to a Court of Appeals from a Judgment or Order of a District Court or a Bankruptcy Appellate Panel

United States District Court for the

District of

In re
)

)

)
Debtor

)
)

) File No. _____
Plaintiff

)
)
v.

)
)

)
Defendant

)

Notice of Appeal to United States Court of Appeals for the
_____ Circuit _____, the
plaintiff [or defendant or other party] appeals to the United
States Court of Appeals for the _____ Circuit from the
final judgment [or order or decree] of the district court for the
district of _____ [or bankruptcy appellate panel or the
_____ circuit], entered in this case on _____,
19____ [here describe the judgment, order, or decree]
_____.
_____.

The parties to the judgment [or order or decree] appealed from
and the names and addresses of their respective attorneys are as
follows:

Dated _____

Signed _____

Attorney for Appellant

Address: _____

(As added Apr. 25, 1989, eff. Dec. 1, 1989.)