Fourth Circuit Civil Appeals: Motions

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This Practice Note addresses motion practice in appeals to the US Court of Appeals for the Fourth Circuit from a federal district court's order or judgment in a civil action. This Note also covers voluntary discontinuance of an appeal.

Motion practice in the US Court of Appeals for the Fourth Circuit is usually quite limited. Many appeals conclude without the parties filing a single motion. However, parties do sometimes file motions. Motions may seek either dispositive relief (for example, dismissal of the appeal) or non-dispositive relief (for example, an extension of time to file a document). An appellant may also move or stipulate to dismiss its own appeal rather than litigate it to its conclusion.

This Note discusses motion practice in the Fourth Circuit and voluntary discontinuance of an appeal.

MAKING A MOTION

TIMING OF MOTIONS

The Fourth Circuit does not have a set time for filing all motions, but counsel generally should file a motion promptly after learning of the supporting facts. When deciding the motion, the court may consider any undue delay by the movant.

Certain types of motions must be filed within a specified time of a given event. For example, parties must file a motion for an extension of time to file the brief or appendix well in advance of the expiration of the time for filing the brief or appendix (4th Cir. R. 31(c)).

CONTENTS OF A MOTION

Although the Fourth Circuit's local rules require some additional contents beyond what the corresponding federal rules require (compare FRAP 27 with 4th Cir. R. 27(a)), they do not significantly alter the required contents for motions. Every motion filed in the Fourth Circuit must contain:

- A cover or first page with identifying information.
- A disclosure of corporate affiliations statement.
- A statement of opposing counsel's position.
- An argument.
- A certificate of compliance.
- A signature block.
- Proof of service.

The motion may also contain supporting affidavits or declarations.

Cover or First Page

A motion need not have a separate cover page, but if it does, the cover must be white (FRAP 27(d)(1)(B)). Attorneys using covers often include their names, office addresses, and telephone numbers. The cover or first page of the motion must state:

- The docket number of the appeal.
- The name of the court (United States Court of Appeals for the Fourth Circuit).
- The title of the case, including the parties to the appeal and their appellate designations (for example, Plaintiff-Appellant).
- A brief descriptive title identifying the filing party and the motion (for example, "Appellant ABC's Unopposed Motion for a Stay Pending Appeal").

(FRAP 27(d)(1)(B).)

Disclosure of Corporate Affiliations Statement

Unless a party has already filed its Disclosure of Corporate Affiliations, a motion must include a disclosure of corporate affiliations statement consistent with FRAP 26.1 and 4th Cir. R. 26.1 (4th Cir. R. 27(c)).

Statement of Opposing Counsel's Position

For any type of relief sought, the motion must include a statement that the movant's counsel consulted opposing counsel and that opposing counsel:

- Does or does not object to the relief sought.
- Intends to or does not intend to file an objection.

(4th Cir. R. 27(a).)

If the motion is opposed, counsel indicate this in the body of the motion, typically at the beginning of the argument section. If the motion is unopposed, counsel typically indicate this both in the motion's title as well as in the body of the motion.

Argument

The motion must state with particularity the relief sought, the grounds for that relief, and any legal argument in support of the motion (FRAP 27(a)(2)(A)). The argument in support of a motion must be in the motion itself; a separate memorandum or brief is not allowed (FRAP 27(a)(2)(C)(i)).

Certificate of Compliance

A motion prepared on a computer must include a certificate of compliance with the word limit. The certificate must also state the number of words in the motion. (FRAP 32(g).) Counsel may rely on the word count provided by the word processing software used to draft the motion (FRAP 32(g)(1)).

Signature Block

The motion must include a signature from one of the attorneys representing the movant. For electronically filed documents, the filing attorney's name on a signature block and CM/ECF system login and password constitute the required signature for all purposes. A manual signature is unnecessary. (FRAP 25(a)(2)(B)(iii), 32(d); 4th Cir. R. 25(a)(9); Fourth Circuit CM/ECF Attorney Manual sections II.B.4 and II.I.1.)

Counsel must indicate the identity of the filing attorney at the end of the document by placing an "s/" on a signature line followed by the attorney's name (4th Cir. R. 25(a)(9); Fourth Circuit CM/ECF Attorney Manual section II.I.1). Counsel should avoid graphic and other electronic signatures. Further, counsel should place the signature block directly below the signature line and include the filing attorney's:

- Name.
- Business address.
- Telephone number.
- Email address.

If submitting a motion that requires the signatures of two or more separately represented parties, the filing attorney may electronically file the document in one of the following ways:

- Submitting a scanned document with all necessary signatures.
- Representing the other parties' consent on the document.
- Identifying the other parties whose signatures are needed and submitting a notice of endorsement by the other parties within three business days.
- Any other manner approved by the court.

(4th Cir. R. 25(a)(9); Fourth Circuit CM/ECF Attorney Manual section II.I.2.)

Absent an objection, the Fourth Circuit presumes that the electronically represented signatures of all parties and filing users are valid signatures (4th Cir. R. 25(a)(9)).

Proof of Service

All filings in the Fourth Circuit must include a certificate of service even if all parties receive service by CM/ECF (FRAP 25(d); 4th Cir. R. 25(a)(4) and 4th Cir. R. 25(b)(3); Fourth Circuit CM/ECF Attorney Manual sections II.D, III.C).

Supporting Documents

If the motion requires facts outside the record on appeal, counsel should support the motion with affidavits or declarations (FRAP 27(a)(2)(B); 4th Cir. R. 27(c)). An affidavit or a declaration should begin with a caption containing the docket number, court name, appeal title, and document title (FRAP 27(d)(1)(B)). The body of the affidavit or declaration must contain only facts, not legal arguments (FRAP 27(a)(2)(B)). The affidavit or declaration must also be signed by the person making the statement (FRAP 32(d)).

The affidavit or declaration may include relevant documentary exhibits (4th Cir. R. 27(c)). If the motion seeks substantive relief, the affidavit or declaration must include the district court's order or judgment as an exhibit, together with any accompanying opinion or memorandum (FRAP 27(a)(2)(B)(iii)).

Counsel **should not** submit a notice of motion or a proposed order (FRAP 27(a)(2)(C)).

FORMATTING A MOTION

Motions must conform to formatting requirements that are similar to those for briefs except for length.

Page Size and Margins

Counsel must prepare the motion using 8.5" by 11" pages. Motion pages must have margins at least one inch on all four sides of the page. Except for page numbers, the motion may not include any text in the margins. (FRAP 27(d)(1)(D).) Pages should be numbered.

Font

Motions must use black type (FRAP 27(d)(1)(A)). The motion must use a plain, roman-style font. However, the motion may occasionally use italics or boldface for emphasis. Counsel must italicize or underline case names in the motion. (FRAP 27(d)(1)(E) and 32(a)(6).)

Counsel may draft the motion in either a proportionally spaced font (for example, Times New Roman) or a monospaced font (for example, Courier) (FRAP 27(d)(1)(E) and 32(a)(5)).

The required font size depends on which of these two font types the movant uses, either:

- **Proportionally spaced font.** A motion written in a proportionally spaced font must use at least a 14-point font size. This font must include serifs (for example, Times New Roman includes serifs). However, headings and captions may appear in sans-serif type (that is, a font without serifs, like Arial or Helvetica).
- **Monospaced font.** A motion printed in a monospaced font may not contain more than 10.5 characters per inch. This roughly translates to 12-point Courier font.

(FRAP 27(d)(1)(E) and 32(a)(5).)

Line Spacing

The text of the motion must be double-spaced (FRAP 27(d)(1)(D)). The motion should also double-space the table of contents and table of citations. However, single-spacing may be used for:

- Direct quotations more than two lines long, which counsel should indent on both sides.
- Headings.
- Footnotes.

(FRAP 27(d)(1)(D).)

Length Limits

A motion may not exceed 5,200 words if prepared using a computer, or 20 pages if prepared using a typewriter or by hand (FRAP 27(d)(2)). The word or page counts do not include:

- The cover, if used.
- Any table of contents.
- Any table of citations.
- The signature block.
- The certificate of compliance.
- Any accompanying affidavits, declarations, or exhibits.
- Proof of service.

(FRAP 32(f).)

Paper Motions

If paper copies of a motion are necessary (see Serving and Filing a Motion), counsel must print them single-sided and bind them in a way that:

- Is secure.
- Does not obscure the text.
- Permits the motion to lie reasonably flat when open.

(FRAP 27(d)(1)(A), (C).)

If using a cover for the motion, it must be white (FRAP 27(d)(1)(B)).

SERVING AND FILING A MOTION

Counsel must use CM/ECF to serve and file the motion unless an exemption applies (FRAP 25(a)(2)(B)(i) and (c)(2); 4th Cir. R. 25(a)(1), (4)).

If any party is exempt from CM/ECF, counsel must serve that party conventionally by paper means (4th Cir. R. 25(a)(4)). Acceptable methods of paper service include:

- Personal delivery.
- First-class mail.
- Third-party commercial carrier for delivery within three days.

(FRAP 25(c)(1).)

RESPONDING TO A MOTION

Any party may respond to a motion (FRAP 27(a)(3)(A)). A response does not necessarily have to oppose the motion. Counsel may, for example, take no position on a motion but bring significant facts to the court's attention. The Court may also direct a party to respond. (4th Cir. R. 27(d)(1)).

TIMING OF A MOTION RESPONSE

Any party may respond to a motion within ten days after service of the motion (FRAP 27(a)(3)(A)). A party served by US mail or commercial carrier may add three days to the time otherwise available to respond. However, a party who receives service through CM/ECF may not add three days to the time to respond. (FRAP 26(c).)

Counsel should respond to procedural motions as soon as reasonably possible because the court may decide these motions without waiting ten days (FRAP 27(b)). Therefore, if a party wishes to oppose another party's motion, it should do so promptly or risk having the motion granted before having an opportunity to respond.

CONTENTS OF A MOTION RESPONSE

A motion response must contain:

- A cover or first page with identifying information.
- A disclosure of corporate affiliations statement.
- An argument.
- A certificate of compliance.
- A signature block.
- Proof of service.

The response may also contain supporting affidavits or declarations.

Cover or First Page

A response need not have a separate cover page, but if it does, the cover must be white (FRAP 27(d)(1)(B)). Attorneys using covers often include their names, office addresses, and telephone numbers. The cover or first page of the response must state:

- The docket number of the appeal.
- The name of the court (United States Court of Appeals for the Fourth Circuit).
- The title of the case, including the parties to the appeal and their appellate designations (for example, Plaintiff-Appellant).
- A brief descriptive title identifying the filing party and the response (for example, "Appellee DEF's Response to Motion for a Stay Pending Appeal").

(FRAP 27(d)(1)(B).)

Disclosure of Corporate Affiliations Statement

Unless a party has already filed its Disclosure of Corporate Affiliations, a response must include a disclosure of corporate affiliations statement consistent with FRAP 26.1 and 4th Cir. R. 26.1 (4th Cir. R. 27(c)).

Argument

The response must respond to the relief requested by the movant.

Certificate of Compliance

A response prepared on a computer must include a certificate of compliance with the word limit. The certificate must also state the number of words in the response. (FRAP 32(g).) Counsel may rely on the word count provided by the word processing software used to draft the response (FRAP 32(g)(1)).

Signature Block

The response must include a signature from one of the attorneys representing the respondent. For electronically filed documents, the filing attorney's name on a signature block and CM/ECF system login and password constitute the required signature for all purposes. A manual signature is unnecessary. (FRAP 25(a)(2)(B)(iii), 32(d); 4th Cir. R. 25(a)(9); Fourth Circuit CM/ECF Attorney Manual sections II.B.4 and II.I.1.)

Counsel must indicate the identity of the filing attorney at the end of the document by placing an "s/" on a signature line followed by the attorney's name (4th Cir. R. 25(a)(9); Fourth Circuit CM/ECF Attorney Manual section II.I.1). Counsel should avoid graphic and other electronic signatures. Further, counsel should place the signature block directly below the signature line and include the filing attorney's:

- Name.
- Business address.
- Telephone number.
- Email address.

If submitting a response that requires signatures of two or more separately represented parties, the filing attorney may electronically file the document in one of the following ways:

- Submitting a scanned document with all necessary signatures.
- Representing the other parties' consent on the document.
- Identifying the other parties whose signatures are needed and submitting a notice of endorsement by the other parties within three business days.
- Any other manner approved by the court.

(4th Cir. R. 25(a)(9); Fourth Circuit CM/ECF Attorney Manual section II.I.2.)

Absent an objection, the Fourth Circuit presumes that the electronically represented signatures of all parties and filing users are valid signatures (4th Cir. R. 25(a)(9)).

Proof of Service

All filings in the Fourth Circuit must include a certificate of service even if all parties receive service by CM/ECF (FRAP 25(d); 4th Cir. R. 25(a)(4) and 4th Cir. R. 25(b)(3); Fourth Circuit CM/ECF Attorney Manual sections II.D, III.C).

Supporting Documents

If the response requires facts outside the record on appeal, counsel should support it with affidavits or declarations (FRAP 27(a)(2)(B), (3)(A); 4th Cir. R. 27(c)). An affidavit or a declaration should begin with a caption containing the docket number, court name, appeal title, and document title (FRAP 27(d)(1)(B)). The body of the affidavit or declaration must contain only facts, not legal arguments (FRAP 27(a)(2)(B), (3)(A)). The affidavit or declaration must also be signed by the person making the statement (FRAP 32(d)). The affidavit or declaration may include relevant documentary exhibits (4th Cir. R. 27(c)).

FORMATTING A MOTION RESPONSE

Motion responses in the Fourth Circuit must conform to the same formatting requirements as motions.

Page Size and Margins

Counsel must prepare the response using 8.5" by 11" pages. Response pages must have margins at least one inch on all four sides of the page. Except for page numbers, the response may not include any text in the margins. (FRAP 27(d)(1)(D).) Pages should be numbered.

Font

Responses must use black type (FRAP 27(d)(1)(A)). The response must use a plain, roman-style font. However, the response may occasionally use italics or boldface for emphasis. Counsel must italicize or underline case names in the response. (FRAP 27(d)(1)(E) and 32(a)(6).)

Counsel may draft the response in either a proportionally spaced font (for example, Times New Roman) or a monospaced font (for example, Courier) (FRAP 27(d)(1)(E) and 32(a)(5)).

The required font size depends on which of these two font types the movant uses, either:

- **Proportionally spaced font.** A response written in a proportionally spaced font must use at least a 14-point font size. This font must include serifs (for example, Times New Roman includes serifs). However, headings and captions may appear in sans-serif type (that is, a font without serifs, like Arial or Helvetica).
- **Monospaced font.** A response printed in a monospaced font may not contain more than 10.5 characters per inch. This roughly translates to 12-point Courier font.

(FRAP 27(d)(1)(E) and 32(a)(5).)

Line Spacing

The text of the response must be double-spaced (FRAP 27(d)(1)(D)). The response should also double-space the table of contents and table of citations. However, single-spacing may be used for:

- Direct quotations more than two lines long, which counsel should indent on both sides.
- Headings.
- Footnotes.

(FRAP 27(d)(1)(D).)

Length Limits

A response may not exceed 5,200 words if prepared using a computer, or 20 pages if prepared using a typewriter or by hand (FRAP 27(d)(2)). The word or page counts do not include:

- The cover, if used.
- Any table of contents.
- Any table of citations.
- The signature block.
- The certificate of compliance.
- Any accompanying affidavits, declarations, or exhibits.
- Proof of service.

(FRAP 32(f).)

Paper Responses

If paper copies of a response are necessary (see Serving and Filing a Motion Response), counsel must print them single-sided and bind them in a way that:

- Is secure.
- Does not obscure the text.
- Permits the motion to lie reasonably flat when open.

(FRAP 27(d)(1)(A), (C).)

If using a cover for the response, it must be white (FRAP 27(d)(1)(B)).

SERVING AND FILING A MOTION RESPONSE

Counsel must use CM/ECF to serve and file the response unless an exemption applies (FRAP 25(a)(2)(B)(i) and (c)(2); 4th Cir. R. 25(a)(1), (4)).

If any party is exempt from CM/ECF, counsel must serve that party conventionally by paper means (4th Cir. R. 25(a)(4)). Acceptable methods of paper service include:

- Personal delivery.
- First-class mail.
- Third-party commercial carrier for delivery within three days.

(FRAP 25(c)(1).)

REPLYING TO A MOTION RESPONSE

A movant has the option of submitting a reply in support of its motion (FRAP 27(a)(4); 4th Cir. R. 27(d)(2)).

TIMING OF A MOTION REPLY

Any reply is due within seven days after service of the response (FRAP 27(a)(4)). If the moving party receives service of the motion response by mail or commercial carrier, the moving party may add three days to the time otherwise available to respond. If the moving party receives service of the motion response through CM/ECF, it may not add three days to the time to submit a reply. (FRAP 26(c).)

However, counsel should submit any reply in support of a procedural motion as soon as reasonably possible because the court may decide this type of motion without waiting for a reply (FRAP 27(b); 4th Cir. R. 27(d)(2)). Where the moving party intends to file a reply, counsel should notify the Fourth Circuit court clerk in writing that the moving party intends to file a reply and ask the court not to act on the motion until the moving party submits its reply (4th Cir. R. 27(d)(2)).

CONTENTS OF A MOTION REPLY

Every motion reply in the Fourth Circuit must contain:

- A cover or first page with identifying information.
- An argument.
- A certificate of compliance.
- A signature block.
- Proof of service.

The reply may also include supporting affidavits or declarations.

Cover or First Page

A reply need not have a separate cover page, but if it does, the cover must be white (FRAP 27(d)(1)(B)). Attorneys using covers often include their names, office addresses, and telephone numbers. The cover or first page of the response must state:

- The docket number of the appeal.
- The name of the court (United States Court of Appeals for the Fourth Circuit).
- The title of the case, including the parties to the appeal and their appellate designations (for example, Plaintiff-Appellant).
- A brief descriptive title identifying the filing party and the reply (for example, "Appellant ABC's Reply in Support of Motion for a Stay Pending Appeal").

(FRAP 27(d)(1)(B).)

Argument

The reply must respond to the arguments made by the respondent. The movant should not restate the arguments it made in its motion.

Certificate of Compliance

The reply must include a certificate of compliance with the word limit if the movant prepared the reply on a computer. The certificate must also state the number of words in the reply. (FRAP 32(g).) Counsel may rely on the word count provided by the word processing software used to draft the reply (FRAP 32(g)(1)).

Signature Block

The reply must include a signature from one of the attorneys representing the movant. For electronically filed documents, the filing attorney's name on a signature block and CM/ECF system login and password constitute the required signature for all purposes. A manual signature is unnecessary. (FRAP 25(a)(2)(B)(iii), 32(d); 4th Cir. R. 25(a)(9); Fourth Circuit CM/ECF Attorney Manual sections II.B.4 and II.I.1.)

Counsel must indicate the identity of the filing attorney at the end of the document by placing an "s/" on a signature line followed by the attorney's name (4th Cir. R. 25(a)(9); Fourth Circuit CM/ECF Attorney Manual section II.I.1). Counsel should avoid graphic and other electronic signatures. Further, counsel should place the signature block directly below the signature line and include the filing attorney's:

- Name.
- Business address.
- Telephone number.
- Email address.

If submitting a reply that requires signatures of two or more separately represented parties, the filing attorney may electronically file the document in one of the following ways:

- Submitting a scanned document with all necessary signatures.
- Representing the other parties' consent on the document.
- Identifying the other parties whose signatures are needed and submitting a notice of endorsement by the other parties within three business days.
- Any other manner approved by the court.

(4th Cir. R. 25(a)(9); Fourth Circuit CM/ECF Attorney Manual section II.I.2.)

Absent an objection, the Fourth Circuit presumes that the electronically represented signatures of all parties and filing users are valid signatures (4th Cir. R. 25(a)(9)).

Proof of Service

All filings in the Fourth Circuit must include a certificate of service even if all parties receive service by CM/ECF (FRAP 25(d); 4th Cir. R. 25(a)(4) and 4th Cir. R. 25(b)(3); Fourth Circuit CM/ECF Attorney Manual sections II.D, III.C).

Supporting Documents

If the reply requires facts outside the record on appeal, counsel should support it with affidavits or declarations (FRAP 27(a)(2)(B); 4th Cir. R. 27(c)). An affidavit or a declaration should begin with a caption containing the docket number, court name, appeal title, and document title (FRAP 27(d)(1)(B)). The body of the affidavit or declaration must contain only facts, not legal arguments (FRAP 27(a)(2)). The affidavit or declaration must also be signed by the person making the statement (FRAP 32(d)). The affidavit or declaration may include relevant documentary exhibits (4th Cir. R. 27(c)).

FORMATTING A MOTION REPLY

Motion replies in the Fourth Circuit must conform to the same formatting requirements as motions except for length.

Page Size and Margins

Counsel must prepare the reply using 8.5" by 11" pages. Reply pages must have margins at least one inch on all four sides of the page. Except for page numbers, the reply may not include any text in the margins. (FRAP 27(d)(1)(D).) Pages should be numbered.

Font

Replies must use black type (FRAP 27(d)(1)(A)). The reply must use a plain, roman-style font. However, the reply may occasionally use italics or boldface for emphasis. Counsel must italicize or underline case names in the reply. (FRAP 27(d)(1)(E) and 32(a)(6).)

Counsel may draft the reply in either a proportionally spaced font (for example, Times New Roman) or a monospaced font (for example, Courier) (FRAP 27(d)(1)(E) and 32(a)(5)).

The required font size depends on which of these two font types the movant uses, either:

- **Proportionally spaced font.** A reply written in a proportionally spaced font must use at least a 14-point font size. This font must include serifs (for example, Times New Roman includes serifs). However, headings and captions may appear in sans-serif type (that is, a font without serifs, like Arial or Helvetica).
- **Monospaced font.** A reply printed in a monospaced font may not contain more than 10.5 characters per inch. This roughly translates to 12-point Courier font.

(FRAP 27(d)(1)(E) and 32(a)(5).)

Line Spacing

The text of the reply must be double-spaced (FRAP 27(d)(1)(D)). The reply should also double-space the table of contents and table of citations. However, single-spacing may be used for:

- Direct quotations more than two lines long, which counsel should indent on both sides.
- Headings.
- Footnotes.

(FRAP 27(d)(1)(D).)

Length Limits

A reply may not exceed 2,600 words if prepared using a computer, or ten pages if prepared using a typewriter or by hand (FRAP 27(d)(2)). The word or page counts do not include:

- The cover, if used.
- The certificate of interested persons.
- Any table of contents.
- Any table of citations.
- The signature block.
- The certificate of compliance.
- Any accompanying affidavits, declarations, or exhibits.
- Proof of service.

(FRAP 32(f).)

Paper Replies

If paper copies of a motion reply are necessary (see Serving and Filing a Motion Reply), counsel must print them single-sided and bind them in a way that:

- Is secure.
- Does not obscure the text.
- Permits the motion to lie reasonably flat when open.

(FRAP 27(d)(1)(A), (C).)

If using a cover for the reply, it must be white (FRAP 27(d)(1)(B)).

Serving and Filing a Motion Reply

Counsel must use CM/ECF to serve and file the reply unless an exemption applies (FRAP 25(a)(2)(B)(i) and (c)(2); 4th Cir. R. 25(a)(1), (4)).

If any party is exempt from CM/ECF, counsel must serve that party conventionally by paper means (4th Cir. R. 25(a)(4)). Acceptable methods of paper service include:

- Personal delivery.
- First-class mail.
- Third-party commercial carrier for delivery within three days.

(FRAP 25(c)(1).)

CROSS-MOTIONS

A party responding to a motion may also request affirmative relief on its own behalf (FRAP 27(a)(3)(B)). This is commonly referred to as a cross-motion. For example, an appellee opposing a motion for a stay pending appeal may cross-move to dismiss the appeal.

A party must serve and file a cross-motion within ten days after service of a motion. The cross-motion must comply with all the content, formatting, notice, service, and filing requirements for a motion (see Making a Motion). The title of the cross-motion must

also alert the court that it is a cross-motion and not simply a motion response. (FRAP 27(a)(3)(A), (B).)

The movant must serve and file its response to a cross-motion within ten days after service of the cross-motion (FRAP 27(a)(3)). The cross-motion response should comply with all the content, formatting, service, and filing requirements for a motion response (see Responding to a Motion).

A party must serve any reply in support of a cross-motion within seven days after service of the response to the cross-motion (FRAP 27(a)(4)). The cross-motion reply should comply with all the content, formatting, service, and filing requirements for a motion reply (see Replying to a Motion Response).

A party served by US mail or commercial carrier may add three days to the time otherwise available to respond. However, a party who receives service through CM/ECF may not add three days to its response time. (FRAP 26(c).)

COMMON TYPES OF MOTIONS

Certain common types of motions have additional requirements, including motions:

- For a stay of an order or judgment pending appeal.
- To extend the briefing schedule.
- To file an oversize brief.
- For reconsideration of a prior order.
- That are emergencies.

MOTIONS FOR A STAY PENDING APPEAL

Taking an appeal **does not** automatically stay the enforcement or execution of a district court's judgment or order. An appellant that wants a stay must request it by motion. A party should first move for a stay pending appeal in the district court. A party should move the Fourth Circuit for a stay only if the district court denies the stay or unusual circumstances make a motion to the district court impracticable. (FRAP 8(a)(1); 4th Cir. R. 8.)

The motion should explain the basis for granting a stay and state either:

- That the movant sought a stay from the district court, that the district court did not grant the relief sought, and the reasons the district court gave for not granting the motion.
- The reasons why moving first in the district court is impracticable.

(FRAP 8(a)(2)(A), (B)(i); 4th Cir. R. 8.)

Counsel must support any facts subject to dispute with affidavits or declarations (FRAP 8(a)(2)(B)(ii)).

A motion for a stay must include as exhibits:

- A copy of any previous application for relief.
- A copy of the district court's ruling on any previous application for relief.

(4th Cir. R. 8.)

A motion for a stay should also include:

- A copy of the judgment or order from which relief is sought.
- Any district court opinion and findings.

If necessary to explain why the court should grant relief, the affidavit or declaration in support of the motion should include as exhibits pertinent parts of the record on appeal (FRAP 8(a)(2)(B)(iii); 4th Cir. R. 27(c)).

If the appellant requires a stay on an expedited basis, its motion must also comply with the requirements for an emergency motion (see Emergency Motions).

If the court grants a motion for a stay pending appeal, it may condition the stay on the appellant posting a bond or other security. The appellant files this bond or other security in the district court. (FRAP 8(a)(2)(E); 4th Cir. R. 8.)

MOTIONS TO EXTEND THE BRIEFING SCHEDULE

A party that cannot meet a deadline to file its brief may ask the court for an extension. No extension is automatic, even where the request is unopposed, as the court only grants extensions when extraordinary circumstances exist. Because the court discourages these motions, it may deny the motion or grant a shorter extension than requested. (4th Cir. R. 31(c).)

A party should request an extension of time as soon as is reasonably possible and **must** make an extension request before the time to file the brief has expired. The motion must set out the additional time requested and reasons for the extension request. (4th Cir. R. 31(c).)

MOTIONS TO FILE AN OVERSIZE BRIEF

Appellants' and appellees' briefs may be up to 30 pages long or contain up to 13,000 words. Reply briefs may be up to 15 pages long or contain up to 6,500 words. (FRAP 32(a)(7), (e).) This is usually more than enough space for the parties to present their arguments, and the Fourth Circuit encourages short, concise briefs (4th Cir. R. 32(b)).

A party that believes it needs more space may move the Fourth Circuit for permission to file an oversize brief. However, the Fourth Circuit disfavors motions for leave to file oversize briefs, only granting them for extraordinary and compelling reasons. If a party still wants to move for leave to file an oversize brief, it must do so at least ten days before the brief's due date. The party's motion must include a statement of reasons why the court should grant the party permission to submit an oversize brief. (4th Cir. R. 32(b).)

MOTIONS FOR RECONSIDERATION

Counsel must move for reconsideration of a prior procedural order from the clerk within 14 days after the entry of the order (4th Cir. R. 27(b)).

EMERGENCY MOTIONS

Counsel seeking any type of relief on an expedited basis must make an emergency motion (4th Cir. R. 27(e)). This is highly disfavored unless time constraints make it impractical to obtain relief on a regular motion. Although a party may present an emergency motion to a single judge for decision, the party must still call the clerk's office to notify it that the party will be seeking emergency relief from a single judge. After making the motion, the movant must file with the clerk as soon as practicable all papers that it presented to the single judge. (4th Cir. R. 27(e).)

A party requesting emergency action should label the motion as an "Emergency Motion" and state:

- The nature of the emergency.
- The date by which the moving party needs the court to act.

WITHDRAWING A MOTION

If the moving party no longer requires a ruling on a pending motion, the party should file a motion to withdraw the motion.

DISPOSITION OF A MOTION

The Fourth Circuit typically decides motions without hearing oral argument (FRAP 27(e)).

The court generally acts on procedural motions without waiting for a response or a reply (FRAP 27(b)). If the court decides a procedural motion before receiving a response or reply, a later-filed response or reply has no effect. If the party whose response or reply was not considered wishes to contest the ruling, it must move for reconsideration of the court's order. (FRAP 27(b); see Motions for Reconsideration.)

The Fourth Circuit clerk may decide certain routine and unopposed procedural motions, subject to review by the court, including motions:

- To extend time to file briefs.
- To withdraw appearances.
- To consolidate appeals.

A single judge may decide non-dispositive motions, subject to review by the court. A single judge may also decide opposed procedural motions that the clerk otherwise may decide when unopposed. (FRAP 27(c).) In addition, a single judge may decide an emergency motion (4th Cir. R. 27(e); see Emergency Motions).

If a party is dissatisfied with a ruling by the Fourth Circuit clerk or single judge on a procedural motion, it can seek relief by filing a motion for reconsideration (see Motions for Reconsideration).

The court refers substantive motions to a panel of three judges selected using a process similar to the process for selecting hearing panels for oral argument, as set out in 4th Cir. I.O.P. 34.1 (4th Cir. R. 27(e)).

VOLUNTARILY DISCONTINUING AN APPEAL

After the appellant files the notice of appeal with the district court but before the Fourth Circuit dockets the appeal, the appellant may file with the district court a stipulation signed by all parties or a motion to discontinue the appeal (FRAP 42(a); 4th Cir. R. 42).

Once the Fourth Circuit dockets the appeal, the appellant must file any stipulation with or make a motion to the Fourth Circuit to discontinue the appeal (FRAP 42(b)). A stipulation of voluntary discontinuance filed in the Fourth Circuit is not effective unless and until it is so ordered by the court (FRAP 42(b)).

A stipulation of voluntary discontinuance filed with the Fourth Circuit must state how the parties are allocating costs and fees (FRAP 42(b)). For example, the stipulation may state that each party agrees to bear its own costs and attorney's fees.

02-19

Fourth Circuit Civil Appeals: Oral Argument, Disposition, and Rehearing

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A Practice Note explaining oral argument, disposition of an appeal, panel rehearing, and rehearing en banc in the US Court of Appeals for the Fourth Circuit.

The parties to an appeal before the US Court of Appeals for the Fourth Circuit may have an opportunity to present oral argument to the three-judge panel deciding the appeal after briefing is complete. With the benefit of the briefs and argument, the court issues a written disposition. Most appeals end this way. Counsel occasionally may have grounds to ask the same panel to consider something that they missed the first time around. In even rarer cases, a party may have grounds to ask the full Fourth Circuit to address a particularly important issue or a conflict with controlling precedent.

This Note addresses oral argument, disposition of an appeal, panel rehearing, and rehearing en banc in the Fourth Circuit.

ORAL ARGUMENT

Oral argument provides the parties with a final opportunity to advocate before the three-judge panel deciding the appeal. It allows the parties to emphasize and clarify the arguments in their briefs and answer any questions or clear up any confusion the judges may have after reading the briefs.

AVAILABILITY OF ORAL ARGUMENT

The Fourth Circuit does not require a party to state in its principal brief whether the party wants oral argument. However, doing so is common and encouraged if the party believes the appeal warrants oral argument.

If a party requests oral argument, the court must grant the request unless a three-judge panel reviews the briefs and record and makes any one of the following findings:

- The appeal is frivolous.
- The dispositive issue on the appeal has already been authoritatively decided.
- Oral argument would not significantly aid decision of the appeal given the presentation of the facts and legal argument in the briefs and record.

(FRAP 34(a)(2); 4th Cir. R. 34(a).)

The court can order oral argument even if no party requests argument and can deny oral argument even if all parties want it (FRAP 34(f)).

REQUESTING ORAL ARGUMENT

If a party includes a statement in its principle brief requesting oral argument, the statement must appear at the conclusion of the brief's argument section (4th Cir. R. 34(a)). The statement should not be long or particularly argumentative. A party may note:

- The complexity of the issues.
- The importance of the case (for example, the amount of money in controversy).
- The unsettled law.
- The lengthy record.
- Any other explanation for how oral argument may aid the court's decision-making process.

Counsel should not use the statement to further argue the merits of the appeal.

A party who does not want oral argument may file a motion to submit a case on the briefs without the necessity of oral argument upon completion of the briefing schedule or within ten days of tentative notification of an argument, whichever is earlier. However, the Fourth Circuit does not grant these motions as a matter of course. (4th Cir. R. 34(e).)

NOTIFICATION AND ACKNOWLEDGMENT OF ORAL ARGUMENT

If the Fourth Circuit decides that a case deserves oral argument, it informs the Clerk's Office. The Clerk's Office then sends counsel a scheduling notice of a tentative argument date, generally about two months away, and asks if counsel have any conflict or other matter that would affect scheduling the case for that session (4th Cir. R. 34(c)). Counsel may use a form available on the Fourth Circuit's

website to inform the court of conflicts with proposed argument dates. A party need not file anything if it does not have conflicts with the proposed dates. After the parties have an opportunity to respond, the clerk sends a notification of the date on which the oral argument is calendared.

After receiving the notice of oral argument, parties have five days to file an oral argument acknowledgment form. This form is available on the Fourth Circuit's website. The form requires counsel to identify which attorney is arguing on behalf of the party and how much time the party plans to allot for the argument. The court usually allots 20 minutes per side, and the appellant can reserve up to one-third of its time for rebuttal. (4th Cir. R. 34(d); Fourth Circuit Oral Argument Acknowledgment form.) If more than one attorney is presenting argument per side (which is not recommended), the attorneys must make their own arrangements for dividing the allotted time and inform the clerk when checking in for oral argument.

Once the Fourth Circuit calendars a case for oral argument, only the court may change the oral argument date, on a showing of good cause. After the clerk issues a notification of oral argument, the court will not remove a case from the calendar because of a conflict, but it may direct another lawyer from the law firm to argue the appeal if counsel of record cannot be present. (4th Cir. R. 34(c).)

PREPARING FOR ORAL ARGUMENT

Counsel should prepare to answer questions about the facts, procedural history, and legal arguments. Counsel may also want to prepare some short opening remarks, as the panel may allow attorneys to speak briefly before interjecting questions.

Counsel should master the record before argument. Although judges understand how the law works, they may not understand the details of the record. Counsel therefore should be prepared to answer questions about the record's contents.

The identity of the panel is not a factor in preparing for oral argument. In the Fourth Circuit, the parties do not learn the identity of the panel until they check into the clerk's office on the date of the argument (4th Cir. I.O.P. 34.1; Fourth Circuit Appellate Procedure Guide: Oral Argument: Argument Panel).

ARGUING THE APPEAL

The Fourth Circuit sits in Richmond, Virginia, to hear cases during six to eight separate argument weeks between September and June. The court also occasionally sits at law schools within the Fourth Circuit. Each panel typically hears oral argument in four cases each day during a court week. (4th Cir. R. 34(c).)

Oral argument sessions usually begin at 9:30 a.m., with the exception of the last day of the session, when it convenes at 8:30 a.m., and except for *en banc* arguments, which begin at 9:00 a.m. Counsel arguing an appeal must check in with the clerk at least 30 minutes before the oral argument session is scheduled to begin. (4th Cir. R. 34(c); 4th Cir. I.O.P. 34.1; Fourth Circuit Appellate Procedure Guide: Oral Argument: Pre-Argument Registration.)

There is not necessarily a single customary opening for oral argument in the Fourth Circuit. Some attorneys begin with a formal "May it please the Court," while others begin with a simple "Good morning, Your Honors." The arguing attorney should then:

- State the attorney's name.
- Identify the party the attorney represents.
- Specify the amount of rebuttal time reserved if representing the appellant.

Counsel should approach argument as a conversation, rather than a speech. Counsel should stop talking as soon as a judge begins to ask a question. Counsel should also immediately answer a judge's question before turning to another topic; counsel should never answer a question by telling the judge, "I will answer that later."

The podium in each of the Fourth Circuit's usual courtrooms has either a series of green, yellow, and red lights, or a countdown clock, and often both. A green light signals the beginning of each party's opening argument. A yellow light signals that five minutes remain. A red light signals that time has expired.

For rebuttal, the green light stays on until the time has expired, at which point the red light comes on. Although the court may continue asking questions after time has expired, counsel should expect to bring the argument to a close when the light turns red.

At the conclusion of argument, the Fourth Circuit reserves decision and takes the case under submission. After each argument, the judges come down from the bench and approach counsels' tables to shake each attorney's hand and exchange pleasantries.

POST-ARGUMENT ISSUES

Counsel learning of significant new case law after the party's last brief was filed or after oral argument may submit those authorities in a letter under Rule 28(j) of the Federal Rules of Appellate Procedure (FRAP). For example, counsel may alert the court to a recent Supreme Court decision that affects the appeal and direct the court to the issue affected by the decision.

The letter cannot exceed 350 words, including footnotes. If a new decision is not reported, counsel should attach copies to the letter. (FRAP 28(j); 4th Cir. R. 28(e); see Practice Note, Fourth Circuit Civil Appeals: Appellee's Brief, Reply Brief, and Cross-Appeals: Submitting Supplemental Authorities (W-015-2387).)

Counsel may not file supplemental briefs without leave of court. However, after an appeal is argued or submitted on the non-argument calendar, the court may call for supplemental briefs on specific issues. (4th Cir. R. 28(e).)

DISPOSITION OF AN APPEAL

OPINIONS

Decisions in the Fourth Circuit generally take the form of published or unpublished opinions. The clerk's office serves opinions by case management/electronic case filing (CM/ECF) on registered filers who have appeared in the appeal. Opinions also are available on the court's website.

Published Opinions

For an opinion to be eligible for publication, the parties must have fully briefed and presented oral argument on the case. The court will not publish an opinion unless the author or a majority of the panel decides to publish the opinion and all members of the court have acknowledged in writing their receipt of the proposed opinion. (4th Cir. R. 36(a).)

The court only publishes an opinion if it satisfies one or more of the standards for publication because it:

- Establishes, alters, modifies, clarifies, or explains a rule of law within the Fourth Circuit.
- Involves a legal issue of continuing public interest.
- Criticizes existing law.
- Contains a historical review of a legal rule that is not duplicative.
- Resolves a conflict between panels of the Fourth Circuit, or creates a conflict with a decision in another circuit.

(4th Cir. R. 36(a).)

Unpublished Opinions

The panel may decide the case by unpublished opinion. Unpublished opinions provide counsel, the parties, and the trial court (or agency) a statement of the reasons for the decision. Unpublished opinions typically do not recite all the facts or background of a case, and they may merely adopt the trial court's (or agency's) reasoning. (4th Cir. R. 36(b).)

A party may move the Fourth Circuit to publish a previously unpublished opinion. If the Fourth Circuit grants the motion, the court will publish the previously unpublished opinion without change in result. (4th Cir. R. 36(b).)

THE JUDGMENT

The Fourth Circuit must enter a judgment to formally dispose of an appeal.

If the court issues an opinion, the Fourth Circuit Clerk prepares and enters a separate judgment (FRAP 36(a)). The Fourth Circuit Clerk notifies the parties by CM/ECF when the court enters the decision and judgment (FRAP 36(b)).

THE MANDATE

The Fourth Circuit must issue a mandate to formally terminate its jurisdiction and transfer jurisdiction back to the district court. Unless the court directs the issuance of a formal mandate, the mandate comprises the opinion, the judgment, and any costs order (FRAP 41(a)).

The Fourth Circuit issues the mandate seven days after the latest of:

- The time to petition for rehearing expires, if no party files a petition.
- Entry of an order denying rehearing, if a party petitions for rehearing.
- Entry of an order denying a motion to stay issuance of the mandate, if a party moves for a stay.

(FRAP 41(b).)

Counsel receive notice by CM/ECF when the Fourth Circuit issues the mandate (4th Cir. I.O.P. 41.1). If the Fourth Circuit modifies or reverses the district court's order or judgment and directs entry of a money judgment, the mandate includes instructions on whether interest is allowed (FRAP 37(b)). If the Fourth Circuit affirms a district court's money judgment, any interest is calculated from the date the district court entered judgment, unless the law provides otherwise (FRAP 37(a)).

STAYING THE MANDATE

A timely petition for panel rehearing or rehearing *en banc* automatically stays issuance of the mandate until the court decides the petition, unless the court orders otherwise (FRAP 41(b)). The court will generally not grant a motion to stay issuance of the mandate unless the moving party shows that it is not frivolous or filed merely for delay (4th Cir. R. 41).

If a party anticipates petitioning the Supreme Court for certiorari, it may move the Fourth Circuit to stay issuance of the mandate. The motion must comply with all the rules generally applicable to Fourth Circuit motions, and must demonstrate that:

- The petition would present a substantial question.
- There is good cause for a stay.

(FRAP 41(d)(1); 4th Cir. R. 41.)

If the Fourth Circuit grants a stay, the stay should not exceed 90 days without good cause. If the movant petitions the Supreme Court for *certiorari* within that time and notifies the Fourth Circuit of the petition, the stay remains in effect until final disposition by the Supreme Court. (FRAP 41(d)(2).) If the Supreme Court extends the time for filing a petition for a writ of certiorari and a party notifies the Fourth Circuit of the extension, any stay of the mandate is automatically extended for the same amount of time (FRAP 41(d)(2)(B)).

The Fourth Circuit may condition a stay on the filing of a bond or other security (FRAP 41(d)(3)). If the court grants a stay and the Supreme Court later denies *certiorari*, the Fourth Circuit must issue the mandate immediately, absent extraordinary circumstances (FRAP 41(d)(4)).

COSTS

The prevailing party is generally entitled to recover its costs on appeal.

Prevailing Party

Unless the court provides otherwise:

The appellant is liable for the appellee's costs if the Fourth Circuit:

- dismisses the appeal; or
- affirms the district court's order or judgment.

- The appellee is liable for the appellant's costs if the Fourth Circuit reverses the district court's order or judgment.
- Costs are taxed as the court directs if a judgment is affirmed in part, reversed in part, modified, or vacated.

(FRAP 39(a).)

Costs may be awarded for or against the US only if a statute so provides (FRAP 39(b)).

Taxable Costs

A prevailing party may recover:

- The notice of appeal docketing fee, if the prevailing party filed a notice of appeal.
- The cost of printing or reproducing its briefs.
- The cost of printing or reproducing the appendix, including exhibits.
- The costs of preparing and transmitting the record.
- The costs of preparing the district court transcript, if needed to determine the appeal.
- Any premiums paid to obtain a bond or other security required to appeal.

(FRAP 39(c), (e); 4th Cir. R. 39(a) and 4th Cir. R. 39(c).)

The first three categories of costs listed above are taxable in the Fourth Circuit. The last three categories are taxable in the district court. (4th Cir. R. 39(c).)

Although some costs are deemed taxable in the Fourth Circuit, all costs are recoverable in the district court after the Fourth Circuit issues the mandate (4th Cir. R. 39(c)). In other words, even though there are certain costs that a party asks the court of appeals to award (tax), and certain costs that a party asks the district court to award, if the opposing party refuses to pay, the prevailing party recovers all costs through an action to enforce an award of costs in the district court (Fourth Circuit Appellate Procedure Guide: Costs and Attorney's Fees: Recovery of Costs).

Taxing Costs in the Fourth Circuit

The docketing fee and the costs of printing and binding briefs and the appendix are taxable in the Fourth Circuit.

The prevailing party may tax the cost of producing and binding necessary copies of briefs and appendices at a rate equal to the actual cost, but no higher than 15 cents per page (4th Cir. R. 39(a)).

Within 14 days after entry of the judgment, a prevailing party that wants to tax costs must serve and file a verified bill of costs (FRAP 39(d)(1)). A bill of costs is timely only if the Fourth Circuit Clerk receives it within the time for filing. A petition for panel rehearing or rehearing *en banc* does not extend the time for filing the bill of costs (4th Cir. R. 39(b)).

Counsel should use the Fourth Circuit's bill of costs form, which is available on the court's website. Counsel should include any invoices and printers' bills with the bill of costs.

Counsel should serve the bill of costs on all other counsel and file it with the court using CM/ECF. If any party is exempt from CM/ECF, counsel must serve it by paper means and file proof of service with the bill of costs.

Any party may object to the prevailing party's bill of costs by serving and filing written objections within 14 days after service of the bill of costs (FRAP 39(d)(2)). The Fourth Circuit Clerk rules on all bills of costs and objections in the first instance (4th Cir. R. 39(b)). The rules do not provide for a reply.

After receiving the bill of costs and any objections, the Fourth Circuit determines the amount of costs recoverable for docketing the appeal and printing the briefs and appendix. The clerk of the court prepares an itemized statement of costs taxable in the Fourth Circuit for inclusion in the mandate. If the mandate has already issued, the Fourth Circuit clerk must direct the district court clerk to include the costs in the mandate. The district court clerk must then amend the mandate. (FRAP 39(d)(3).)

Taxing Costs in the District Court

The costs of preparing and transmitting the record, preparing the district court transcript, and posting a bond or other security are taxable in the district court (FRAP 39(e); FRCP 54(d)(1); 4th Cir. R. 39(c)).

Under Rule 54(d)(1) of the Federal Rules of Civil Procedure (FRCP), a district court may tax costs against the losing party on 14-days' notice.

Counsel should consult the FRCP, the district court's local rules, and any individual rules of the presiding judge when seeking to recover costs in the district court. For more information about recovering costs in the district court, see Practice Note, Enforcing Federal Court Judgments: Enforcement Procedures: Collecting Costs on a Federal Court Judgment (4-531-6993).

PANEL REHEARING

If a losing party believes that the court overlooked or misapprehended a point of law or a material fact in deciding an appeal, it may ask the three-judge panel that issued the decision for a rehearing (FRAP 40). A rehearing petition must state with particularity each point of law or fact that the petitioner believes the court overlooked or misapprehended (FRAP 40(a)(2)). Counsel should not request rehearing solely for purposes of delay or to merely reargue the case (4th Cir. R. 40(a)). Only the panel that decided the appeal reviews petitions for panel rehearing (4th Cir. I.O.P. 40.2).

PETITIONING FOR PANEL REHEARING

A party requests rehearing by petitioning the same panel that initially heard the appeal.

Time to Petition

A party generally must file a petition for panel rehearing within 14 days after entry of the Fourth Circuit's judgment. Any party has 45 days to petition for panel rehearing in cases where the US (including an officer or agency) is a party. (FRAP 40(a)(1); 4th Cir. R. 40(c).)

A party may only seek an extension of time to file a petition for panel rehearing if there is either:

- A death or serious illness of counsel or a member counsel's immediate family.
- An extraordinary circumstance wholly beyond counsel's control.

(4th Cir. R. 40(c).)

Contents of the Petition

A petition for panel rehearing must explain with particularity what legal or factual material the panel overlooked or misapprehended (FRAP 40(a)(2)).

The petition must contain a Statement of Purpose, which is an introduction stating that, in counsel's judgment, one or more of the following exist:

- The panel overlooked a material factual or legal matter in the decision.
- A change in the law occurred after the case was submitted and the panel overlooked it.
- The opinion conflicts with a decision of the US Supreme Court, the Fourth Circuit, or another court of appeals and the opinion does not address the conflict.
- The proceeding involves one or more questions of exceptional importance.

(4th Cir. R. 40(b).)

The petition should only direct the court's attention to one or more of the above situations, and the Statement of Purpose should succinctly list the points the party intends to raise in the petition (4th Cir. R. 40(b)).

The petition must also include:

- A certificate of compliance with the word limit if the petitioner prepared the petition using a computer (FRAP 32(g) and 40(b)).
- A certificate of service (FRAP 25(d); 4th Cir. R. 25(a)(4) and 4th Cir. R. 25(b)(3)).

Formatting the Petition

Rehearing petitions must conform to the following formatting requirements:

- **Page size and margins.** Counsel must prepare the petition using 8.5" by 11" pages. Petition pages must have margins at least one inch on all four sides of the page. Except for page numbers, the petition cannot include any text in the margins. Pages should be numbered. (FRAP 32(a)(1), (4) and 40(b).)
- **Font.** Petitions should use black type and a plain, roman-style font (FRAP 32(a)(1)). Petitions may occasionally use italics or boldface for emphasis. Case names must appear italicized or underlined. Petitions may use either proportionally spaced font (for example, Times New Roman) or a monospaced font (for example, Courier). The required font size depends on whether the petitioning party uses:
  - **a proportionally spaced font.** A petition written in a proportionally spaced font must use at least a 14-point font size. This font must include serifs (for example, Times New Roman includes serifs). However, headings and captions may appear in sans-serif type (that is, a font without serifs, like Arial or Helvetica); or
  - **a monospaced font.** A petition printed in a monospaced font cannot contain more than 10.5 characters per inch. This roughly translates to 12-point Courier font.

  (FRAP 32(a)(1), (5), (6) and 40(b).)
- **Line spacing.** The text of the petition must be double-spaced. The petition should also double-space the table of contents and table of citations. However, a petition may use single-spacing for:
  - direct quotes more than two lines long, which counsel should indent on both sides;
  - headings; and
  - footnotes.

  (FRAP 32(a)(4).)
- **Length limits.** Except by the court's permission, a petition for panel rehearing cannot exceed 3,900 words if prepared on a computer, or 15 pages if prepared on a typewriter or by hand (FRAP 40(b)). If a party also petitions for rehearing *en banc*, the combined documents cannot exceed 3,900 words or 15 pages (FRAP 35(b)(3), 40(a); 4th Cir. R. 35(a) (requiring petition for rehearing *en banc* be made at same time and in same document as petition for rehearing)). Counsel may rely on the word or line count provided by the word processing software used to draft the petition (FRAP 32(g)(1)). The page and word counts do not include:
  - the cover, if used;
  - the corporate disclosure statement;
  - the table of contents;
  - the table of citations;
  - the signature block;
  - the certificate of service; and
  - the attached opinion.

  (FRAP 32(f), (g)(1) and 40(b).)
- **Signature Block.** A petition must include a signature from one of the attorneys representing the petitioner. For electronically filed documents, the filing attorney's name on a signature block and CM/ECF system login and password constitute the required signature for all purposes. A manual signature is unnecessary. (FRAP 25(a)(2)(B)(iii) and 32(d); 4th Cir. R. 25(a)(9); Fourth Circuit CM/ECF Attorney Manual Sections II.B.4 and II.I.1.) Counsel must indicate the identity of the filing attorney at the end of the document by placing an "s/" on a signature line followed by the attorney's name. Absent an objection, the Fourth Circuit presumes that the electronically represented signatures of all parties and filing users are valid signatures. (4th Cir. R. 25(a)(9); Fourth Circuit CM/ECF Attorney Manual Section II.I.1.) Counsel should avoid graphic and other electronic signatures. Counsel also should include the signature block directly below the signature line, including the filing attorney's name, business address, telephone number, and email address. If submitting a petition that requires signatures of two or more separately represented parties, the filing attorney may electronically file the document in one of the following ways:
  - submitting a scanned document with all necessary signatures;
  - representing the other parties' consent on the document;
  - identifying the other parties whose signatures are needed and submitting a notice of endorsement by the other parties within three business days; or
  - any other manner approved by the court.

  (4th Cir. R. 25(a)(9); Fourth Circuit CM/ECF Attorney Manual Section II.I.2.)

- **Cover.** A party may use a cover, but it is not required for petitions for rehearing if the party places a caption on the front page and the caption and the signature block together provide the information that would otherwise appear on a cover, as required under FRAP 32(a)(2). If the party uses a cover, it must be white. (FRAP 32(c)(2)(A) and 40(b); Fourth Circuit Appellate Procedure Guide: Rehearing & Rehearing En Banc: Length & Format of Petition.) If a party combines a petition for rehearing *en banc* with its petition for panel rehearing, either the cover, if used, or the title page must plainly state that it is a petition for panel rehearing and a petition for rehearing *en banc* (FRAP 32(c)(2)(A) and 40(b); 4th Cir. R. 35(a) and 4th Cir. R. 40(a); Fourth Circuit Appellate Procedure Guide: Rehearing & Rehearing En Banc: Length & Format of Petition).
- **Paper Petitions.** If paper copies of a petition are necessary, counsel must print them single-sided and bind them in a way that:
  - is secure;
  - does not obscure the text; and
  - permits the petition to lie reasonably flat when open.

  (FRAP 32(a)(1), (3), (c)(2) and 40(b).)

Serving and Filing the Petition

Counsel must use CM/ECF to serve and file the petition unless an exemption applies (FRAP 25(a)(2)(B)(i), (c)(2); 4th Cir. R. 25(a)(1), (4)).

If any party is exempt from CM/ECF, counsel must serve that party by paper means (4th Cir. R. 25(a)(4)). Acceptable methods of paper service include:

- Personal delivery.
- First-class mail.
- Third-party commercial carrier for delivery within three days.

(FRAP 25(c)(1).)

RESPONDING TO THE PETITION FOR PANEL REHEARING

A party cannot serve and file a response to a rehearing petition unless and until the Fourth Circuit requests a response. The court does not ordinarily grant a petition without requesting a response. (FRAP 40(a)(3).)

A response is subject to the same formatting, service, and filing requirements as a petition (see Formatting the Petition). The rules do not provide for a reply. Any party who wants to file a reply should file a motion for leave to do so, or the court is likely to reject the reply.

An amicus curiae that wants to support a petition for panel rehearing (or that does not support either party) must file its brief and motion within seven days after the petitioner files its petition (FRAP 29(b)(5)). An amicus that wants to oppose a rehearing petition must file its brief and motion no later than the date the court sets for the response (FRAP 29(b)(5)). No party may respond to the motion unless the court directs otherwise.

The amicus's motion must state:

- The movant's interest.
- The reason why an amicus brief is desirable.
- Why the matters asserted are relevant to the disposition of the case.

(FRAP 29(a)(3), (b)(3).)

An amicus brief filed in connection with a rehearing petition cannot exceed 2,600 words and must otherwise comply with the content and formatting requirements of an amicus brief filed during consideration of the case on the merits (FRAP 29(a)(4), (b)(4); see Practice Note, Fourth Circuit Civil Appeals: Amicus Curiae Briefs (W-016-6276)).

An amicus need only file an electronic copy of the amicus brief, unless the court orders the amicus to file a paper copy. An amicus need not serve paper copies of its brief where it serves the amicus brief electronically. (4th Cir. R. 29(b)(2).)

DISPOSITION OF A PETITION FOR PANEL REHEARING

The panel that heard and decided the appeal will rule on the petition for rehearing (4th Cir. I.O.P. 40.2). The Fourth Circuit does not hear oral argument on petitions for panel rehearing (FRAP 40(a)(2)).

The court may (and usually will) deny a petition for rehearing without requesting a response. The court does not ordinarily grant a petition without requesting a response (FRAP 40(a)(3)).

If the court grants a petition for panel rehearing, it vacates the original judgment and opinion, and the original panel rehears the case (4th Cir. I.O.P. 40.2). The panel may do any one of the following:

- Request further argument or briefing.
- Decide the appeal without further argument or briefing.
- Make any other appropriate order.

(FRAP 40(a)(4); 4th Cir. I.O.P. 40.2; Fourth Circuit Appellate Procedure Guide: Rehearing & Rehearing En Banc: Panel Rehearing.)

The court may direct the parties to submit additional briefs, or the parties may move the court to submit additional briefs (4th Cir. I.O.P. 40.2).

REHEARING *EN BANC*

A losing party that believes the panel's opinion conflicts with controlling precedent or presents an extraordinarily important issue may request rehearing *en banc*.

STANDARD FOR REHEARING *EN BANC*

A petition for rehearing *en banc* should bring to the entire court's attention either:

- An opinion that directly conflicts with Supreme Court or Fourth Circuit precedent.
- A precedent-setting error of exceptional importance.

(FRAP 35(a).)

En banc consideration is extraordinary in nature, and the Fourth Circuit strongly discourages *en banc* rehearing petitions (4th Cir. R. 25(a)). Alleged errors in a panel's determination of state law, in the facts of the case, or in the panel's misapplication of correct precedent to the facts of the case are matters for panel rehearing, but not for *en banc* consideration.

PETITIONING FOR REHEARING *EN BANC*

A party requests rehearing *en banc* by petitioning the full Fourth Circuit. The party must make a petition for rehearing *en banc* at

the same time and in the same document as a petition for panel rehearing. The party must plainly state its request for rehearing *en banc* in the title of the petition (or on the cover of the petition, if using a cover). (4th Cir. R. 35(a) and 4th Cir. R. 40(a); Fourth Circuit Appellate Procedure Guide: Rehearing & Rehearing En Banc: Length & Format of Petition.)

Time to Petition

A party must petition for rehearing *en banc* within 14 days after entry of the Fourth Circuit's judgment, unless the court orders otherwise. Any party has 45 days to petition for rehearing *en banc* in cases where the US (including an officer or agency of the US) is a party. (FRAP 35(c) and 40(a)(1); 4th Cir. R. 40(c); Fourth Circuit Appellate Procedure Guide: Rehearing & Rehearing En Banc: Filing Period.) The court enters judgment on the date it files its opinion. A party may only seek an extension of time to file a petition for rehearing *en banc* if there is either:

- A death or serious illness of the attorney or a member of the attorney's immediate family.
- An extraordinary circumstance wholly beyond the attorney's control.

(4th Cir. R. 40(c).)

Contents of the Petition

A petition for rehearing *en banc* must include:

- A cover page or title page.
- A statement regarding rehearing *en banc* demonstrating that:
  - the panel decision conflicts with precedent from the Supreme Court or the Fourth Circuit, requiring consideration by the full Fourth Circuit to secure and maintain uniformity of the court's decisions (FRAP 35(b)(1)(A)); or
  - the proceeding involves a question of exceptional importance, such as a conflict between the panel decision and precedent from other federal courts of appeals (FRAP 35(b)(1)(B)).
- A table of contents and table of citations.
- A statement of the issue or issues that warrant *en banc* consideration.
- A statement of course of proceedings and disposition of the case.
- A statement of facts necessary to the argument of the issues.
- Argument and authorities.
- A conclusion.
- A certificate of service.
- A certificate of compliance with the word limit if the petitioner prepared the brief on a computer.
- A copy of the panel opinion.

(FRAP 32 and 35(b).)

If counsel assert that there is a conflict with precedent, the petition must cite each conflicting precedent (FRAP 35(b)(1)(A)).

If counsel assert that there are questions of exceptional importance, the petition must concisely state each question (FRAP 35(b)(1)(B)).

Formatting the Petition

Petitions for rehearing *en banc* must conform to the following formatting requirements:

- **Page size and margins.** Counsel must prepare the petition using 8.5" by 11" pages. Petition pages must have margins at least one inch on all four sides of the page. Except for page numbers, the petition cannot include any text in the margins. Pages should be numbered. (FRAP 32(a)(1), (4).)
- **Font.** Petitions must use black type and a plain, roman-style font. Petitions may occasionally use italics or boldface for emphasis. Case names must appear italicized or underlined. Petitions may use either a proportionally spaced font (for example, Times New Roman) or a monospaced font (for example, Courier). The font size depends on whether counsel use:
  - **a proportionally spaced font.** A petition written in a proportionally spaced font must use at least a 14-point font size. This font must include serifs (for example, Times New Roman includes serifs). However, headings and captions may appear in sans-serif type (that is, a font without serifs, like Arial or Helvetica); or
  - **a monospaced font.** A petition printed in a monospaced font cannot contain more than 10.5 characters per inch. This roughly translates to 12-point Courier font.

  (FRAP 32(a)(1), (5), (6).)
- **Line spacing.** The text of the petition must be double-spaced. The petition should also double-space the table of contents and table of citations. However, a petition may use single-spacing for:
  - direct quotes more than two lines long, which counsel should indent on both sides;
  - headings; and
  - footnotes.

  (FRAP 32(a)(4).)
- **Length limits.** Except by the court's permission, a rehearing *en banc* petition cannot exceed 3,900 words if prepared on a computer, or 15 pages if prepared on a typewriter or by hand (FRAP 35(b)(2)). If a party also petitions for panel rehearing, the combined documents cannot exceed 3,900 words or 15 pages (FRAP 35(b)(2), (3); 4th Cir. R. 35(a) (requiring petition for rehearing *en banc* be made at same time and in same document as petition for panel rehearing)). Counsel may rely on the word or line count provided by the word processing software used to draft the petition (FRAP 32(g)(1)). The page and word counts do not include:
  - a cover, if used;
  - the corporate disclosure statement;
  - the table of contents;
  - the table of citations;
  - the signature block;
  - the certificate of service; and
  - the attached opinion.

  (FRAP 32(f), (g)(1).)
- **Signature Block.** A petition must include a signature from one of the attorneys representing the petitioner. For electronically filed documents, the filing attorney's name on a signature block and CM/ECF system login and password constitute the required signature for all purposes. A manual signature is unnecessary. (FRAP 25(a)(2)(B)(iii) and 32(d); 4th Cir. R. 25(a)(9); Fourth Circuit

CM/ECF Attorney Manual Sections II.B.4 and II.I.1.) Counsel must indicate the identity of the filing attorney at the end of the document by placing an "s/" on a signature line followed by the attorney's name. Absent an objection, the Fourth Circuit presumes that the electronically represented signatures of all parties and filing users are valid signatures. (4th Cir. R. 25(a)(9); Fourth Circuit CM/ECF Attorney Manual Section II.I.1.) Counsel should avoid graphic and other electronic signatures. Counsel also should include the signature block directly below the signature line, including the filing attorney's name, business address, telephone number, and email address. If submitting a petition that requires signatures of two or more separately represented parties, the filing attorney may electronically file the document in one of the following ways:

- submitting a scanned document with all necessary signatures;
- representing the other parties' consent on the document;
- identifying the other parties whose signatures are needed and submitting a notice of endorsement by the other parties within three business days; or
- any other manner approved by the court.

(4th Cir. R. 25(a)(9); Fourth Circuit CM/ECF Attorney Manual Section II.I.2.)

- **Cover.** A party may use a cover for a petition for rehearing *en banc*, but it is not required if the party places a caption on the front page and the caption and the signature block together provide the information that would otherwise appear on a cover, as required under FRAP 32(a)(2). If not using a cover, the petition title must plainly state that the petition is for rehearing *en banc*. If a party uses a cover, it must be white and plainly state that it is a petition for rehearing *en banc*. (FRAP 32(c)(2)(A) and 40(b); 4th Cir. R. 35(a) and 4th Cir. R. 40(a); Fourth Circuit Appellate Procedure Guide: Rehearing & Rehearing En Banc: Length & Format of Petition.)
- **Paper Petitions.** If paper copies of a petition are necessary, counsel must print them single-sided and bind them in a way that:
  - is secure;
  - does not obscure the text; and
  - permits the petition to lie reasonably flat when open.

  (FRAP 32(a)(1), (3), (c)(2).)

Serving and Filing the Petition

Counsel must use CM/ECF to serve and file the petition unless an exemption applies (FRAP 25(a)(2)(B)(i), (c)(2); 4th Cir. R. 25(a)(1), (4)).

If any party is exempt from using CM/ECF, counsel must serve that party by paper means (4th Cir. R. 25(a)(4)). Acceptable methods of paper service include:

- Personal delivery.
- First-class mail.
- Third-party commercial carrier for delivery within three days.

(FRAP 25(c)(1).)

RESPONDING TO THE PETITION FOR REHEARING *EN BANC*

A party cannot serve and file a response to an *en banc* rehearing petition unless and until the Fourth Circuit requests a response (FRAP 35(e)). A response is subject to the same formatting, service, and filing requirements as a petition unless the court directs otherwise.

The rules do not provide for a reply. Any party who wants to file a reply must file a motion for leave to do so, or else the court will likely reject the reply.

An *amicus curiae* that wants to support a petition for rehearing *en banc* (or that does not support either party) must file its brief and motion within seven days after the petitioner files its petition. An amicus that wants to oppose a petition for rehearing *en banc* must file its brief and motion no later than the date the court sets for the response. (FRAP 29(b)(5).) No party may respond to the motion unless the court directs otherwise.

The amicus's motion must state:

- The movant's interest.
- The reason why an amicus brief is desirable.
- Why the matters asserted are relevant to the disposition of the case.

(FRAP 29(a)(3), (b)(3).)

An amicus brief filed in connection with a petition for rehearing *en banc* cannot exceed 2,600 words, and otherwise must comply with the content and formatting requirements of an amicus brief filed during consideration of the case on the merits (FRAP 29(a)(4), (b)(4); see Practice Note, Fourth Circuit Civil Appeals: Amicus Curiae Briefs (W-016-6276)).

An amicus need only file an electronic copy of the amicus brief, unless the court orders the amicus to file a paper copy. An amicus need not serve paper copies of its brief where it serves the amicus brief electronically. (4th Cir. R. 29(b)(2).)

DISPOSITION OF A PETITION FOR REHEARING *EN BANC*

The Fourth Circuit does not hear oral argument on petitions for rehearing *en banc*.

An active judge of the court, or a senior or visiting judge who sat on the panel that decided the case originally, may request that a poll be taken on whether to rehear the case *en banc* (FRAP 35(f); 4th Cir. R. 35(b); Fourth Circuit Appellate Procedure Guide: Rehearing & Rehearing En Banc: Poll). Absent a request for a poll on the petition for rehearing *en banc*, none will be taken.

A majority of the Fourth Circuit judges who are in regular active service (and not disqualified from the case) may grant rehearing *en banc* (FRAP 35(a); 4th Cir. R. 35(b)). Senior or visiting judges do not vote on the petition for rehearing *en banc*, even if the senior or visiting judge sat on the panel that decided the case (Fourth Circuit Appellate Procedure Guide: Rehearing & Rehearing En Banc: Decision to Hear or Rehear a Case En Banc). A judge who joins the court after the petition is submitted and before an order is entered is eligible to vote on whether to grant rehearing *en banc* (4th Cir. R. 35(b)).

If no eligible judge requests a poll, the panel's order on the petition for rehearing will say that no member of the court requested a poll. If an eligible judge requests a poll and the court denies the petition, the order will reflect the vote of each participating judge. (4th Cir. R. 35(b).) If the court votes to grant rehearing *en banc*, the order will state that a majority of the judges in regular active service voted to grant rehearing *en banc*, but it will not reflect the vote of each judge (Fourth Circuit Appellate Procedure Guide: Rehearing & Rehearing En Banc: Poll).

REHEARING *EN BANC*

An *en banc* rehearing takes place before all eligible and active participating judges, and any senior judge of the court who sat on the panel that decided the case originally (4th Cir. R. 35(c)). The court will order additional briefing on its own initiative or on motion by a party if a majority of the court agrees it is needed. If the court orders additional briefing, its order will include an *en banc* briefing schedule that indicates whether the parties must submit full or supplemental briefs and, where appropriate, the issues the parties must address. (4th Cir. R. 35(d).)

As appropriate, full or supplemental briefing should address:

- The necessity of securing or maintaining uniformity of the court's decisions.
- Whether the court should revise existing circuit precedent.
- Intervening precedent.
- Any other issues the court identifies in the briefing order.

Unless the court orders otherwise, granting *en banc* rehearing vacates the previous panel judgment and opinion and stays the mandate (4th Cir. R. 35(c)).

DISPOSITION AFTER REHEARING *EN BANC*

The Fourth Circuit ordinarily decides an *en banc* rehearing with an opinion.

INITIAL HEARING *EN BANC*

A party may request the court to initially hear an appeal *en banc* without first having a three-judge panel consider the appeal and issue a decision. The procedure for an initial hearing *en banc* follows that for a rehearing *en banc* except that a petition for initial hearing *en banc* is due by the date when the appellee's brief is due. (FRAP 35(c).) The Fourth Circuit rarely grants an initial hearing *en banc*.

02-19

Fourth Circuit Civil Appeals: Appellee's Brief, Reply Brief, and Cross-Appeals

ADAM CHARNES AND THURSTON WEBB, KILPATRICK TOWNSEND & STOCKTON LLP, WITH PRACTICAL LAW LITIGATION

A Practice Note explaining how to prepare and submit the appellee's brief and reply brief in civil appeals to the US Court of Appeals for the Fourth Circuit from a federal district court's order or judgment. This Note also explains how to brief cross-appeals and submit supplemental authorities using so-called Rule 28(j) letters.

After the appellant files its opening brief, the appellee responds with its own brief. The appellant then has an opportunity to reply. If both parties appeal, then three briefs rather than two follow the appellant's opening brief. The appellee has an opportunity at the end of the briefing process to reply in support of its cross-appeal. Whether the briefing ends after the third or fourth brief, the parties can submit to the court any significant legal authority they become aware of after briefing and before argument. This Note addresses briefing schedules, the content, formatting, service and filing requirements for appellee's briefs, reply briefs, and cross-appeals, and Rule 28(j) letters alerting the court to supplemental authorities.

BRIEFING SCHEDULES

The parties must serve and file their briefs according to a schedule the Fourth Circuit sets. The parties may request extensions if they have good reasons for being unable to meet the court's deadlines.

TIMING

Once the Fourth Circuit clerk's office receives the record or determines that the record is complete, it provides the parties with a formal briefing schedule (4th Cir. R. 31(b)). Typically, a briefing schedule requires that:

- The appellant serve and file its opening brief within 40 days from the notice of the schedule.
- The appellee serve and file its response brief within 30 days after the appellant serves its brief.
- The appellant serve and file any reply brief within 21 days after the appellee serves its response brief.

(FRAP 31(a)(1); 4th Cir. R. 31(b) (clarifying that the briefing schedule dictates the due dates of the briefs, not receipt of the record as stated in FRAP 31(a)(1)).)

EXTENSIONS OF THE BRIEFING SCHEDULE

A party that cannot meet a deadline to file its brief may ask the court for an extension by serving and filing a motion (4th Cir. R. 31(c)). The parties may not change the briefing schedule by stipulation.

The Fourth Circuit grants extensions only when extraordinary circumstances exist. Therefore, no extension is automatic, even where the request is unopposed. Because the Fourth Circuit disfavors extensions, it may deny the motion entirely or grant less time than the moving party requests. (4th Cir. R. 31(c).) But as a practical matter, the court generally grants unopposed motions for extensions.

A party should request an extension of time as soon as is reasonably possible. The moving party must file its motion well in advance of the subject brief's due date. The motion must state the additional time the moving party requests and the reasons for the request. (4th Cir. R. 31(c).) The motion also must contain a statement that the moving party's counsel consulted opposing counsel, and that the opposing counsel either:

- Consent to the requested extension.
- Will or will not promptly file a response in opposition.

(4th Cir. R. 27(a).)

FAILURE TO COMPLY WITH BRIEFING SCHEDULES

If an appellee fails to file its brief by the due date, the appeal is submitted for argument or decision. The appellee may not appear at oral argument unless the court orders otherwise (FRAP 31(c)).

THE APPELLEE'S BRIEF

The appellee's brief is the primary vehicle for an appellee to explain why the Fourth Circuit should affirm the district court's order or judgment and why the appellant's arguments are wrong.

CONTENTS OF THE APPELLEE'S BRIEF

The appellee's brief must include:

- A cover.
- A corporate disclosure statement.
- A table of contents.
- A table of citations.
- A summary of the argument.
- An argument.
- A signature block.
- A certificate of compliance.
- Proof of service.

(FRAP 25(a)(2)(B)(iii) and (d), 26.1(b), 28(a), (b) and 32(a), (d), and (g); 4th Cir. R. 26.1(a)(2).)

The following sections are optional for the appellee's brief:

- A jurisdictional statement.
- A statement of the issues.
- A statement of the case.
- A statement of the standard of review.
- A statement regarding oral argument.

(FRAP 28(b) and 34(a); 4th Cir. R. 34(a).)

Although not required, counsel also typically include a conclusion.

Cover (Mandatory)

The cover page must list:

- The court of appeals docket number centered at the top of the page.
- The name of the court (United States Court of Appeals for the Fourth Circuit).
- The title of the case, including the parties to the appeal and their appellate designations (for example, Plaintiff-Appellee).
- The nature of the proceeding and the name of the court below (for example, On Appeal from the United States District Court for the Middle District of North Carolina).
- The title of the brief, which must indicate the name of the party for whom the brief is filed (for example, Appellee's Brief).
- The name, office address, and telephone number of counsel representing the party for whom the brief is filed.

(FRAP 32(a)(2).)

Except for filings by unrepresented parties, paper copies of the appellee's brief must have a red cover (FRAP 32(a)(2)).

If all of the necessary information does not fit on the cover, the information may continue on the inside of the cover.

Corporate Disclosure Statement (Mandatory)

The appellee's brief must include a completed copy of the Fourth Circuit's Disclosure of Corporate Affiliations Statement immediately after the cover unless the appellee is the US or a party proceeding in forma pauperis. A state or local government need not file a disclosure statement if the opposing party is pro se. (FRAP 26.1 and 28(a)(1), (b); 4th Cir. R. 26.1.) The statement must:

- Identify any parent corporation and any publicly held corporation that owns 10% or more of the party's stock, or state that there is no such corporation.
- Identify any publicly held corporation, whether or not a party to the litigation, that has a direct financial interest in the outcome of the litigation by reason of a franchise, lease, other profit sharing agreement, insurance, or indemnity agreement, or state that there is no such corporation.
- If the party is a trade organization, it must identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member.

(FRAP 26.1(b) and 28(a)(1), (b); 4th Cir. R. 26.1; see Disclosure of Corporate Affiliations Statement; see also Practice Note, Fourth Circuit Civil Appeals: Post-Initiation Filings and Mediation: Disclosure of Corporate Affiliations (Disclosure Statement) (W-014-1278).)

For the Disclosure of Corporate Affiliations Statement, a publicly held corporation includes any master limited partnership, real estate investment trust, or other legal entity whose shares are publicly held or traded (4th Cir. R. 26.1(a)(2)(C)).

The appellee's brief must include the disclosure statement even if the appellee previously submitted a disclosure statement to the court (FRAP 26.1(b) and 28(a)(1), (b)).

Counsel must immediately supplement the disclosure statement if any of the relevant information changes (FRAP 26.1(b)).

Table of Contents (Mandatory)

The appellee's brief must include a table of contents indicating the page on which each section of the brief begins (FRAP 28(a)(2), (b)). The table should also include specific page references to each heading or subheading of each issue argued.

Table of Citations (Mandatory)

The appellee's brief must include a table of citations (also known as a table of authorities) listing the cases, statutes, and other authorities cited in the brief along with page references to where the appellee has cited each authority. Cases must appear in the table in alphabetical order. (FRAP 28(a)(3), (b).)

It is unnecessary to divide authorities of a given type by jurisdiction. For example, the table may list federal and state cases together.

Some attorneys use *passim* when an authority appears on several pages of the brief rather than providing a lengthy list of pages. Counsel may, for example, use *passim* if an authority appears on five or more pages.

Jurisdictional Statement (Optional)

An appellee may include a jurisdictional statement in its brief if either:

- The appellee disagrees with the appellant about the existence of jurisdiction.
- The appellant incorrectly identified the basis for jurisdiction.

(FRAP 28(a)(4), (b).)

If the appellee includes a jurisdictional statement, it must include:

- The basis for the district court's subject matter jurisdiction (for example, federal question jurisdiction or diversity jurisdiction), with any relevant facts establishing jurisdiction and citations to the appropriate statutes. For example, if jurisdiction is based on diversity of citizenship, the jurisdictional statement should state the citizenship of each of the parties and the amount in controversy, with appropriate citations to the record.
- The basis for appellate jurisdiction (for example, an appeal from a final judgment), with any relevant facts establishing jurisdiction and citations to the appropriate statutes.
- The filing dates necessary to establish the timeliness of the appeal. These typically include the date:
  - the district court issued the order or judgment appealed from; and
  - the appellant filed the notice of appeal or petition for permission to appeal.
- A statement that the appeal is:
  - from a final order or judgment disposing of all claims; or
  - premised on some other proper basis for appellate jurisdiction.

(FRAP 28(a)(4), (b).)

To the extent that the second and fourth items are duplicative, the jurisdictional statement may recite the relevant information once. For example, counsel need not state twice that the appeal is taken from a final order or judgment.

If the appellee disputes the existence of jurisdiction, either in the district court or in the Fourth Circuit, its jurisdictional statement should explain why jurisdiction does not exist. For example, an appellee may state that although the appeal is from a final judgment, the district court lacked subject matter jurisdiction because there is no federal question and the parties were not diverse.

The jurisdictional statement is often a single paragraph.

Statement of the Issues (Optional)

The appellee's brief may include after the jurisdictional statement a statement of the issues presented for appellate review (FRAP 28(a)(5), (b)).

An appellee may include a statement of the issues to re-frame an issue presented in the appellant's brief or to present bases for affirmance the appellant's brief did not address. For example, a defendant-appellee may have argued in the district court that the plaintiff's complaint should be dismissed because it:

- Is barred by the applicable statute of limitations.
- Fails to state a claim on which relief can be granted.

Even if the district court dismissed the action on limitations grounds without addressing the merits of the plaintiff's claims, the defendant-appellee's brief may argue that the merits provide an alternative ground for affirmance. In this example, the defendant-appellee should include both limitations and the merits in its statement of the issues presented for review.

Even if the appellee does not intend to present alternative grounds for affirmance, the appellee almost always wants to rephrase the issues as presented by the appellant in a way that frames them more favorably for the appellee.

The rules do not specify any particular format for the issues presented. Most attorneys phrase their issues as either:

- A question (for example, "Does a plaintiff need to plead with particularity a claim of negligent misrepresentation?").
- A declaratory statement beginning with "whether" (for example, "Whether a plaintiff must plead with particularity a claim of negligent misrepresentation.").

If an issue involves some facts, attorneys often include a generic description of them. There is no need to present the specific facts of the appeal in the statement of issues presented for review. For example, an issue in a negligence case may be "Whether a driver violates his duty of due care to others when he accelerates through a yellow light."

Issues presented can be in multiple sentences. For example, the negligence issue could alternatively be phrased as, "A driver accelerated while driving through a yellow light. Did he violate his duty of care to others?"

The rules do not specify how many issues a brief may present or what makes something significant enough to constitute an issue presented for review. Some attorneys present as many issues as there are main sections of the argument (see Argument (Mandatory)). For example, if the argument section of a brief has three main points, some attorneys have three issues presented, even if some of the points have subpoints.

Attorneys commonly place each issue presented for review in a separate, numbered paragraph.

Statement of the Case (Optional)

The appellee's brief may include a statement of the case after the statement of the issues presented for review (FRAP 28(a)(6), (b)). An appellee may include a statement of the case to add events that the appellant omitted or to present its own narrative.

If the appellee includes a statement of the case, the statement must:

- Include a narrative statement of all the facts necessary for the court to reach the conclusion that the brief desires with references to the specific pages in the joint appendix that support each of the facts stated.
- Describe the relevant procedural history, with appropriate references to specific pages in the appendix.
- Identify the rulings presented for review, with appropriate references to specific pages in the appendix.

(FRAP 28(a)(6), (e); 4th Cir. R. 28(f).)

Although the court has access to the entire record, the Fourth Circuit disfavors citation to portions of the record not included in the appendix (4th Cir. R. 30(b)).

The appellee should write the statement of the case as a persuasive (but not argumentative) narrative and not as a bullet point string of relevant facts. In describing the facts and procedural history, counsel should set out only the material events and dates. Superfluous information may distract or confuse readers.

When providing all of the relevant facts, counsel should disclose material facts that are bad for the appellee. Counsel may seek to minimize those bad facts but should not conceal them.

Although not required, counsel often divide the statement of the case into separate sections with headings. For example, a heading in a breach of contract action may be "The Parties Agree to a Contract."

Counsel should refer to the parties by their names or by descriptive terms that clearly identify them. For example, a brief may describe the parties as the employer and the employee, the buyer and the seller, or the plaintiff and defendant. Referring to the parties as the appellant and the appellee may confuse readers. (FRAP 28(d).)

Summary of Argument (Mandatory)

The appellee's brief must include a summary of its argument after the statement of the case. The summary should provide a brief narrative overview of the argument. It must not merely restate the headings in the argument section. (FRAP 28(a)(7).) Counsel may, for example, provide a single paragraph synopsis of each point in the argument section.

Argument (Mandatory)

After presenting a summary of its argument on appeal, the appellee's brief must set out in full its argument for affirming the district court's order or judgment. The argument section must include:

- The appellee's contentions and the legal reasons supporting them.
- Citations to legal authorities and record materials relied on by the appellee.

(FRAP 28(a)(8), (b).)

Although not required, an appellee may identify the standard of appellate review for each issue presented in its argument section (FRAP 28(b)). An appellee may discuss the standard of review if it disagrees with the appellant's statement of the applicable standard. Counsel often discuss the applicable standard of review for each issue under a separate descriptive heading.

The appellee's argument may or may not follow the organization of the appellant's argument depending on the particulars of a given case.

Attorneys commonly divide the argument section into points, with each point addressing one of the appellee's main arguments. Each point may contain subpoints. For example:

- Point I may argue that the district court lacked subject matter jurisdiction, while Point II argues that the complaint fails to state a claim for negligence.
- Point II may contain subpoints II.A, II.B, II.C and II.D, arguing that the plaintiff inadequately alleged duty, breach, causation, and damages, respectively.

Counsel must support every statement in the brief concerning matters in the record, including factual assertions, with a citation to the appendix (FRAP 28(e)).

An appellee may cite to an unpublished federal judicial decision issued on or after January 1, 2007 (FRAP 32.1(a)). The Fourth Circuit disfavors citations to unpublished dispositions issued before January 1, 2007, except to establish any of the following:

- *Res judicata*.
- Estoppel.
- Law of the case.

(4th Cir. R. 32.1.)

However, a party may cite a pre-2007 Fourth Circuit unpublished disposition, if the party:

- Believes the pre-2007 unpublished disposition has precedential value relating to a material issue on appeal.
- Believes there is no published opinion that would serve as well as the pre-2007 unpublished disposition.
- Files and serves a copy of the unpublished disposition if required by FRAP 32.1(b).

(4th Cir. R. 32.1.)

If the appellee cites a federal judicial opinion, order, judgment, or other written disposition that is not available in a publicly accessible electronic database, the party must file and serve a copy of that disposition with the brief (FRAP 32.1(b)). A party complies with FRAP 32.1(b) by either including the cited material in an addendum at the end of the brief or supplying the cited material to the court under separate cover (4th Cir. R. 28(b)).

Legal citations should comply with the rules of citation in the latest edition of *The Bluebook*. Citations should include a reference to the specific page or footnote of the case that supports the stated proposition. For reported state cases, an appellee should cross-reference the national reporter in the citation.

If disposition of the appeal "requires the study" of legal authorities, an appellee must set out relevant parts of statutes, regulations, rules, or other authorities in one of the following:

- The appellee's brief itself.
- An addendum at the end of the brief.
- A separate volume provided to the court.

(FRAP 28(f).)

Counsel typically quote in the appellee's brief itself relevant portions of a statute, regulation, rule, or other authority. If the relevant portion is lengthy or if an authority is not easily accessible (for example, a local law not published online), counsel may include a copy of it in an addendum at the end of a brief.

Conclusion (Optional)

The appellee's brief should contain a short conclusion stating the precise relief sought in the appeal (typically asking the court to affirm the district court's judgment) (FRAP 28(a)(9), (b)). For example, the conclusion may read "For all of the foregoing reasons, the Court should affirm the district court's judgment."

Statement Regarding Oral Argument (Optional)

The appellee's brief may include a short statement explaining whether the appellee wants oral argument, and if so, the reasons why the court should hear oral argument (FRAP 34(a); 4th Cir. R. 34(a)). The statement regarding the need for oral argument should generally appear after the brief's conclusion and above the signature block (4th Cir. R. 34(a)).

The statement regarding oral argument should not be long or particularly argumentative. A party may note the complexity of the issues, the importance of the case (for example, the amount of money in controversy), the involvement of unsettled law, the lengthy record, or any other explanation for how oral argument might aid the court's decision-making process. Counsel should not use the statement to further argue the merits of the appeal.

Signature Block (Mandatory)

For electronically filed documents, the filing attorney's name on a signature block and Case Management/Electronic Case Filing (CM/ECF) system login and password constitute the required signature for all purposes. A manual signature is unnecessary. (FRAP 25(a)(2)(B)(iii), 32(d); 4th Cir. R. 25(a)(9); Fourth Circuit CM/ECF Attorney Manual sections II.B.4 and II.I.1.)

Counsel must indicate the identity of the filing attorney at the end of the document by placing an "s/" on a signature line followed by the attorney's name (4th Cir. R. 25(a)(9); Fourth Circuit CM/ECF Attorney Manual section II.I.1). Counsel should avoid graphic and other electronic signatures. Counsel also should include a signature block directly below the signature line, including the filing attorney's:

- Name.
- Business address.
- Telephone number.
- Email address.

If submitting a brief that requires signatures of two or more separately represented parties, the filing attorney may electronically file the document in one of the following ways:

- Submitting a scanned document with all necessary signatures.
- Representing the other parties' consent on the document.
- Identifying the other parties whose signatures are needed and submitting a notice of endorsement by the other parties within three business days.
- Any other manner approved by the court.

(4th Cir. R. 25(a)(9); Fourth Circuit CM/ECF Attorney Manual section II.I.2.)

Absent an objection, the Fourth Circuit presumes that all parties' electronically represented signatures and filing users' signatures are valid signatures (4th Cir. R. 25(a)(9)).

Certificate of Compliance (Mandatory)

An appellee's brief longer than 30 pages must contain a certificate by the appellee's attorney stating that the brief complies with the type-volume limitations under FRAP 32(a)(7)(B) (FRAP 28(a)(10), (b) and 32(a)(7)(A), (g)(1); see Length or Type-Volume).

The certificate must state the number of words or the number of lines of monospaced type in the brief. When preparing the certificate, counsel may rely on the word or line count provided by the word processing software used when drafting the brief. (FRAP 32(g)(1).)

To satisfy the requirements for a certificate of compliance, counsel may use Form 6 in the FRAP Appendix of Forms (FRAP 32(g)(2); FRAP Form 6).

Certificate of Service (Mandatory)

The appellee must attach a certificate of service as the last (and unnumbered) page of the brief, even if all parties receive service by CM/ECF (FRAP 25(d); 4th Cir. R. 25(b)(3); Fourth Circuit CM/ECF Attorney Manual sections II.D.2 and III.C).

The certificate must generally include:

- The date and manner of service.
- The names of the individuals served.
- The served individuals' mail or email addresses, fax numbers, or the addresses of the places of delivery.

(FRAP 25(d)(B).)

If all parties receive service by CM/ECF, when filing the brief the appellee's counsel need only enter the service information appearing in CM/ECF's Attorney Service Preference Report to prepare the certificate of service (4th Cir. R. 25(a)(4); see Fourth Circuit CM/ECF Attorney Manual sections III.C.6 and IV.C).

If any party is exempt from using CM/ECF and receives paper service, the appellee's counsel must conventionally serve a copy of the electronically filed brief and include that information in the certificate of service (FRAP 25(d); 4th Cir. R. 25(a)(4); see Fourth Circuit CM/ECF Attorney Manual sections II.D.4, III.C.6, and IV.C).

Counsel should follow the certification of service examples in the CM/ECF Attorney Manual (see Fourth Circuit CM/ECF Attorney Manual section III.C.6) or use the Fourth Circuit's fillable certificate of service form (see Fourth Circuit CM/ECF Attorney Manual section II.D.2).

FORMATTING THE APPELLEE'S BRIEF

The appellee's brief must comply with formatting requirements regarding:

- Page size and margins.
- Font.
- Line spacing.
- Length or type-volume.
- Paper copies of briefs.

Page Size and Margins

Counsel must prepare the appellee's brief using 8.5" by 11" pages. Brief pages must have margins at least one inch on all four sides of the page. Except for page numbers, the appellee's brief may not include any text in the margins. (FRAP 32(a)(4).) Pages should be numbered.

Font

Briefs must use black type (FRAP 32(a)(1)). The appellee's brief must use a plain, Roman-style font. However, the appellee's brief may occasionally use italics or boldface for emphasis. Counsel must italicize or underline case names in the brief. (FRAP 32(a)(6).)

Counsel may draft the appellee's brief in either a proportionally spaced font (for example, Times New Roman) or a monospaced font (for example, Courier) (FRAP 32(a)(5)).

The required font size depends on which of these two font types the appellee uses:

- **Proportionally spaced font.** An appellee's brief written in a proportionally spaced font must use at least a 14-point font size. This font must include serifs (for example, Times New Roman includes serifs). However, headings and captions may appear in sans-serif type (that is, a font without serifs, like Arial or Helvetica).
- **Monospaced font.** An appellee's brief printed in a monospaced font may not contain more than 10.5 characters per inch. This roughly translates to 12-point Courier font.

(FRAP 32(a)(5).)

Line Spacing

The text of the appellee's brief must be double-spaced (FRAP 32(a)(4)). The brief should also double-space the table of contents and table of citations. However, a brief may use single-spacing for:

- Direct quotes more than two lines long, which counsel should indent on both sides.
- Headings.
- Footnotes.

(FRAP 32(a)(4).)

Length or Type-Volume

The appellee's brief may not exceed 30 pages without prior approval from the court unless it either:

- Contains no more than 13,000 words.
- Uses a monospaced font and contains no more than 1,300 lines of text.

(FRAP 32(a)(7).)

Counsel may rely on the word or line count provided by the word processing software used to draft the brief (FRAP 32(g)(1)). Counsel should ensure that the word processor includes any footnotes in calculating the word count.

If the appellee's brief exceeds 30 pages, the appellee's attorney must certify that they have satisfied these requirements by including a certificate of compliance in the appellee's brief (FRAP 32(g) and see Certificate of Compliance (Mandatory)).

In determining the word or line count of a brief, referred to as type-volume, counsel must include the headings, text, footnotes, and quotations. Counsel may exclude:

- The cover page.
- The corporate disclosure statement.
- The statement regarding oral argument.
- The table of contents.
- The table of citations.
- The signature block.
- Any certificates of counsel (for example, the certificate of compliance).
- Any addendum containing statutes, rules, or regulations.
- The certificate of service.

(FRAP 32(f).)

The Fourth Circuit disfavors motions for leave to file oversize briefs, and grants them only for extraordinary and compelling reasons. If a party wants to move for leave to file an oversize brief, it must do so at least ten days before the brief's due date and explain why the party needs the extra space. (4th Cir. R. 32(b).)

Hyperlinks

In the Fourth Circuit, electronically filed documents, such as briefs (see Serving and Filing the Appellee's Brief), may include hyperlinks to:

- Other portions of the appellee's brief or other documents filed on appeal.
- Documents filed in the district court that are part of the record on appeal.
- Statutes, rules, regulations, and opinions.

(4th Cir. R. 25(a)(12).)

However, hyperlinks do not replace proper citations to the appendix, the record, or legal authorities (4th Cir. R. 25(a)(12)).

Paper Briefs

Paper copies of the appellee's brief must include a red cover of durable quality on both the front and back sides (FRAP 32(a)(2)). Briefs must be printed single-sided (FRAP 32(a)(1)(A)). The print quality must be at least as good as that of a laser printer (FRAP 32(a)(1)(B)).

Counsel must bind paper copies of the appellee's brief along the left margin in a way that:

- Is secure.
- Does not obscure the text.
- Permits the brief to lie reasonably flat when open.

(FRAP 32(a)(3); 1998 Advisory Committee Notes to FRAP 32(a)(3).)

SERVING AND FILING THE APPELLEE'S BRIEF

Counsel must use CM/ECF to serve and file the appellee's brief (FRAP 25(a)(2)(B)(i) and (c)(2); 4th Cir. R. 25(a)(1)(B) and see Practice Note, Fourth Circuit Civil Appeals: Post-Initiation Filings and Mediation: Electronic Filing in the Fourth Circuit) (W-014-1278). The Fourth Circuit does not require the appellee to serve paper copies on opposing counsel registered for CM/ECF (4th Cir. R. 25(a)(1)(B); 4th Cir. R. 31(d)(2)).

However, if the brief contains sealed materials, filing counsel must serve one paper copy on the lead counsel for each party separately represented who is authorized to have access to the sealed material (4th Cir. R. 31(d)(2)).

Also, counsel must serve a paper copy of the appellee's brief on any *pro se* party or opposing counsel not registered for electronic service through CM/ECF (4th Cir. R. 25(a)(1)(B), (4); 4th Cir. R. 25(b)(2)). Acceptable methods of paper service include:

- Personal delivery.
- First-class mail.
- Third-party commercial carrier for delivery within three days.

(FRAP 25(c)(1).)

Counsel also must file one originally signed paper copy of the appellee's brief with the court (4th Cir. R. 25(a)(1)(B); 4th Cir. R. 31(d)(1)). The paper copy must be identical to the electronic copy except that it must have a red cover (FRAP 32(a)(2)). The Fourth Circuit deems the brief filed as of the date and time stated on the notice of docketing activity for the electronic version of the brief, if the appellee does any of the following the next business day:

- Mails the paper copy to the clerk's office.
- Delivers the paper copy to a third-party commercial carrier to deliver to the clerk's office.
- Personally delivers the paper copy to the clerk's office.

(4th Cir. R. 25(a)(1)(B).)

The court orders the appellee to file additional paper copies for oral argument or if otherwise needed (4th Cir. R. 31(d)(1)).

THE REPLY BRIEF

The reply brief provides the appellant with an opportunity to answer the appellee's brief and explain why, despite the appellee's contentions, the Fourth Circuit should grant the appellant relief. A reply brief is optional (FRAP 28(c) and 31(a)).

CONTENTS OF THE REPLY BRIEF

The appellant's reply brief must include:

- A cover.
- A table of contents.
- A table of citations (also known as a table of authorities).
- An argument.
- A signature block.
- A certificate of compliance.
- A certificate of service.

(FRAP 25(a)(2)(B)(iii) and (d), 28(c) and 32(a), (d), and (g).)

Many attorneys also include a brief conclusion.

Cover

The cover of the reply must comply with the same requirements that apply to the appellant's opening brief and the appellee's brief. The cover page for the reply brief must list:

- The court of appeals docket number centered at the top of the page.
- The name of the court (United States Court of Appeals for the Fourth Circuit).
- The title of the case, including the parties to the appeal and their appellate designations (for example, Plaintiff-Appellant).
- The nature of the proceeding and the name of the court below (for example, On Appeal from the United States District Court for the Middle District of North Carolina).
- The title of the brief, which must indicate the name of the party for whom the brief is filed (for example, Appellant's Reply Brief).
- The name, office address, and telephone number of counsel filing the brief.

(FRAP 32(a)(2).)

Except for filings by unrepresented parties, paper copies of the reply brief must have a gray cover (FRAP 32(a)(2)).

Table of Contents

The reply brief must include a table of contents indicating the page on which each section of the brief begins. The table also must include specific page references to each heading or subheading of each issue addressed in the argument section. (FRAP 28(a)(2), (c).)

Table of Citations

The reply brief must include a table of citations (also known as a table of authorities) listing the cases, statutes, and other authorities cited in the brief along with page references to where the appellant has cited each authority. Cases must appear in the table in alphabetical order. (FRAP 28(a)(3), (c).)

It is unnecessary to divide authorities of a given type by jurisdiction. For example, the table may list federal and state cases together.

Some attorneys use *passim* when an authority appears on several pages of the brief rather than providing a lengthy list of pages. Counsel may, for example, use *passim* if an authority appears on five or more pages.

Argument

The reply brief must set out in full its argument for rejecting the appellee's contentions and granting relief from the order or judgment below. The argument section must include:

- The appellant's reply arguments and the legal reasons supporting them.
- Citations to legal authorities and record materials relied on by the appellant.

(FRAP 28(a)(8).)

The reply brief's argument may or may not follow the organization of the prior briefs depending on the particulars of a given case.

Attorneys commonly divide the argument section into points, with each point addressing one of the appellant's main reply arguments. Each point may contain subpoints addressing a subsidiary argument.

Counsel must support every statement in the brief concerning matters in the record, including factual assertions, with a citation to the record (FRAP 28(e); 4th Cir. R. 28(f)).

An appellant may cite to an unpublished judicial decision issued on or after January 1, 2007 (FRAP 32.1(a)). The Fourth Circuit disfavors citations to unpublished dispositions issued before January 1, 2007, except to establish any of the following:

- *Res judicata*.
- Estoppel.
- Law of the case.

(4th Cir. R. 32.1.)

However, a party may cite a pre-2007 Fourth Circuit unpublished disposition if the party:

- Believes the pre-2007 unpublished disposition has precedential value relating to a material issue on appeal.
- Believes there is no published opinion that would serve as well as the pre-2007 unpublished disposition.
- Files and serves a copy of the unpublished disposition if required by FRAP 32.1(b).

(4th Cir. R. 32.1.)

If the reply brief cites a federal judicial opinion, order, judgment, or other written disposition that is not available in a publicly accessible electronic database, the party must file and serve a copy of that disposition with the brief (FRAP 32.1(b)). A party complies with FRAP 32.1(b) by either including the cited material in an addendum at the end of the brief or supplying the cited material to the court under separate cover (4th Cir. R. 28(b)).

Legal citations should comply with the rules of citation in the latest edition of *The Bluebook*. Citations must include a reference to the specific page or footnote of the case that supports the stated proposition. For reported state cases, the national reporter should be cross-referenced.

If disposition of the appeal "requires the study" of legal authorities, an appellant must set out relevant parts of statutes, regulations, rules, or other authorities in one of the following:

- The appellant's reply brief itself.
- An addendum at the end of the brief.
- A separate volume provided to the court.

(FRAP 28(f); 4th Cir. R. 28(b).)

However, if an appellant already provided the authority in an earlier brief, there is no need to include it again.

Counsel typically quote the relevant portions of a statute, regulation, rule, or other authority in the reply brief itself. If the relevant portion is lengthy or if an authority is not easily accessible (for example, a local law not published online), counsel may include a copy of it in an addendum at the end of the reply brief.

Conclusion

The reply brief does not need a conclusion (FRAP 28(c)). Still, appellants commonly include a short conclusion reiterating their request for relief.

Signature Block

For electronically filed documents, the filing attorney's typed name on a signature block and CM/ECF system login and password constitute the required signature for all purposes. A manual signature is unnecessary. (FRAP 25(a)(2)(B)(iii), 32(d); 4th Cir. R. 25(a)(9); Fourth Circuit CM/ECF Attorney Manual sections II.B.4 and II.I.1.)

Counsel must indicate the identity of the filing attorney at the end of the document by placing an "s/" on a signature line followed by the attorney's name (4th Cir. R. 25(a)(9); Fourth Circuit CM/ECF Attorney Manual section II.I.1). Counsel should avoid graphic and other electronic signatures. Counsel also should include a signature block directly below the signature line, including the filing attorney's:

- Name.
- Business address.
- Telephone number.
- Email address.

If submitting a brief that requires signatures of two or more separately represented parties, the filing attorney may electronically file the document in one of the following ways:

- Submitting a scanned document with all necessary signatures.
- Representing the other parties' consent on the document.
- Identifying the other parties whose signatures are needed and submitting a notice of endorsement by the other parties within three business days.
- Any other manner approved by the court.

(4th Cir. R. 25(a)(9); Fourth Circuit CM/ECF Attorney Manual section II.I.2.)

Absent an objection, the Fourth Circuit presumes that all parties' electronically represented signatures and filing users' signatures are valid signatures (4th Cir. R. 25(a)(9)).

Certificate of Compliance

A reply brief longer than 15 pages must contain a certificate by the appellant's attorney stating that the brief complies with the type-volume limitations under FRAP 32(a)(7)(B) (FRAP 32(a)(7)(A), (g)(1)).

The certificate must state the number of words or the number of lines of monospaced type in the brief. When preparing the certificate, counsel may rely on the word or line count provided by the word processing software used when drafting the brief. (FRAP 32(g)(1).)

To satisfy the requirements for a certificate of compliance, counsel may use Form 6 in the FRAP Appendix of Forms (FRAP 32(g)(2); FRAP Form 6).

Certificate of Service

The appellant's counsel must include a certificate of service as the last (and unnumbered) page of the reply brief, even if all parties receive service by CM/ECF (FRAP 25(d); 4th Cir. R. 25(b)(3); Fourth Circuit CM/ECF Attorney Manual sections II.D.2 and III.C).

The certificate must generally include:

- The date and manner of service.
- The names of the individuals served.
- The served individuals' mail or email addresses, fax numbers, or the addresses of the places of delivery.

(FRAP 25(d)(B).)

If all parties receive service by CM/ECF, when filing the reply brief the appellant's counsel need only enter the service information appearing in CM/ECF's Attorney Service Preference Report to prepare the certificate of service (4th Cir. R. 25(a)(4); see Fourth Circuit CM/ECF Attorney Manual sections III.C.6 and IV.C).

If any party is exempt from using CM/ECF and receives paper service, the appellant's counsel must conventionally serve a copy of the electronically filed brief and include that information in the certificate of service (FRAP 25(d); 4th Cir. R. 25(a)(4); see Fourth Circuit CM/ECF Attorney Manual sections II.D.4, III.C.6, and IV.C).

Counsel should follow the certification of service examples in the CM/ECF Attorney Manual (see Fourth Circuit CM/ECF Attorney Manual section III.C.6) or use the Fourth Circuit's fillable certificate of service form (see Fourth Circuit CM/ECF Attorney Manual section II.D.2).

FORMATTING THE REPLY BRIEF

The reply brief must comply with formatting requirements regarding:

- Page size and margins.
- Font.
- Line spacing.
- Length or type-volume.
- Paper copies of the reply briefs.

Page Size and Margins

Counsel must prepare the reply brief using 8.5" by 11" pages. Brief pages must have margins of at least one inch on all four sides of the page. Except for page numbers, the appellant's brief may not include any text in the margins. (FRAP 32(a)(4).) Pages should be numbered.

Font

Briefs must use black type (FRAP 32(a)(1)). The reply brief must use a plain, Roman-style font. However, reply briefs may occasionally use italics or boldface for emphasis. Counsel must italicize or underline case names in the brief. (FRAP 32(a)(6).)

Counsel may draft the appellant's reply brief in either a proportionally spaced font (for example, Times New Roman) or a monospaced font (for example, Courier) (FRAP 32(a)(5)).

The required font size depends on which type of font the appellant uses:

- **Proportionally spaced font.** An appellant's reply brief written in a proportionally spaced font must use at least a 14-point font size. This font must include serifs (for example, Times New Roman includes serifs). However, headings and captions may appear in sans-serif type (that is, a font without serifs, like Arial or Helvetica).
- **Monospaced font.** An appellant's reply brief printed in a monospaced font may not contain more than 10.5 characters per inch. This roughly translates to 12-point Courier font.

(FRAP 32(a)(5).)

Line Spacing

The text of the reply brief must be double-spaced (FRAP 32(a)(4)). The reply brief should also double-space the table of contents and table of citations. However, a reply brief may use single-spacing for:

- Direct quotes more than two lines long, which counsel should indent on both sides.
- Headings.
- Footnotes.

(FRAP 32(a)(4).)

Length or Type-Volume

The reply brief may not exceed 15 pages without prior approval from the court (obtained by motion), unless it either:

- Contains no more than 6,500 words.
- Uses a monospaced font and contains no more than 650 lines of text.

(FRAP 32(a)(7).)

Counsel may rely on the word or line count provided by the word processing software used to draft the brief (FRAP 32(g)(1)). Counsel should ensure that the word processor includes any footnotes in calculating the word count.

If the reply brief exceeds 15 pages, the appellant's attorney must certify that the attorney has satisfied these requirements by including a certificate of compliance in the appellant's reply brief (FRAP 32(g) and see Certificate of Compliance).

In determining the reply brief's word or line count, referred to as type-volume, counsel must include the headings, text, footnotes, and quotations. Counsel may exclude:

- The cover page.
- The corporate disclosure statement.
- The statement regarding oral argument.
- The table of contents.
- The table of citations.
- The signature block.
- Any certificates of counsel (for example, the certificate of compliance).
- Any addendum containing statutes, rules, or regulations.
- The certificate of service.

(FRAP 32(f).)

The Fourth Circuit disfavors motions for leave to file oversize briefs, and grants them only for extraordinary and compelling reasons. If a party wants to move for leave to file an oversize reply brief, it must do so at least ten days before the brief's due date and explain why the party needs the extra space. (4th Cir. R. 32(b).)

Hyperlinks

Like the appellant's principal brief, the reply brief may include hyperlinks to:

- Other portions of the appellee's brief or other documents filed on appeal.
- Documents filed in the district court that are part of the record on appeal.
- Statutes, rules, regulations, and opinions.

(4th Cir. R. 25(a)(12); and see Practice Note: Fourth Circuit Civil Appeals: Appellant's Brief and Appendix: The Appellant's Brief (W-014-8338).)

Hyperlinks do not replace proper citations in the reply brief to the appendix, the record, or legal authorities (4th Cir. R. 25(a)(12)).

Paper briefs

Paper copies of the reply brief must have a **gray** cover of durable quality on both the front and back sides (FRAP 32(a)(2)). Briefs must

be printed single-sided (FRAP 32(a)(1)(A)). The print quality must be at least as good as that of a laser printer (FRAP 32(a)(1)(B)).

Counsel must bind paper copies of the reply brief in a way that in a way that:

- Is secure.
- Does not obscure the text.
- Permits the brief to lie reasonably flat when open.

(FRAP 32(a)(3); 1998 Advisory Committee Notes to FRAP 32(a)(3).)

SERVING AND FILING THE REPLY BRIEF

Counsel must use CM/ECF to serve and file the reply brief (FRAP 25(a)(2)(B)(i) and (c)(2); 4th Cir. R. 25(a)(1)(B) and see Practice Note, Fourth Circuit Civil Appeals: Post-Initiation Filings and Mediation: Electronic Filing in the Fourth Circuit (W-014-1278)). The Fourth Circuit does not require the appellant to serve paper copies on opposing counsel registered for CM/ECF (4th Cir. R. 25(a)(1)(B); 4th Cir. R. 31(d)(2)).

However, if the reply brief contains sealed materials, filing counsel must serve one paper copy on the lead counsel for each party separately represented who is authorized to have access to the sealed material (4th Cir. R. 31(d)(2)).

Also, counsel must serve a paper copy of the reply brief on any *pro se* party or opposing counsel not registered for electronic service through CM/ECF (4th Cir. R. 25(a)(1)(B), (4); 4th Cir. R. 25(b)(2)). Acceptable methods of paper service include:

- Personal delivery.
- First-class mail.
- Third-party commercial carrier for delivery within three days.

(FRAP 25(c)(1).)

Counsel also must file one originally signed paper copy of the brief with the court (4th Cir. R. 25(a)(1)(B); 4th Cir. R. 31(d)(1)). The paper copy must be identical to the electronic copy except that it must have a gray cover (FRAP 32(a)(2)). The Fourth Circuit deems the reply brief filed as of the date and time stated on the notice of docketing activity for the electronic version of the brief, if the appellant does any of the following the next business day:

- Mails the paper copy to the clerk's office.
- Delivers the paper copy to a third-party commercial carrier to deliver to the clerk's office.
- Personally delivers the paper copy to the clerk's office.

(4th Cir. R. 25(a)(1)(B).)

The court orders the appellant to file additional paper copies for oral argument or if otherwise needed (4th Cir. R. 31(d)(1)).

BRIEFING CROSS-APPEALS

If the appellee is aggrieved by the order or judgment from which the appellant appeals, the appellee may cross-appeal. For example, if the plaintiff prevails at trial on one of its two claims and then appeals from so much of the judgment as relates to the second claim, the defendant may cross-appeal from so much of the judgment as relates to the first claim.

PARTY NAMES ON CROSS-APPEAL

The courts deem the first party to file a notice of appeal the appellant. If both parties file notices of appeal on the same day, the courts deem the plaintiff the appellant. However, these default designations may be altered by stipulation or court order. (FRAP 28.1(b).)

A party taking a cross-appeal is called a cross-appellant. A party defending against a cross-appeal is called a cross-appellee.

If the defendant appeals from a district court judgment and the plaintiff then cross-appeals from the same judgment, the Fourth Circuit designates the parties as the defendant-appellant/cross-appellee and the plaintiff-appellee/cross-appellant.

BRIEFS ON CROSS-APPEAL

A cross-appeal has a total of four briefs, rather than the three filed in an ordinary appeal. The parties brief a cross-appeal as follows:

- The appellant/cross-appellee files a brief stating its arguments supporting the appeal (Blue Brief).
- The appellee/cross-appellant files a brief stating its arguments opposing the appeal and supporting the cross-appeal (Red Brief).
- The appellant/cross-appellee files a brief stating its reply arguments supporting the appeal and its arguments opposing the cross-appeal (Yellow Brief).
- The appellee/cross-appellant files a brief stating its reply arguments supporting the cross-appeal (Gray Brief).

(FRAP 28.1(c), (d).)

BRIEFING SCHEDULES FOR CROSS-APPEALS

Just like with a normal appeal, the Fourth Circuit issues a briefing schedule specifying the due dates for the parties to serve and file their briefs. Typically:

- The appellant/cross-appellee must serve and file its principal brief (Blue Brief) within 40 days after the court issues the scheduling notice.
- The appellee/cross-appellant must serve and file its principal and responsive brief (Red Brief) within 30 days after the appellant/cross-appellee serves its brief (Blue Brief).
- The appellant/cross-appellee must serve and file its second brief (Yellow Brief) within 30 days after the appellee/cross-appellant serves its opening brief (Red Brief).
- The appellee/cross-appellant must serve and file its reply brief (Gray Brief) within 21 days after the appellant/cross-appellee serves its second brief (Yellow Brief), but in any case at least seven days before argument, unless the court allows for a later filing based on good cause.

(FRAP 28.1(f); 4th Cir. R. 31(b) (clarifying that the briefing schedule dictates the due dates of the briefs, not receipt of the record as stated in FRAP 31(a)(1)).)

The parties may request extensions if they have good reasons for being unable to meet the court's deadlines (4th Cir. R. 31(c); see Extensions of the Briefing Schedule).

CONTENT, FORMATTING, SERVICE, AND FILING RULES FOR CROSS-APPEALS

The briefs for a cross-appeal follow the rules generally applicable to Fourth Circuit briefs, with a few exceptions.

The Blue Brief (appellant's opening brief) follows the same rules as any other appellant's brief (FRAP 28.1(c)(1), (d), and (e); see Practice Note, Fourth Circuit Civil Appeals: Appellant's Brief and Appendix: The Appellant's Brief (W-014-8338)).

The Red Brief (appellee's response/cross-opening brief) follows the rules for the appellant's brief, except that:

- The statement of the case is optional.
- Paper copies of the brief must have a red cover.
- The brief may satisfy any of the following length or type-volume requirements:
  - be no more than 35 pages;
  - contain no more than 15,300 words; or
  - contain no more than 1,500 lines of monospaced typeface text.

(FRAP 28.1(c)(2), (d), and (e).)

The Yellow Brief (appellant's brief in response to the cross-appeal and reply in support of its appeal) follows the rules for the appellee's brief, except paper copies of the brief have a yellow cover (FRAP 28.1(c)(3), (d), and (e); see The Appellee's Brief). The appellant/cross-appellee may choose how many pages it devotes to reply arguments supporting the appeal and how many pages it devotes to arguments in opposition to the cross-appeal.

The Gray Brief (appellee's cross-reply brief in support of the cross-appeal) follows the rules for the reply brief (FRAP 28.1(c)(4), (d), and (e); see The Reply Brief). The Gray Brief may address only the cross-appeal and may not serve as a sur-reply on the appeal (FRAP 28.1(c)(4)).

SUBMITTING SUPPLEMENTAL AUTHORITIES

A party may bring to the Fourth Circuit's attention "pertinent and significant authorities" that it learns of either:

- After filing its last brief but before oral argument.
- After oral argument but before decision.

(FRAP 28(j).)

A party does this by sending a letter to the clerk with citations to the supplemental authorities (FRAP 28(j); 4th Cir. R. 28(e)). The letter must state the reasons for the supplemental authorities. It must also refer to either the page of the brief or the point advanced at oral argument. The body of the letter must not exceed 350 words, including footnotes. (FRAP 28(j).)

The requirement that authority be significant means that a party should not submit a Rule 28(j) letter every time there is a new decision reiterating or applying existing law. Appropriate grounds for a Rule 28(j) letter may include any of the following:

- A Supreme Court decision.
- A Fourth Circuit opinion (but not a summary opinion, which has no precedential value).
- A novel opinion by:
  - another federal court of appeals; or
  - a state high court, if the appeal involves a question of state law.

Any other party may respond to the letter promptly by submitting a letter of its own, addressed to the clerk of the court. The body of the response letter cannot exceed 350 words. (FRAP 28(j).)

Counsel must use CM/ECF to serve and file Rule 28(j) letters and responses (FRAP 25(a)(2)(B)(i) and (c)(2); 4th Cir. R. 25(a)(1), (4)).

For *pro se* parties and attorneys not registered for electronic filing, counsel must serve paper copies of Rule 28(j) letters and responses and file proof of service (FRAP 25(b)-(d); 4th Cir. R. 25(a)(4)). Acceptable methods of paper service include:

- Personal delivery.
- First-class mail.
- Third-party commercial carrier for delivery within three days.

(FRAP 25(c)(1).)

After serving *pro se* parties and attorneys not registered for electronic filing with paper copies, attorneys must use the CM/ECF system to serve other parties and file with the Fourth Circuit. The electronically filed document must include a certificate of service proving proper service on each party. (FRAP 25(d); 4th Cir. R. 25(a)(4); 4th Cir. R. 25(b)(3).)

02-19

Fourth Circuit Civil Appeals: Amicus Curiae Briefs

ADAM CHARNES AND THURSTON WEBB, KILPATRICK TOWNSEND & STOCKTON LLP, WITH PRACTICAL LAW LITIGATION

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A Practice Note explaining how to prepare and submit amicus curiae briefs (also called "friend of the court" briefs) in civil appeals to the United States Court of Appeals for the Fourth Circuit from a federal district court's order or judgment. This Note explains how to obtain permission to appear as an amicus and the content, formatting, service, and filing requirements for amicus briefs.

An amicus curiae brief provides a non-party the opportunity to address the US Court of Appeals for the Fourth Circuit about the issues presented in an appeal. An amicus brief often provides the court with a broader perspective than the parties' briefs, which tend to focus on the particular dispute at hand. An amicus brief may, for example:

- Provide additional context by explaining how an industry or policy operates beyond the specific interaction between the parties.
- Explain to the court the likely consequences of deciding the appeal in a particular manner.
- Offer a legal analysis different from that offered by the party the amicus supports.

This Note explains how to prepare and submit *amicus curiae* briefs in appeals to the US Court of Appeals for the Fourth Circuit from a federal district court's civil order or judgment. The Note addresses both amicus briefs on the merits of the appeal and amicus briefs in connection with rehearing.

For more information on amicus briefing in federal court, see Practice Note, Amicus Briefs: What Are They and When Should a Company File One? (W-001-6339) and Expert Q&A on Best Practices for Amicus Briefing (W-002-8700).

OBTAINING PERMISSION TO FILE AN AMICUS BRIEF

The US, a federal agency, a federal officer, or a state may file an amicus brief as of right, whether addressing the merits or rehearing (FRAP 29(a)(2), (b)(2)).

Every other potential amicus must obtain permission to file an amicus brief. A potential amicus obtains permission to file a brief on the merits of the appeal by either:

- Receiving the consent of all parties to the appeal.
- Making a motion explaining:
  - the movant's interest in the appeal;
  - why the court should want an amicus brief; and
  - why the contents of the proposed amicus brief are relevant to the appeal.

(FRAP 29(a)(2), (3).)

The Fourth Circuit will prohibit an amicus from filing a brief or strike a previously filed amicus brief if the brief would result in a judge's disqualification or recusal (FRAP 29(a)(2); 4th Cir. R. 29(a)).

The parties cannot stipulate to amicus filings about rehearing. A potential amicus that cannot file as of right must obtain the court's permission by motion before filing a brief regarding rehearing. (FRAP 29(b)(2).)

A copy of the proposed amicus brief must accompany a motion to appear as an amicus (FRAP 29(a)(3), (b)(3)).

Counsel for an amicus or potential amicus must serve and file an Appearance of Counsel form, which is available on the Fourth Circuit's website.

TIME TO APPEAR AS AN AMICUS

A potential amicus that wants to address the merits of the appeal must file its brief and any motion for permission to appear as amicus no later than seven days after the party the amicus supports files its principal brief. A potential amicus that does not support any party

must file its brief and any motion for permission to appear as an amicus no later than seven days after the appellant files its principal brief. (FRAP 29(a)(6).) For information on when the parties' briefs are due, see Practice Note, Fourth Circuit Civil Appeals: Appellant's Brief and Appendix: Briefing Schedules (W-014-8338).

A potential amicus that supports a petition for rehearing or supports neither party on the petition for rehearing must serve and file its brief and accompanying motion no later than seven days after a party files the petition. A potential amicus opposing the petition must file its brief and motion within the time set by the court for responding to the petition. (FRAP 29(b)(5).)

If a potential amicus moves for permission to appear in the appeal, any of the parties to the appeal may oppose the motion (FRAP 27(a)(3); 4th Cir. R. 27(d)(1)). A party must generally file its opposition within ten days after the potential amicus serves its motion, unless the court shortens or extends the time (FRAP 27(a)(3)(A)). The parties should not dispute in their motion papers the merits of the arguments contained in the proposed amicus brief. Counsel should instead focus their motion papers on the reasons why the court should or should not grant the potential amicus permission to participate in the appeal.

The parties should discuss the merits of the arguments in the proposed amicus brief in their briefs if the court grants the motion. If the court grants a motion to file an amicus brief after the opposing party has filed its last brief, the court may let the opposing party file a supplemental brief responding to the arguments contained in the amicus brief (FRAP 29(a)(6)).

CONTENTS OF AN AMICUS BRIEF

An amicus brief, whether addressing the merits of the appeal or rehearing, must contain:

- A cover page.
- A corporate disclosure statement, if the amicus is a corporation.
- A table of contents.
- A table of citations.
- A statement of identification.
- An argument and citations to authority.
- A signature block.
- A certificate of compliance.
- A certificate of service.

(FRAP 25(a)(2)(B)(iii) and (d), 26.1, 29(a)(4)-(5) and (b)(4), and 32(a), (d), (g); 4th Cir. R. 26.1(b).)

Although a conclusion is not required under the rules, an amicus brief should always include one.

Counsel sometimes include a statement of issues in the amicus brief, but the rules do not require one. Likewise, counsel also often include a summary of the argument after the statement of identification, even though the rules do not require that amicus briefs contain a summary of the argument.

COVER

The brief's cover must list:

- The court of appeals docket number centered at the top of the page.
- The court name (United States Court of Appeals for the Fourth Circuit).
- The case title, including the parties to the appeal and their appellate designations (for example, Plaintiff-Appellant).
- The nature of the proceeding and the name of the court below (for example, On Appeal from the United States District Court for the Middle District of North Carolina).
- The title of the brief, which must indicate the name of the *amicus curiae*, the party it supports, and whether the amicus supports affirmance or reversal.
- The name, office address, and telephone number of counsel filing the brief.

(FRAP 28(a)(4) and 32(a)(2).)

Except for filings by unrepresented parties, paper copies of an amicus brief must have a **green** cover (FRAP 32(a)(2)). If all the necessary information does not fit on the cover, the information may continue on the inside of the cover.

CORPORATE DISCLOSURE STATEMENT

In the Fourth Circuit, an amicus brief must include a completed copy of the Fourth Circuit's Disclosure of Corporate Affiliations Statement immediately after the cover unless the amicus is the United States or a party proceeding in forma pauperis. A state or local government need not file a disclosure statement if the opposing party is pro se. (FRAP 26.1, 28(a)(1), and 29(a)(4)(A); 4th Cir. R. 26.1.) The statement must:

- Appear before the table of contents.
- Identify any parent corporation and any publicly held corporation that owns 10% or more of the party's stock, or state that there is no such corporation.
- Identify any publicly held corporation, whether or not a party to the litigation, that has a direct financial interest in the outcome of the litigation by reason of a franchise, lease, other profit sharing agreement, insurance, or indemnity agreement, or state that there is no such corporation.

(FRAP 26.1(b) and 28(a)(1); 4th Cir. R. 26.1(b); see Practice Note, Fourth Circuit Civil Appeals: Post-Initiation Filings and Mediation: Disclosure of Corporate Affiliations (Disclosure Statement) (W-014-1278).)

For the Disclosure of Corporate Affiliations form, a publicly held corporation includes any master limited partnership, real estate investment trust, or other legal entity whose shares are publicly held or traded (4th Cir. R. 26.1(a)(2)(C)).

The amicus brief must include the disclosure statement even if the amicus previously submitted one to the court (FRAP 26.1(b)). Counsel must immediately supplement the disclosure statement if any of the relevant information changes (FRAP 26.1(b) and 4th Cir. R. 26.1(e)).

A corporate amicus does not have to indicate whether it is a trade association (4th Cir. R. 26.1(b)(2); see Disclosure of Corporate Affiliations form ("5. Is party a trade association? (amici curiae do not complete this question)")).

For more information about drafting, formatting, and updating the corporate disclosure statement, see Practice Note, Fourth Circuit Civil Appeals: Post-Initiation Filings and Mediation: Disclosure of Corporate Affiliations (Disclosure Statement) (W-014-1278).

TABLE OF CONTENTS

The amicus brief must include a table of contents indicating the page on which each section of the brief begins (FRAP 29(a)(4)(B)). The table should always include specific page references to each heading or subheading of each issue argued.

TABLE OF CITATIONS

The amicus brief must include a table of citations (also called a table of authorities) listing the cases, statutes, and other authorities cited in the brief along with page references to where the amicus has cited each authority. Cases must appear in the table in alphabetical order. (FRAP 29(a)(4)(C).)

It is unnecessary to divide authorities of a given type by jurisdiction. For example, the table may list federal and state cases together.

Some attorneys use *passim* when an authority appears on several pages of the brief rather than providing a lengthy list of pages. Counsel may, for example, use *passim* if an authority appears on five or more pages.

STATEMENT OF IDENTIFICATION

The statement of identification must concisely state:

- The identity of the *amicus curiae*.
- The interest of the amicus in the case.
- The source of authority to file the amicus brief (consent of the parties, a court order, or a rule).

(FRAP 29(a)(4)(D).)

Unless the amicus is a government officer or entity that may appear as of right under FRAP 29(a), the amicus brief must also state whether:

- A party's counsel authored the brief in whole or in part.
- A party or a party's counsel contributed money intended to fund the preparation or submission of the brief.
- A person other than the *amicus curiae*, its members, or its counsel contributed money intended to fund the preparation or submission of the brief and, if so, the identity of these contributors.

(FRAP 29(a)(4)(E).)

SUMMARY OF THE ARGUMENT

An amicus brief may include a summary of the argument after the statement of identification (FRAP 29(a)(4)(F)). If included, the summary should provide a brief narrative overview of the amicus's argument. It should not merely restate the headings in the argument section. (FRAP 28(a)(7).) Counsel may, for example, provide a single paragraph synopsis of each point in the argument section.

ARGUMENT

An amicus brief must set out in full the amicus's argument for the result it supports (FRAP 29(a)(4)(F)). The argument section should include:

- The amicus's contentions and the legal reasons supporting them.
- Citations to legal authorities and record materials relied on by the amicus.

(FRAP 28(a)(8).)

An amicus need not identify the standard of appellate review for each issue presented in its argument section (FRAP 29(a)(4)(F)). It may do so, however, if it disagrees with the parties' description of the standard of review.

Often the most effective amicus briefs emphasize points of fact or law particularly tied to the interest of the amicus in the case. As non-parties, amici ordinarily discuss broader concerns with the decision and its potential impact on future cases. (See Practice Note, Amicus Briefs: What Are They and When Should a Company File One? (W-001-6339) and Expert Q&A on Best Practices for Amicus Briefing (W-002-8700).)

The amicus brief should present the legal argument in a narrative form with proper headings. Counsel should organize the argument in a concise and logical way free of irrelevant information.

Counsel often divide the argument section into points, with each point addressing one of the amicus's main arguments. Each point may contain subpoints with separate descriptive headings.

Counsel must support every statement in the brief concerning matters in the record, including factual assertions, with a citation to specific pages of the appendix (FRAP 28(e)). However, unlike the parties to the case, an amicus often presents the court with information not contained within the record on appeal. In such cases, counsel should support that information with citations to authoritative sources.

Legal citations should comply with the rules of citation in the latest edition of The Bluebook. Citations must include a reference to the specific page or footnote of the case that supports the stated proposition. For reported state cases, the amicus should cross-reference the national reporter.

If the argument of the amicus requires the study of legal authorities, the amicus should set out relevant parts of statutes, rules, unpublished opinions, or other authorities in one of the following:

- The amicus brief itself.
- An addendum at the end of the brief.
- A separate volume provided to the court.

(FRAP 28(f); 4th Cir. R. 28(b).)

Counsel typically quote in the amicus brief itself relevant portions of a statute, regulation, rule, or other authority. If the relevant portion is lengthy or if an authority is not easily accessible (for example, a local law not published online), counsel may include a copy of it in an addendum at the end of the brief.

CONCLUSION

An amicus brief should include a short conclusion stating the outcome the amicus supports.

SIGNATURE BLOCK

For electronically filed documents, the filing attorney's name on a signature block and case management/electronic case filing (CM/ECF) system login and password constitute the required signature for all purposes. A manual signature is unnecessary. (FRAP 25(a)(2)(B)(iii); 4th Cir. R. 25(a)(9); Fourth Circuit CM/ECF Attorney Manual sections II.B.4 and II.I.1.)

Counsel must identify the filing attorney at the end of the document, by placing an "s/" on a signature line followed by the attorney's name (4th Cir. R. 25(a)(9); Fourth Circuit CM/ECF Attorney Manual section II.I.1). Counsel should avoid graphic and other electronic signatures.

Counsel also should include a signature block directly below the signature line, including the filing attorney's:

- Name.
- Business address.
- Telephone number.
- Email address.

If submitting a brief that requires signatures of two or more separately represented amici, the filing attorney may electronically file the document in one of the following ways:

- Submitting a scanned document with all necessary signatures.
- Representing the other parties' consent on the document.
- Identifying the other parties whose signatures are needed and submitting a notice of endorsement by the other parties within three business days.
- Any other manner approved by the court.

(4th Cir. R. 25(a)(9); Fourth Circuit CM/ECF Attorney Manual section II.I.2.)

Absent an objection, the Fourth Circuit presumes that all parties' electronically represented signatures and filing users' signatures are valid signatures (4th Cir. R. 25(a)(9)).

CERTIFICATE OF COMPLIANCE

An amicus brief on the merits of the appeal that is longer than 15 pages must contain a certificate by the amicus's attorney stating that the brief complies with the type-volume limitations under FRAP 32(g)(1) (FRAP 29(a)(4)(G), (a)(5) and 32(a)(7), (g)(1); see Length or Type-Volume). An amicus brief that addresses rehearing must contain a certificate by the amicus's attorney stating that the brief complies with the 2,600-word limit (FRAP 29(b)(4), (a)(4)(G), and 32(g)(1)).

The certificate must state the number of words or the number of lines of monospaced type in the brief. When preparing the certificate, counsel may rely on the word or line count provided by the word processing software used when drafting the brief. (FRAP 32(g)(1).)

To satisfy the requirements for a certificate of compliance, counsel may use Form 6 in the FRAP Appendix of Forms (FRAP 32(g)(2); FRAP Form 6).

CERTIFICATE OF SERVICE

Counsel must attach a certificate of service as the last (and unnumbered) page of the amicus brief, even if all parties receive service by CM/ECF (FRAP 25(d); 4th Cir. R. 25(b)(3); Fourth Circuit CM/ECF Attorney Manual sections II.D.2 and III.C)).

The certificate must generally include:

- The date and manner of service.
- The names of the individuals served.
- The served individuals' mail or email addresses, fax numbers, or the addresses of the places of delivery.

(FRAP 25(d)(B).)

If all parties receive service by CM/ECF, when filing the amicus brief counsel need only enter the service information appearing in CM/ECF's Attorney Service Preference Report to prepare the certificate of service (4th Cir. R. 25(a)(4); see Fourth Circuit CM/ECF Attorney Manual sections III.C.6 and IV.C).

If any party is exempt from using CM/ECF and receives paper service, counsel must conventionally serve a copy of the electronically filed amicus brief and include that information in the certificate of service (FRAP 25(d); 4th Cir. R. 25(a)(4); see Fourth Circuit CM/ECF Attorney Manual sections II.D.4, III.C.6, and IV.C).

Counsel should follow the certification of service examples in the CM/ECF Attorney Manual (see Fourth Circuit CM/ECF Attorney Manual section III.C.6) or use the Fourth Circuit's fillable certificate of service form (see Fourth Circuit CM/ECF Attorney Manual section II.D.2).

FORMATTING AN AMICUS BRIEF

An amicus brief must conform to formatting requirements regarding:

- Page size and margins.
- Font.
- Line spacing.
- Length or type-volume.
- Paper briefs.

PAGE SIZE AND MARGINS

Counsel must prepare an amicus brief using 8.5" by 11" pages. Brief pages must have margins of at least one inch on all four sides of the page. Except for page numbers, the amicus brief may not include any text in the margins. (FRAP 32(a)(4).) Pages should be numbered.

FONT

Briefs must use black type (FRAP 32(a)(1)). The amicus brief must use a plain, roman style font. However, an amicus brief may occasionally use italics or boldface for emphasis. Counsel must italicize or underline case names in the brief. (FRAP 32(a)(6).)

Counsel may draft the amicus brief in either a proportionally spaced font (for example, Times New Roman) or a monospaced font (for example, Courier) (FRAP 32(a)(5)).

The required font size depends on which type of font the amicus uses:

- **Proportionally spaced font.** An amicus brief written in a proportionally spaced font must use at least a 14-point font size. This font must include serifs (for example, Times New Roman includes serifs). Headings and captions may appear in sans-serif type (a font without serifs, like Arial or Helvetica).
- **Monospaced font.** An amicus brief printed in a monospaced font may not contain more than 10.5 characters per inch. This roughly translates to 12-point Courier font.

(FRAP 32(a)(5).)

LINE SPACING

The text of the amicus brief must be double-spaced (FRAP 32(a)(4)). The brief should also double-space the table of contents and table of citations. A brief may use single-spacing for:

- Direct quotes more than two lines long, which counsel should indent on both sides.
- Headings.
- Footnotes.

(FRAP 32(a)(4).)

LENGTH OR TYPE-VOLUME

An amicus brief on the merits of the appeal may not exceed 15 pages without prior approval from the court (obtained by motion), unless it either:

- Contains no more than 6,500 words.
- Uses a monospaced font and contains no more than 650 lines of text.

(FRAP 29(a)(5) and 32(a)(7).)

The length of an amicus brief does not change if the court grants an appellant or appellee permission to file an oversize principal brief (FRAP 29(a)(5)).

An amicus brief submitted on rehearing may not exceed 2,600 words (FRAP 29(b)(4)).

In determining the word or line count of a brief, referred to as type-volume, counsel must include the headings, text, footnotes, and quotations. Counsel may exclude:

- The cover page.
- The corporate disclosure statement.
- The table of contents.
- The table of citations.
- The signature block.
- Any certificates of counsel (for example, the certificate of compliance).
- Any addendum containing statutes, rules, or regulations.
- The certificate of service.

(FRAP 32(f).)

Counsel may rely on the word or line count provided by the word processing software used to draft the brief (FRAP 32(g)(1)). Counsel should ensure that the word processor includes any footnotes in calculating the word count.

The Fourth Circuit disfavors motions for leave to file oversize briefs, and grants them only for extraordinary and compelling reasons. If an amicus wants to move for leave to file an oversize brief, it must do so at least ten days before the brief's due date and explain why it needs the extra space. (4th Cir. R. 32(b).)

PAPER BRIEFS

Paper copies of the amicus brief must include a cover of durable quality on both the front and back sides. The cover must be **green**. (FRAP 32(a)(2).) Briefs must be printed single-sided (FRAP 32(a)(1)(A)). The print quality must be at least as good as that of a laser printer (FRAP 32(a)(1)(B)).

Counsel must bind paper copies of the amicus brief along the left margin in a way that:

- Is secure.
- Does not obscure the text.
- Permits the brief to lie reasonably flat when open.

(FRAP 32(a)(3); 1998 Advisory Committee Notes to FRAP 32(a)(3).)

SERVING AND FILING AN AMICUS BRIEF

Absent an exemption, counsel must use CM/ECF to serve and file the amicus brief and any motion for permission to appear as amicus (FRAP 25(a)(2)(B)(i) and (c)(2); 4th Cir. R. 25(a)(1)(B) and see Practice Note, Fourth Circuit Civil Appeals: Post-Initiation Filings and Mediation: Electronic Filing in the Fourth Circuit (W-014-1278)).

The Fourth Circuit does not require the amicus to serve paper copies on parties' counsel (or unrepresented parties) registered for CM/ECF (4th Cir. R. 29(b); 4th Cir. R. 25(a)(1)(B), (4); 4th Cir. R. 31(d)(2)). However, counsel must serve a paper copy of the amicus brief on any *pro se* party or opposing counsel not registered for electronic service through CM/ECF (4th Cir. R. 25(a)(1)(B), (4); 4th Cir. R. 25(b)(2)). Acceptable methods of paper service include:

- Personal delivery.
- First-class mail.
- Third-party commercial carrier for delivery within three days.

(FRAP 25(c)(1).)

If the brief contains sealed materials, filing counsel must serve one paper copy on lead counsel for each party separately represented who is authorized to have access to the sealed material (4th Cir. R. 31(d)(2)).

If filing the amicus brief during the court's consideration of the case on the merits, counsel also must file one originally signed paper copy of the brief with the court (4th Cir. R. 29(b)(1); 4th Cir. R. 25(a)(1)(B); 4th Cir. R. 31(d)(1)). The paper copy must be identical to the electronic copy except that it must have a green cover (FRAP 32(a)(2)). The Fourth Circuit deems the brief filed as of the date and time stated on the notice of docketing activity for the electronic version of the brief, if the amicus does any of the following the next business day:

- Mails the paper copy to the clerk's office.
- Delivers the paper copy to a third-party commercial carrier to deliver to the clerk's office.
- Personally delivers the paper copy to the clerk's office.

(4th Cir. R. 25(a)(1)(B).)

The court orders the amicus to file additional paper copies for oral argument or if otherwise needed (4th Cir. R. 29(b)(1); 4th Cir. R. 31(d)(1)).

If filing an amicus brief during consideration of whether to grant rehearing or rehearing en banc, counsel need only file one electronic copy of the brief. An amicus need not file a paper copy unless the court orders otherwise. (4th Cir. R. 29(b)(2).)

ORAL ARGUMENT

An *amicus curiae* may only participate in oral argument with the court's permission obtained by motion (FRAP 29(a)(8)). This most commonly occurs when the federal government appears as an amicus.

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Fourth Circuit Civil Appeals: Appellant's Brief and Appendix

ADAM CHARNES AND THURSTON WEBB, KILPATRICK TOWNSEND & STOCKTON LLP, WITH PRACTICAL LAW LITIGATION

Search the Resource ID numbers in blue on Westlaw for more.

A Practice Note explaining how to prepare and submit the appellant's brief and appendix in civil appeals to the US Court of Appeals for the Fourth Circuit from a federal district court's order or judgment. This Note also addresses briefing schedules.

In the US Court of Appeals for the Fourth Circuit, briefing begins with the appellant's opening brief and an appendix, which compiles key parts of the record on appeal. This Note explains briefing schedules and the content, formatting, service, and filing requirements for the appellant's brief and appendix.

BRIEFING SCHEDULES

The parties must serve and file their briefs according to a schedule set by the Fourth Circuit. The parties may request extensions if they have good reasons for being unable to meet the court's deadlines.

TIMING

Once the Fourth Circuit clerk's office receives the record or determines that the record is complete, it provides the parties with a formal briefing schedule (4th Cir. R. 31(b)). The briefing schedule typically requires that:

- The appellant serve and file its opening brief within 40 days from the notice of the schedule.
- The appellee serve and file its response brief within 30 days after the appellant serves its brief.
- The appellant serve and file any reply brief within 21 days after the appellee serves its response brief.

(FRAP 31(a)(1); 4th Cir. R. 31(b) (clarifying that the briefing schedule dictates the due dates of the briefs, not receipt of the record as stated in FRAP 31(a)(1)).)

EXTENSIONS OF THE BRIEFING SCHEDULE

A party that cannot meet a deadline to file its brief may ask the court for an extension by serving and filing a motion (4th Cir. R. 31(c)). The parties cannot change the briefing schedule by stipulation.

The Fourth Circuit grants extensions only when extraordinary circumstances exist. No extension is automatic, even where the request is unopposed, and because the Fourth Circuit disfavors extensions, it may deny the motion entirely or grant less time than the moving party requests. (4th Cir. R. 31(c).) But as a practical matter, the court generally grants unopposed motions for extensions.

A party should request an extension of time as soon as is reasonably possible. The moving party must file its motion well before the subject brief's due date. The motion must state the additional time the moving party requests and the reasons for the request. (4th Cir. R. 31(c).) The motion also must contain a statement that the moving party's counsel consulted opposing counsel and that the opposing counsel either:

- Consents to the requested extension.
- Will or will not promptly file a response in opposition.

(4th Cir. R. 27(a).)

FAILURE TO COMPLY WITH BRIEFING SCHEDULES

If an appellant fails to file its brief or appendix by the due date, the clerk issues a notice that the court will dismiss the appeal in 15 days unless the party remedies the default (4th Cir. R. 45; Fourth Circuit Appellate Procedure Guide, Formal Briefing). The appellee also may move to dismiss the appeal (FRAP 31(c)).

THE APPELLANT'S BRIEF

The appellant's brief is the primary vehicle for the appellant to explain to the Fourth Circuit why it should grant relief from the district court's order or judgment.

CONTENTS OF THE APPELLANT'S BRIEF

Although the particular facts and legal arguments vary from appeal to appeal, every appellant's brief contains the same general contents, in the same order:

- A cover.
- A corporate disclosure statement.
- A table of contents.
- A table of citations.
- A statement of subject-matter and appellate jurisdiction.
- A statement of the issues.
- A statement of the case.
- A summary of the argument.
- An argument.
- A conclusion.
- A statement regarding oral argument.
- A signature block.
- A certificate of compliance.
- Proof of service.

(FRAP 25(a)(2)(B)(iii) and (d), 26.1(b), 28(a), and 32(a), (d), (g); 4th Cir. R. 26.1(a)(2); 4th Cir. R. 28(f).)

Cover

The cover page must list:

- The court of appeals docket number centered at the top of the page.
- The name of the court (United States Court of Appeals for the Fourth Circuit).
- The title of the case, including the parties to the appeal and their appellate designations (for example, Plaintiff-Appellant).
- The nature of the proceeding and the name of the court below (for example, On Appeal from the United States District Court for the Middle District of North Carolina).
- The title of the brief, which must indicate the name of the party for whom the brief is filed (for example, Appellant's Brief).
- The name, office address, and telephone number of counsel filing the brief.

(FRAP 32(a)(2).)

Except for filings by unrepresented parties, paper copies of the appellant's brief must have a blue cover (FRAP 32(a)(2)).

If all of the necessary information does not fit on the cover, the information may continue on the inside of the cover.

Corporate Disclosure Statement

The appellant's brief must include a completed copy of the Fourth Circuit's Disclosure of Corporate Affiliations Statement immediately after the cover unless the appellant is the US or a party proceeding in forma pauperis. A state or local government also need not file a disclosure statement if the opposing party is pro se. (FRAP 26.1 and 28(a)(1); 4th Cir. R. 26.1.) The statement must:

- Appear before the table of contents.
- Identify any parent corporation and any publicly held corporation that owns 10% or more of the party's stock or state that none exist.
- Identify any publicly held corporation, whether or not a party to the litigation, that has a direct financial interest in the outcome of the litigation by reason of a franchise, lease, other profit-sharing agreement, insurance, or indemnity agreement, or state that none exist.
- If the party is a trade organization, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that none exist.

(FRAP 26.1(b) and 28(a)(1); 4th Cir. R. 26.1; see Practice Note, Fourth Circuit Civil Appeals: Post-Initiation Filings and Mediation: Disclosure of Corporate Affiliations (W-014-1278).)

For the Disclosure of Corporate Affiliations Form, a publicly held corporation includes any master limited partnership, real estate investment trust, or other legal entity whose shares are publicly held or traded (4th Cir. R. 26.1(a)(2)(C)).

The appellant's brief must include the disclosure statement even if the appellant previously submitted a certificate to the court (FRAP 26.1(b) and 28(a)(1)).

Counsel must immediately supplement the disclosure statement if any of the relevant information changes (FRAP 26.1(b)).

Table of Contents

The appellant's brief must include a table of contents indicating the page on which each section of the brief begins (FRAP 28(a)(2)). The table should also include specific page references to each heading or subheading of each issue argued.

Table of Citations

The parties' briefs must include a table of citations (also known as a table of authorities) listing the cases, statutes, and other authorities cited in the brief along with page references to where the appellant has cited each authority. Cases must appear in the table in alphabetical order. (FRAP 28(a)(3).)

It is unnecessary to divide authorities of a given type by jurisdiction. For example, the table may list federal and state cases together.

Some attorneys use *passim* when an authority appears on several pages of the brief rather than providing a lengthy list of pages. Counsel may, for example, use *passim* if an authority appears on five or more pages.

Jurisdictional Statement

The appellant's brief must include a statement of subject matter and appellate jurisdiction immediately before the statement of the issues. The jurisdictional statement must include:

- The basis for the district court's subject matter jurisdiction (for example, federal question jurisdiction or diversity jurisdiction), with any relevant facts establishing jurisdiction and citations to the appropriate statutes. For example, if jurisdiction is based on diversity of citizenship, the jurisdictional statement should set out the citizenship of each of the parties and the amount in controversy, with appropriate citations to the record.
- The basis for appellate jurisdiction (for example, an appeal from a final judgment), with any relevant facts establishing jurisdiction and citations to the appropriate statutes.

- The filing dates necessary to establish the timeliness of the appeal. These typically include the date:
  - the district court issued the order or judgment appealed from; and
  - the appellant filed the notice of appeal or petition for permission to appeal.
- A statement that the appeal is:
  - from a final order or judgment disposing of all claims; or
  - premised on some other proper basis for appellate jurisdiction.

(FRAP 28(a)(4).)

To the extent that the second and fourth items are duplicative, the jurisdictional statement may recite the relevant information once. For example, counsel need not state twice that the appeal is taken from a final order or judgment. The jurisdictional statement is often a single paragraph.

Statement of the Issues

The appellant's brief must include a statement of the issues presented for appellate review after the jurisdictional statement (FRAP 28(a)(5)).

The appellant's opening brief must raise and address every issue the appellant wants the Fourth Circuit to consider. The court ordinarily does not consider issues raised for the first time on reply (*Grayson O Co. v. Agadir Int'l LLC*, 856 F.3d 307, 316 (4th Cir. 2017)).

The rules do not specify any particular format for the issues presented. Most attorneys phrase their issues as either:

- A question (for example, "Does a plaintiff need to plead with particularity a claim of negligent misrepresentation?").
- A declaratory statement beginning with "whether" (for example, "Whether a plaintiff must plead with particularity a claim of negligent misrepresentation.").

If an issue involves some facts, attorneys often include a generic description of them. There is no need to present the specific facts of the appeal in the statement of issues presented for review. An issue in a negligence case may, for example, be "Whether a driver violates his duty of due care to others when he accelerates through a yellow light."

Issues presented can be multiple sentences. For example, appellant's brief could alternatively phrase the negligence issue above as, "A driver accelerated while driving through a yellow light. Did he violate his duty of care to others?"

The rules do not specify how many issues a brief may present or what makes something significant enough to constitute an issue presented for review. Some attorneys present as many issues as there are main sections of the argument (see Argument). For example, if the argument section of a brief has three main points, some attorneys have three issues presented, even if some of the points have subpoints.

Selecting the issues to raise is one of the most important decisions made on appeal. The more issues an appellant presents, the less space counsel have to devote to each issue and the less attention the court pays to each. An appellant is far better served by presenting a small number of strong issues, rather than by raising every possible ground for error.

Attorneys commonly place each issue presented in a separate numbered paragraph.

Statement of the Case

The appellant's brief must include a statement of the case after the statement of the issues presented for review (FRAP 28(a)(6); 4th Cir. R. 28(f)). The statement must:

- Include a narrative statement of all of the facts necessary for the court to reach the conclusion that the brief desires with references to the specific pages in the joint appendix that support each of the facts stated.
- Describe the relevant procedural history, with appropriate references to specific pages in the appendix.
- Identify the rulings presented for review, with appropriate references to specific pages in the appendix.

(FRAP 28(a)(6), (e); 4th Cir. R. 28(f).)

Although the court has access to the entire record, the Fourth Circuit disfavors citation to portions of the record not included in the appendix (4th Cir. R. 30(b)).

The appellant should write the statement of the case as a persuasive (but not argumentative) narrative, not as a bulleted string of relevant facts. In describing the facts and procedural history, counsel should set out only the material events and dates. Superfluous information may distract or confuse readers.

When providing all of the relevant facts, counsel should disclose material facts that are bad for the appellant. Counsel may seek to minimize those bad facts but should not conceal them. The bad facts may look substantially worse when revealed for the first time in the appellee's brief, and appellant's counsel may lose credibility with the court.

Although not required, counsel often divide the statement of the case into separate sections with headings. For example, a heading in a breach of contract action may be "The Parties Agree to a Contract."

Counsel should refer to the parties by their names or by descriptive terms that identify them clearly. For example, a brief may describe the parties as the employer and the employee, the buyer and the seller, or the plaintiff and defendant. Referring to the parties as the appellant and the appellee may confuse readers. (FRAP 28(d).)

Summary of the Argument

The appellant's brief must include a summary of its argument after the statement of the case. The summary should provide a brief narrative overview of the argument. It must not merely restate the headings in the argument section. (FRAP 28(a)(7).) Counsel may, for example, provide a single paragraph synopsis of each point in the argument section.

Argument

After presenting a summary of its argument on appeal, the appellant's brief must set out in full its argument for relief from the district court's order or judgment. The argument section must include:

- The appellant's contentions and the legal reasons supporting them.
- A concise statement of the applicable standard of review for each issue.
- Citations to legal authorities and record materials relied on by the appellant.

(FRAP 28(a)(8).)

The statement of the standard of review for each issue must appear either:

- Under a separate heading placed before the discussion of the issue.
- In the discussion of the issue itself.

(FRAP 28(a)(8)(B).)

The appellant's brief should present the legal argument in a narrative form with proper headings. Counsel should organize the argument in a concise and logical way free of irrelevant information.

Counsel often divide the argument section into points, with each point addressing one of the appellant's main arguments. Each point may contain subpoints with separate descriptive headings. For example, Point I may argue that the district court had diversity jurisdiction over the action, while Point II argues that the complaint states a claim for negligence. Point II may contain subpoints II.A, II.B, II.C, and II.D, arguing that the plaintiff adequately alleged duty, breach, causation, and damages.

Counsel must support every statement in the brief concerning matters in the record, including factual assertions, with a citation to specific pages of the appendix (FRAP 28(e)).

An appellant may cite to an unpublished federal judicial decision issued on or after January 1, 2007 (FRAP 32.1(a)). The Fourth Circuit disfavors citations to unpublished dispositions issued before January 1, 2007, except to establish any of the following:

- Res judicata.
- Estoppel.
- Law of the case.

(4th Cir. R. 32.1.)

However, a party may cite a pre-2007 Fourth Circuit unpublished disposition if the party:

- Believes the pre-2007 unpublished disposition has precedential value relating to a material issue on appeal.
- Believes there is no published opinion that would serve as well as the pre-2007 unpublished disposition.
- Files and serves a copy of the unpublished disposition if required by FRAP 32.1(b).

(4th Cir. R. 32.1.)

If the appellant cites a federal judicial opinion, order, judgment, or other written disposition that is not available in a publicly accessible electronic database, the party must file and serve a copy of that disposition with the brief (FRAP 32.1(b)). A party complies with FRAP 32.1(b) by either including the cited material in an addendum at the end of the brief or supplying the cited material to the court under separate cover (4th Cir. R. 28(b)).

Legal citations should comply with the rules of citation in the latest edition of *The Bluebook*. Citations should include a reference to the specific page or footnote of the case that supports the stated proposition. For reported state cases, an appellant should cross-reference the national reporter in the citation.

If disposition of the appeal requires the study of legal authorities, an appellant must set out relevant parts of statutes, regulations, rules, or other authorities in one of the following:

- The appellant's brief itself.
- An addendum at the end of the brief.
- A separate volume provided to the court.

(FRAP 28(f); 4th Cir. R. 28(b).)

Counsel typically quote in the appellant's brief itself relevant portions of a statute, regulation, rule, or other authority. If the relevant portion is lengthy or if an authority is not easily accessible (for example, a local law not published online), counsel may include a copy of it in an addendum at the end of a brief.

Conclusion

The appellant's brief must contain a short conclusion stating the precise relief sought in the appeal (FRAP 28(a)(9)). For example, the conclusion may read, "For all of the foregoing reasons, the Court should reverse the decision below and enter judgment for plaintiff."

Statement Regarding Oral Argument

The appellant's brief may include a short statement explaining whether the appellant wants oral argument and, if so, the reasons why the court should hear oral argument.

The statement regarding oral argument should not be long or particularly argumentative. A party may note the complexity of the issues, the importance of the case (for example, the amount of money in controversy), the involvement of unsettled law, the lengthy record or any other explanation for how oral argument might aid the court's decision-making process. Counsel should not use the statement to further argue the merits of the appeal.

Signature Block

For electronically filed documents, the filing attorney's typed name on a signature block and Case Management/Electronic Case Filing (CM/ECF) system login and password constitute the required signature for all purposes. A manual signature is unnecessary. (FRAP 25(a)(2)(B)(iii), 32(d); 4th Cir. R. 25(a)(9); Fourth Circuit CM/ECF Attorney Manual sections II.B.4 and II.I.1.)

Counsel must indicate the identity of the filing attorney at the end of the document by placing an "s/" on a signature line followed by the attorney's name (4th Cir. R. 25(a)(9); Fourth Circuit CM/ECF Attorney Manual section II.I.1). Counsel should avoid graphic and other electronic signatures. Counsel also should include a signature block directly below the signature line, including the filing attorney's:

- Name.
- Business address.
- Telephone number.
- Email address.

If submitting a brief that requires signatures of two or more separately represented parties, the filing attorney may electronically file the document in one of the following ways:

- Submitting a scanned document with all necessary signatures.
- Representing the other parties' consent on the document.
- Identifying the other parties whose signatures are needed and submitting a notice of endorsement by the other parties within three business days.
- Any other manner approved by the court.

(4th Cir. R. 25(a)(9); Fourth Circuit CM/ECF Attorney Manual section II.I.2.)

Absent an objection, the Fourth Circuit presumes that all parties' electronically represented signatures and filing users' signatures are valid signatures (4th Cir. R. 25(a)(9)).

Certificate of Compliance

An appellant's brief longer than 30 pages must contain a certificate by the appellant's attorney stating that the brief complies with the type-volume limitations under FRAP 32(a)(7)(B) (FRAP 28(a)(10) and 32(a)(7)(A), (g)(1); see Length or Type-Volume).

The certificate must state the number of words or the number of lines of monospaced type in the brief. When preparing the certificate, counsel may rely on the word or line count provided by the word processing software used when drafting the brief. (FRAP 32(g)(1).)

To satisfy the requirements for a certificate of compliance, counsel may use Form 6 in the FRAP Appendix of Forms (FRAP 32(g)(2); FRAP Form 6).

Certificate of Service (Brief)

The appellant must attach a certificate of service as the last (and unnumbered) page of the brief, even if all parties receive service by CM/ECF (FRAP 25(d); 4th Cir. R. 25(b)(3); Fourth Circuit CM/ECF Attorney Manual sections II.D.2 and III.C).

The certificate must generally include:

- The date and manner of service.
- The names of the individuals served.
- The served individuals' mail or email addresses or fax numbers or the addresses of the places of delivery.

(FRAP 25(d)(B).)

If all parties receive service by CM/ECF, when filing the brief, the appellant's counsel need only enter the service information appearing in CM/ECF's Attorney Service Preference Report to prepare the certificate of service (4th Cir. R. 25(a)(4); see Fourth Circuit CM/ECF Attorney Manual sections III.C.6 and IV.C).

If any party is exempt from using CM/ECF and receives paper service, the appellant's counsel must conventionally serve a copy of the electronically filed brief and include that information in the certificate of service (FRAP 25(d); 4th Cir. R. 25(a)(4); see Fourth Circuit CM/ECF Attorney Manual sections II.D.4, III.C.6, and IV.C).

Counsel should follow the certification of service examples in the CM/ECF Attorney Manual (see Fourth Circuit CM/ECF Attorney Manual section III.C.6) or use the Fourth Circuit's fillable certificate of service form (see Fourth Circuit CM/ECF Attorney Manual section II.D.2).

FORMATTING THE APPELLANT'S BRIEF

The appellant's brief must comply with formatting requirements regarding:

- Page size and margins.
- Font.
- Line spacing.
- Length or type-volume.
- Paper copies of briefs.

Page Size and Margins

Counsel must prepare the appellant's brief using 8.5" by 11" pages. Brief pages must have margins of at least one inch on all four sides of the page. Except for page numbers, the appellant's brief cannot include any text in the margins. (FRAP 32(a)(4).) Pages should be numbered.

Font

Briefs must use black type (FRAP 32(a)(1)). The appellant's brief must use a plain, roman style font. However, appellants may occasionally use italics or boldface for emphasis. Counsel must italicize or underline case names in the brief. (FRAP 32(a)(6).)

Counsel may draft the appellant's brief in either a proportionally spaced font (for example, Times New Roman) or a monospaced font (for example, Courier) (FRAP 32(a)(5)).

The required font size depends on which type of font the appellant uses:

- **Proportionally spaced font.** An appellant's brief written in a proportionally spaced font must use at least a 14-point font size. This font must include serifs (for example, Times New Roman includes serifs). However, headings and captions may appear in sans-serif type (that is, a font without serifs, like Arial or Helvetica).
- **Monospaced font.** An appellant's brief printed in a monospaced font cannot contain more than 10.5 characters per inch. This roughly translates to 12-point Courier font.

(FRAP 32(a)(5).)

Line Spacing

The text of the appellant's brief must be double-spaced (FRAP 32(a)(4)). The brief should also double-space the table of contents and table of citations. However, a brief may use single-spacing for:

- Direct quotes more than two lines long, which counsel should indent on both sides.
- Headings.
- Footnotes.

(FRAP 32(a)(4).)

Length or Type-Volume

The appellant's brief cannot exceed 30 pages without prior approval from the court unless it either:

- Contains no more than 13,000 words.
- Uses a monospaced font and contains no more than 1,300 lines of text.

(FRAP 32(a)(7).)

Counsel may rely on the word or line count provided by the word processing software used to draft the brief (FRAP 32(g)(1)). Counsel should ensure that the word processor includes any footnotes in calculating the word count.

If the appellant's brief exceeds 30 pages in length, the appellant's counsel must certify that they have satisfied these requirements by including a certificate of compliance in the appellant's brief (FRAP 32(g) and see Certificate of Compliance).

In determining the word or line count of a brief, referred to as type-volume, counsel must include the headings, text, footnotes, and quotations. Counsel may exclude:

- The cover page.
- The corporate disclosure statement.
- The statement regarding oral argument.
- The table of contents.
- The table of citations.
- The signature block.
- Any certificates of counsel (for example, the certificate of compliance).
- Any addendum containing statutes, rules, or regulations.
- The certificate of service.

(FRAP 32(f).)

The Fourth Circuit disfavors motions for leave to file oversize briefs and grants them only for extraordinary and compelling reasons. If a party wants to move for leave to file an oversize brief, it must do so at least ten days before the brief's due date and explain why the party needs the extra space. (4th Cir. R. 32(b).)

Hyperlinks

In the Fourth Circuit, electronically filed documents, such as briefs and appendices (see Serving and Filing the Appellant's Brief and Serving and Filing the Appendix), may include hyperlinks to:

- Other portions of the appellant's brief or other documents filed on appeal.
- Documents filed in the district court that are part of the record on appeal.
- Statutes, rules, regulations, and opinions.

(4th Cir. R. 25(a)(12).)

However, hyperlinks do not replace proper citations to the appendix, the record, or legal authorities (4th Cir. R. 25(a)(12)).

Paper Briefs

Paper copies of the appellant's brief must include a blue cover of durable quality on both the front and back sides (FRAP 32(a)(2)). Briefs must be printed single-sided (FRAP 32(a)(1)(A)). The print quality must be at least as good as that of a laser printer (FRAP 32(a)(1)(B)).

Counsel must bind paper copies of the appellant's brief along the left margin in a way that:

- Is secure.
- Does not obscure the text.
- Permits the brief to lie reasonably flat when open.

(FRAP 32(a)(3); 1998 Advisory Committee Notes to FRAP 32(a)(3).)

SERVING AND FILING THE APPELLANT'S BRIEF

Absent an exemption, counsel must use CM/ECF to serve and file the appellant's brief (FRAP 25(a)(2)(B)(i) and (c)(2); 4th Cir. R. 25(a)(1)(B) and see Practice Note, Fourth Circuit Civil Appeals: Post-Initiation Filings and Mediation: Electronic Filing in the Fourth Circuit (W-014-1278)). The Fourth Circuit does not require the appellant to serve paper copies on opposing counsel registered for CM/ECF (4th Cir. R. 25(a)(1)(B); 4th Cir. R. 31(d)(2)).

However, counsel must serve a paper copy of the appellant's brief on any *pro se* party or opposing counsel not registered for electronic service through CM/ECF (4th Cir. R. 25(a)(1)(B), (4); 4th Cir. R. 25(b)(2)).

Also, if the brief contains sealed materials, filing counsel must serve one paper copy on lead counsel for each party separately represented who is authorized to have access to the sealed material (4th Cir. R. 31(d)(2)).

Acceptable methods of paper service include:

- Personal delivery.
- First-class mail.
- Third-party commercial carrier for delivery within three days.

(FRAP 25(c)(1).)

Counsel also must file one originally signed paper copy of the brief with the court (4th Cir. R. 25(a)(1)(B); 4th Cir. R. 31(d)(1)). The paper copy must be identical to the electronic copy except that it must have a blue cover (FRAP 32(a)(2)). The Fourth Circuit deems the brief filed as of the date and time stated on the notice of docketing activity for the electronic version of the brief, if the appellant does any of the following the next business day:

- Mails the paper copy to the clerk's office.
- Delivers the paper copy to a third-party commercial carrier to deliver to the clerk's office.
- Personally delivers the paper copy to the clerk's office.

(4th Cir. R. 25(a)(1)(B).)

The court orders the appellant to file additional paper copies for oral argument or if otherwise needed (4th Cir. R. 31(d)(1)).

THE APPENDIX

The appendix includes those portions of the record necessary for the court's disposition of the appeal.

THE PARTIES' RESPONSIBILITIES

The appellant must compile the appendix and submit it the same day it files its opening brief, unless it later files a deferred appendix under FRAP 30(c) (FRAP 30(a)(3); see Deferred Appendix).

The parties have a responsibility to coordinate in preparing the appendix, and the court encourages parties to agree on the content of the appendix (FRAP 30(b)(1); 4th Cir. R. 30(c)). Absent an agreement, the appellant must serve on the appellee, within 14 days after the record is filed, a designation of the parts of the record the appellant intends to include in the appendix along with a statement of the issues it will raise for review.

The appellee may then, within 14 days of receiving the designation, serve on the appellant a designation of additional parts of the record to include in the appendix. The appellant must include those designated parts in the appendix. (FRAP 30(b)(1).)

The appellant ordinarily bears the cost of preparing the appendix, but the appellee must advance the cost of including additional designations (FRAP 30(b)(2)). The court may impose sanctions on an attorney who unreasonably increases litigation costs by including unnecessary material in the appendix (FRAP 30(b)(2); 4th Cir. R. 30(a)).

CONTENTS OF THE APPENDIX

The appendix must include:

- A cover.
- A table of contents.
- The district court docket sheet.
- The relevant record material from the district court, including the order appealed from and the complaint or petition as finally amended.
- Proof of service.

(FRAP 30(a)(1), (d); 4th Cir. R. 30(b)(1).)

Cover

The appendix cover must be white and contain:

- The court of appeals docket number centered at the top of the page.
- The name of the court (United States Court of Appeals for the Fourth Circuit).
- The title of the case, including the parties to the appeal and their appellate designations (for example, Plaintiff-Appellant).
- The nature of the proceeding and the name of the court below (for example, On Appeal from the United States District Court for the Middle District of North Carolina).
- A title indicating the document is the appendix.
- The appendix volume number, if filing multiple volumes.
- The name, address, and telephone number of lead counsel for each party on whose behalf the appendix is submitted.

(FRAP 32(a)(2), (b).)

Table of Contents

The appendix must begin with a table of contents that:

- Provides a description of each item sufficient to explain the nature of the item.
- Identifies the relevant record entry number, if available.
- Specifies the pages where the document or item appears.

(FRAP 30(d); 4th Cir. R. 30(b)(2).)

Counsel often include the date of each item in its description, which may assist in ensuring that parts of the record appear in chronological order, as required under FRAP 30(d).

The Fourth Circuit requires that the appendix table of contents contain sufficient detail to help the court (4th Cir. R. 30(b)(2)). This means, for example, when the appendix includes witness testimony, the table of contents should clearly identify the testimony and the proceeding in which it occurred. When the appendix includes exhibits, the table of contents should list the exhibits by their number or letter and by name or brief description. (4th Cir. R. 30(b)(2).)

If the appellant files multiple appendix volumes, the table of contents must indicate the volume in which each document appears.

Docket Entries

Immediately following the table of contents, the appendix must contain the entire federal district court docket sheet (FRAP 30(a)(1)(A), (d)).

Record Material from the District Court

The bulk of the appendix consists of the evidence and other record material from the district court on which the parties rely in making their appellate arguments.

The appendix must include those items required under FRAP 30(a)(1) and 4th Cir. R. 30(b)(1):

- The judgment, final order, order, or decision appealed from (FRAP 30(a)(1)(C); 4th Cir. R. 30(b)(1)).
- The complaint or petition, as finally amended (4th Cir. R. 30(b)(1)).
- The relevant portions of the pleadings, jury charge, findings of fact, and conclusions of law or opinion (FRAP 30(a)(1)(B)).
- Any other parts of the record to which the parties want to direct the court's attention (FRAP 30(a)(1)(D)) or that are vital to the understanding of the basic issues on appeal (4th Cir. R. 30(b)(1)).

The appendix should not include memorandums of law submitted to the district court unless they have independent relevance (FRAP 30(a)(2)).

Certificate of Service (Appendix)

The appendix must include a certificate indicating that the appellant served the appendix on all parties either by CM/ECF or by one of the conventional service methods (FRAP 25(d); 4th Cir. R. 25(b)(3); Fourth Circuit CM/ECF Attorney Manual sections II.D.2 and III.C). The appendix should contain the same certificate of service as the brief (4th Cir. R. 25(b)(3); see Certificate of Service (Brief)).

Counsel should follow the certification of service examples in the CM/ECF Attorney Manual (see Fourth Circuit CM/ECF Attorney Manual section III.C.6), or use the Fourth Circuit's fillable certificate of service form (see Fourth Circuit CM/ECF Attorney Manual section II.D.2).

FORMATTING THE APPENDIX

The relevant docket entries must follow the appendix's table of contents. Other parts of the record must follow chronologically. (FRAP 30(d).)

Counsel must consecutively number all the pages in the appendix (FRAP 30(d)). The page numbers in the appendix commonly begin with the prefix "A" (for example, A1, A2, and A3). If filing the appendix in multiple volumes, page numbers should continue sequentially from volume to volume.

When the appendix includes transcripts, the transcript page numbers must appear in brackets immediately before the included pages (FRAP 30(d)). The name of the testifying witness and the type of examination (for example, direct or cross examination) must appear at the top of each page of the witness's testimony (4th Cir. R. 30(b)(2)).

The Fourth Circuit does not limit the length of the appendix, except that no joint appendix in a court-appointed case may exceed 500 pages without court permission (4th Cir. R. 30(b)(1); 4th Cir. R. 32(a)).

Paper copies of the appellant's separately bound appendix must include a white cover (FRAP 32(b)). The Fourth Circuit prefers double-sided copying of appendices (4th Cir. R. 32(a)). Counsel must bind the appendix in a way that:

- Is secure.
- Does not obscure the text.
- Allows the appendix to lie reasonably flat when open.

(FRAP 32(a)(3), (b).)

When counsel need to include odd-sized documents in an appendix, the appendix may be a size other than 8.5" by 11" and need not lie reasonably flat when open (FRAP 32(b)(3)).

SERVING AND FILING THE APPENDIX

Unless an exemption applies, the appellant must serve and file the appendix using CM/ECF (FRAP 25(a)(2)(B)(i) and (c)(2); 4th Cir. R. 25(a)(1)(D); 4th Cir. R. 30(b)(4)). The Fourth Circuit does not require appellant to serve a paper copy on opposing counsel registered for CM/ECF (4th Cir. R. 25(a)(1)(D); 4th Cir. R. 30(b)(4)(B)).

However, counsel must conventionally serve a paper copy of the appellant's appendix on any *pro se* party or opposing counsel not registered for electronic service by CM/ECF (4th Cir. R. 25(a)(4); 4th Cir. R. 25(b)(2)). Acceptable methods of paper service include:

- Personal delivery.
- First-class mail.
- Third-party commercial carrier for delivery within three days.

(FRAP 25(c)(1).)

If the appendix contains sealed materials, filing counsel must serve one paper copy on lead counsel for each party separately represented who is authorized to have access to the sealed material (4th Cir. R. 30(b)(4)(B); 4th Cir. R. 25(a)(4); 4th Cir. R. 25(c)(3)(F)).

In addition to electronically filing the appendix by CM/ECF, the appellant must also file one paper copy of the appendix with the court (4th Cir. R. 30(b)(4)(A); 4th Cir. R. 25(a)(1)(D)). The Fourth Circuit deems the appendix filed as of the date and time stated on the notice of docketing activity for the electronic version of the appendix, if the appellant does any of the following on the next business day:

- Mails the paper copy of the appendix to the clerk's office.
- Delivers the paper copy of the appendix to a third-party commercial carrier to deliver to the clerk's office.
- Personally delivers the paper copy of the appendix to the clerk's office.

(4th Cir. R. 25(a)(1)(D).)

The court orders the appellant to file additional paper copies for oral argument or if otherwise needed (4th Cir. R. 30(b)(4)(A)).

DEFERRED APPENDIX

Parties may also use a deferred appendix, where the appendix is not filed until after the briefs are filed (FRAP 30(c)). This is helpful in appeals where there is a large record or long trial and it would be difficult to determine which portions of the record are relevant before briefing.

Parties must move the Fourth Circuit for permission to use a deferred appendix. When using a deferred appendix, the appellant and appellee initially file a page-proof brief, in which they include citations to the record, using CM/ECF. (FRAP 30(c)(2); 4th Cir. R. 31(d)(3).) Twenty-one days after the appellee files its brief, the appellant files an appendix that includes all portions of the record cited in the briefs.

Then, 14 days after the appellant files the deferred appendix, all parties serve final copies of their brief in which they substitute references to the appendix for references to the record in their page-proof briefs. (FRAP 30(c).) Parties serve and file final briefs as they would other briefs (see Serving and Filing the Appellant's Brief).

02-19

Fourth Circuit Civil Appeals: Initiating an Appeal

ADAM CHARNES AND THURSTON WEBB, KILPATRICK TOWNSEND & STOCKTON LLP, WITH PRACTICAL LAW LITIGATION

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This Practice Note explains the process for starting a civil appeal to the US Court of Appeals for the Fourth Circuit from a federal district court's order or judgment. This Note covers preliminary considerations, taking an appeal as of right, petitioning for permission to appeal, and cost bonds.

A losing party in federal district court generally can appeal the final order or judgment to a federal court of appeals, also known as a circuit court. In limited circumstances, a party also can appeal non-final orders. This Note discusses the first steps in appealing a civil order or judgment to the US Court of Appeals for the Fourth Circuit, including preliminary issues attorneys should consider before an appeal, taking an appeal as of right, petitioning for permission to appeal, and posting a bond for costs.

PRELIMINARY CONSIDERATIONS

Before an appeal begins, attorneys should:

- Review the applicable procedural rules (see Review the Applicable Procedural Rules).
- Obtain admission to practice in the Fourth Circuit (see Obtain Admission to the Fourth Circuit Bar).
- Register for the Fourth Circuit's electronic filing system (see Register for Fourth Circuit CM/ECF).

REVIEW THE APPLICABLE PROCEDURAL RULES

Attorneys always should review the relevant sections of the following rules before drafting, serving, or filing any document relating to an appeal in federal court:

- The Federal Rules of Appellate Procedure (FRAP).
- The appellate court's local rules.
- The appellate court's administrative, general, or standing orders, if any.
- The appellate court's Case Management/Electronic Case Filing (CM/ECF) rules and instructions.

Although the FRAP provide the basic formatting, substantive, filing, and service requirements, the individual court's local rules and CM/ECF instructions may supplement the FRAP or mandate different requirements.

Attorneys also should review the Federal Rules of Civil Procedure (FRCP) and the district court's local rules. The parties must file certain documents in the district court, such as the notice of appeal (see How to Take an Appeal as of Right). Those documents must comply with both the appellate and district court rules.

Attorneys should also consult the federal appellate jurisdiction statutes. These provisions govern which federal district court orders or judgments a party may appeal, and to which federal appellate court. (28 U.S.C. §§ 1251-1260 and 1291-1296.)

The Fourth Circuit has jurisdiction over most appeals from the US District Courts for:

- The District of Maryland.
- The Northern District of West Virginia.
- The Southern District of West Virginia.
- The Western District of Virginia.
- The Eastern District of Virginia.
- The Western District of North Carolina.
- The Middle District of North Carolina.
- The Eastern District of North Carolina.
- The District of South Carolina.

(28 U.S.C. §§ 41, 100, 113, 121, 127, 129, and 1294.)

Other federal appellate courts hear appeals in patent cases and a few unusual types of cases, such as those heard by a three-judge district court. (28 U.S.C. §§ 1253, 1295 and 2284).

OBTAIN ADMISSION TO THE FOURTH CIRCUIT BAR

Each attorney appearing in court for a party or amicus curiae must currently be admitted to practice in the Fourth Circuit. However, any attorney may appear on a brief provided that at least one lawyer

admitted to practice in the Fourth Circuit also appears on the brief. (4th Cir. R. 46(b).)

To qualify for admission, an attorney must be:

- Of good moral and professional character.
- A member in good standing of the bar of:
  - the highest court of a state;
  - the US Supreme Court;
  - another US circuit court; or
  - a US district court.

(FRAP 46(a).)

To obtain admission to practice in the Fourth Circuit, an attorney must submit:

- The attorney admission application, including:
  - the applicant's required information;
  - the applicant's signed and notarized oath; and
  - a motion for admission signed by an attorney admitted to the Fourth Circuit.
- The $221 attorney admission fee.

(4th Cir. R. 46(b) and United States Court of Appeals for the Fourth Circuit Application for Admission to the Bar; Instructions for Submitting Bar Application Electronically.)

The application is available on the Fourth Circuit's Court Form & Fees webpage.

Attorneys may submit the application either:

- Electronically using CM/ECF, if registered for the Fourth Circuit's CM/ECF system (see Register for Fourth Circuit CM/ECF). Electronic filers pay the admission fee by credit card using CM/ECF.
- In paper format, delivered to the Fourth Circuit Clerk's office. Paper filers pay the admission fee by check made payable to Clerk, United States Court of Appeals.

(United States Court of Appeals for the Fourth Circuit Application for Admission to the Bar and Submit Bar Application.)

An attorney does not need to appear in court regarding the application (4th Cir. R. 46(b)).

REGISTER FOR FOURTH CIRCUIT CM/ECF

All attorneys appearing before to the Fourth Circuit must register for CM/ECF. Attorneys use CM/ECF to serve and file most appellate documents. (FRAP 25(a)(2)(B)(i) and (c)(2); 4th Cir. R. 25(a)(2)).

An attorney registers for Fourth Circuit CM/ECF by completing the online registration form at the federal Public Access to Court Electronic Records (PACER) Appellate Courts webpage.

An attorney must register for Fourth Circuit CM/ECF even if the attorney is already registered for PACER or for another circuit's CM/ECF. PACER registration enables a user to view documents on federal courts' CM/ECF websites, but it does not permit service and filing. Registration for another circuit's CM/ECF permits service and filing only in that other circuit. Registration for Fourth Circuit CM/ECF similarly does not permit service and filing of documents in another federal court of appeals.

PARTIES THAT MAY APPEAL

Any party aggrieved by a district court's order or judgment may appeal or seek permission to appeal. A party is aggrieved if the district court awards any relief against it or denies some or all the relief it requested. (*HCA Health Servs. of Va. v. Metro. Life Ins. Co.*, 957 F.2d 120, 123-24 (4th Cir. 1992).) A party is not aggrieved merely because the district court makes adverse factual findings or employs an unfavorable legal analysis. For example, if a district court order criticizes the defendant but grants its motion to dismiss the complaint, the defendant is not aggrieved.

Every aggrieved party that wants relief from the Fourth Circuit should appeal or request permission to appeal. Failure to appeal may result in a party not receiving relief, even if another aggrieved party prevails on its appeal from the same order or judgment.

TAKING AN APPEAL AS OF RIGHT

In federal court, an aggrieved party has a right to appeal final orders and judgments and certain types of interlocutory (that is, non-final) orders. This section covers the main issues to consider when taking an appeal as of right, including:

- The types of orders and judgments that are appealable as of right (see Orders or Judgments Appealable as of Right).
- When a party may take an appeal as of right (see Time to Appeal as of Right, Post-Judgment Motions May Extend the Time to Appeal, and Motions to Extend the Time to Appeal).
- How to take an appeal as of right (see How to Take an Appeal as of Right).

ORDERS OR JUDGMENTS APPEALABLE AS OF RIGHT

An aggrieved party generally has the right to appeal if the district court enters a final order or judgment (28 U.S.C. § 1291). A final order or judgment is one that concludes the district court proceedings as a whole. An order or judgment that concludes the case for only some parties or claims is not final for purposes of appeal. (*Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467 (1978), superseded by rule on other grounds, *Microsoft Corp. v. Baker*, 137 S. Ct. 1702 (2017)); *Porter v. Zook*, 803 F.3d 694, 696 (4th Cir. 2015).) An order or judgment that resolves all claims for all parties generally is final even if there is an outstanding request for attorney's fees and costs (*Ray Haluch Gravel Co. v. Cent. Pension Fund of the Int'l Union of Operating Eng'rs*, 134 S. Ct. 773, 779, 782-83 (2014)).

Certification of Non-Final Orders for Appeal

A party may move the district court to certify a non-final order (such as a grant of partial summary judgment) as a final judgment in a case involving multiple claims or parties (FRCP 54(b)). If the district court grants the motion and certifies the order as a final judgment, the aggrieved party may then appeal as of right without waiting for the end of the entire case.

Statutory Limitations on Right to Appeal

Even if the district court enters a final judgment, a party may not appeal as of right if federal law otherwise prohibits an appeal (28 U.S.C. § 1447(d); *Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 229-30 (2007) (remand based on lack of subject matter jurisdiction or a defect in the removal procedure is not appealable)).

Appealable Interlocutory Orders

An aggrieved party also has the right to appeal an interlocutory order that does any of the following:

- Grants, denies, dissolves, modifies, or refuses to dissolve or modify injunctive relief (28 U.S.C. § 1292(a)(1)).
- Appoints a receiver or refuses to wind up a receivership (28 U.S.C. § 1292(a)(2)).
- Determines the rights and liabilities of the parties to an admiralty case (28 U.S.C. § 1292(a)(3)).
- Falls within the collateral order doctrine.

TIME TO APPEAL AS OF RIGHT

A party generally must appeal as of right within either:

- 30 days after entry of the order or judgment from which it is appealing (FRAP 4(a)(1)(A)).
- 60 days after entry of the order or judgment, if any of the following is a party to the case:
  - the US;
  - a federal agency; or
  - a federal officer sued in connection with the officer's official duties.

(FRAP 4(a)(1)(B).)

Entry generally occurs when the district court clerk lists the order or judgment on the district court docket (FRAP 4(a)(7)).

If one party timely files a notice of appeal, the deadline for any other party to file a notice of appeal is the later of:

- 14 days after the first filing.
- The end of the applicable 30- or 60-day period described above.

(FRAP 4(a)(3).)

The time limits for taking an appeal are usually jurisdictional. If a statute prescribes an appeal deadline, the deadline is jurisdictional; if prescribed only by rule, the deadline is not jurisdictional (*Hamer v. Neighborhood Hous. Servs. of Chicago*, 138 S. Ct. 13, 16 (2017)). Failure to comply with a deadline prescribed by statute results in dismissal of the appeal (*Bowles v. Russell*, 551 U.S. 205, 209 (2007)). In certain circumstances, however, a would-be appellant may move for an extension of time to appeal (see Motions to Extend the Time to Appeal).

Calculating the Time to Appeal

In calculating the time to file a notice of appeal, attorneys should consult FRCP 6 (FRAP 1(a)(2) (when FRAP require filing in district court, procedure must comply with district court practice) and FRAP 4 (1998 advisory committee notes)). Under that rule, when a period of time is stated in days (as is the case for appealing as of right):

- Exclude the day of the event that triggers the period.
- Count every day, including intermediate Saturdays, Sundays, and legal holidays.
- Include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not Saturday, Sunday, or a legal holiday.

(FRCP 6(a)(1) and FRAP 26(a)(1).)

Post-Judgment Motions May Extend the Time to Appeal

Certain types of district court motions concerning a prior order or judgment automatically extend the time to appeal from the prior order or judgment, if made within the time permitted by the FRCP. Those are motions under:

- FRCP 50(b) for judgment as a matter of law (see Practice Note, Motion for Judgment as a Matter of Law: Overview (Federal) (4-586-0945)).
- FRCP 52(b) to amend findings of fact after a bench trial or to make additional findings, regardless of whether granting the motion would alter the judgment.
- FRCP 54 for attorneys' fees, but only if the district court extends the time to appeal under FRCP 58 (see Costs and Attorneys' Fees Checklist (W-002-0409)).
- FRCP 59 to alter or amend the judgment (see Practice Note, Motion to Alter or Amend a Judgment Under FRCP 59(e) (3-609-0045)).
- FRCP 59 for a new trial (see Practice Note, Motion for a New Trial: Overview (Federal) (6-597-2485)).
- FRCP 60 for relief from a judgment or order if the motion is filed within 28 days after entry of the judgment (see Practice Note, Motion for Relief from Judgment Under FRCP 60(b) (W-000-4939)).

(FRAP 4(a)(4)(A).)

If a party timely makes one of the motions listed above within the time permitted by the FRCP and FRAP 4(a)(4)(A), the time for any party to file a notice of appeal runs from entry of the order deciding the motion rather than from entry of the original order or judgment. If the parties make more than one of these motions within the time allowed by the FRCP and FRAP 4(a)(4)(A), the time to file a notice of appeal begins to run when the district court decides the last remaining motion. (FRAP 4(a)(4)(A).)

However, a motion made outside the time set by the FRCP and FRAP 4(a)(4)(A), even with the opposing party's consent or the district court's approval, does not toll the time to appeal (FRAP 4(a)(4)(A) (2016 advisory committee notes)).

If a party makes one of the motions listed above within the time permitted by the FRCP but after any party files a notice of appeal, the notice becomes effective when the district court decides the motion. In other words, the appeal proceeds as if the appellant had filed the notice of appeal after the district court decided the motion. There is no need to file another notice of appeal from the prior order or judgment. To appeal from the decision on the motion, however, the losing party must amend the existing notice of appeal or file a new one. (FRAP 4(a)(4)(B).)

For example, if the district court enters final judgment for the defendant on March 1, the plaintiff files a notice of appeal from the judgment on March 2, the plaintiff moves the district court for a new trial on March 8, and the court denies the new trial motion on March 29, the appeal from the judgment becomes effective on March 29. In this hypothetical, however, the plaintiff has no appeal from the March 29 order unless it timely amended its existing notice of appeal or filed a second one.

Amended Notices of Appeal

Orders or judgments affecting prior orders or judgments may cause uncertainty about the need for a new or amended notice of appeal. Attorneys should be cautious and amend the existing notice of appeal to encompass later or amended orders or judgments. (FRAP 4(a)(4) (1993 and 1995 advisory committee notes).) A new or amended notice of appeal is subject to the same time limits as any other notice of appeal except that the time is measured from entry of the order disposing of the post-judgment motion (FRAP 4(a)(4)(B)(ii)).

Motions to Extend the Time to Appeal

A party unable to appeal on time may, under limited circumstances, move for an extension of time to appeal.

A party must make a motion to extend the time to appeal in the district court, not the Fourth Circuit (FRAP 4(a)(5)(A)).

A party may make an extension motion any time up to 30 days after the expiration of the time otherwise available to appeal as of right (FRAP 4(a)(5)(A)(i)).

Regardless of when the party makes the motion, the would-be appellant must demonstrate excusable neglect or good cause for not timely appealing (FRAP 4(a)(5)(A)(ii); see *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 395 (1993) (setting out four factors for courts to consider in determining whether excusable neglect exists); *Thompson v. E.I. DuPont de Nemours & Co., Inc.*, 76 F.3d 530, 533 (4th Cir. 1996) (adopting the *Pioneer* factors for purposes of FRAP 4(a)(5) excusable-neglect determination)).

Under the FRAP, attorneys may make a motion to extend the time to appeal without serving the opposing party if the time to appeal as of right has not yet expired. However, attorneys must check the district court's local rules and the district judge's individual practice rules to determine whether they permit parties to make this kind of motion ex parte. (FRAP 4(a)(5)(B).)

After the time to appeal has expired, the moving attorney must serve the motion on the opposing party or the district court cannot entertain the motion (FRAP 4(a)(5)(B)).

Attorneys may want to serve the opposing party even where service is optional. Federal courts generally are not fond of motions made without notice. Obtaining a more favorable reception from the court may well outweigh any harm from giving the opposing party a chance to respond to the motion.

The district court may extend the time to appeal up to the later of:

- 30 days after the time otherwise available.
- 14 days after entry of the order deciding the motion.

(FRAP 4(a)(5)(C).)

For example, if the district court enters judgment on March 1, the time to appeal as of right would normally expire on March 31. The would-be appellant must move for an extension on or before April 30. The district court may then grant an extension to the later of April 30 or 14 days after it decides the motion. Because the court may grant a shorter extension, attorneys should be prepared to appeal promptly after making the extension motion.

The 30-day limit for an extension of time to file a notice of appeal is a non-jurisdictional rule that the parties can waive or forfeit (see *Hamer*, 138 S. Ct. at 16). Still, attorneys always should ensure that a court-ordered extension of time complies with the FRAP's time limits, as merely complying with a court-ordered extension may not ensure appellate review if the extension exceeds 30 days (or 14 days after entry of the order deciding the motion) (see *Hamer*, 138 S. Ct. at 22 (declining to address whether a party's failure to object to an overlong time extension, standing alone, can forfeit the FRAP's time limits)).

Motions to Reopen the Time to Appeal

A party that did not receive timely notice of the district court's judgment may, under certain circumstances, move to reopen the time to appeal. A party must move to reopen the time to appeal in the district court, not the Fourth Circuit. (FRAP 4(a)(6).)

The district court may grant a motion of this type only if:

- The movant did not receive notice of the district court's entry of the judgment or order at issue within 21 days of that entry.
- The motion is made within the earlier of:
  - 180 days after entry of the judgment or order; or
  - 14 days after the movant receives notice of the entry.
- Granting the motion does not prejudice any other party.

(FRAP 4(a)(6).)

If all these conditions are satisfied, the district court has discretion to grant or withhold relief (*Woods v. Attorney Gen. of Md.*, 523 F. App'x 241, 242 (4th Cir. 2013)).

If the district court grants the motion, it may reopen the time to appeal for 14 days after entry of the order granting the motion (FRAP 4(a)(6)).

HOW TO TAKE AN APPEAL AS OF RIGHT

A party initiates an appeal as of right by filing a notice of appeal. This section covers the key issues to consider when drafting, serving, and filing the notice.

Contents of the Notice of Appeal

The body of the notice of appeal must specify:

- The appellant or appellants.
- The judgment, order, or portion of a judgment or order from which the appellant appeals.
- The court hearing the appeal.

(FRAP 3(c)(1).)

The body of the notice of appeal should not contain material beyond those three items. It should not, for example, contain any legal or factual argument. Nor should it name the appellees unless doing so is necessary to identify the judgment or order appealed from. Naming only some of the appellees may prevent an appeal against the omitted parties.

The notice must also contain:

- A proper caption. Because the appealing party must file the notice of appeal in the **district court**, the caption must conform to FRCP 10(a)

and the district court's local rules (FRCP 7(b)(2)). The caption should include the name of the district court and the district court action's docket number, and identify the parties by their district court designations (that is, either "Plaintiff" or "Defendant").
- The title "Notice of Appeal."
- Appellant's attorney's signature and a signature block listing the attorney's name, address, email address, telephone number, and any other information the local rules require (FRCP 11(a)).
- Anything else the district court's local rules require.

For a sample notice of appeal and drafting tips, see Standard Document, Notice of Appeal (Federal) (8-519-3198).

Counsel should attach or electronically link to the notice of appeal the order or judgment appealed from (see Filing and Serving the Notice of Appeal). Among other things, this makes clear from which order or judgment the party is appealing.

Procedure When Multiple Parties Appeal

A single notice of appeal may list multiple parties as appellants, provided that their respective interests do not make it impracticable for them to litigate jointly. Parties appealing jointly proceed as a single appellant, rather than completing each step of the appellate process separately for each party. (FRAP 3(b).) For example, parties appealing jointly file a single brief rather than one brief per party. Whether this is beneficial depends on the particulars of a given case.

Alternatively, multiple parties entitled to appeal a single order or judgment may each file their own notice of appeal. In that event, each party separately completes each step of the appellate process, including payment of the requisite filing fee (see Paying the Filing Fee). The Fourth Circuit may, however, join or consolidate the appeals (FRAP 3(b)). If multiple parties proceed in a consolidated appeal, the Fourth Circuit permits only one brief per side (4th Cir. R. 28(a)).

Procedures for Cross-Appeals

After an appellant has filed an appeal, the appellee may also file an appeal, known as a cross-appeal (FRAP 28.1). The appellee must file a notice of appeal to initiate a cross-appeal, which is due within the later of:
- 14 days after the date when the first notice was filed.
- The time otherwise available under FRAP 4

(FRAP 4(a)(3).

Where to File the Notice of Appeal

The appellant's counsel must file the notice of appeal in the district court from which the appeal is taken, not in the Fourth Circuit (FRAP 3(a)(1)). Before filing the notice of appeal, counsel should review the district court's local rules and CM/ECF rules to determine the proper filing procedure.

If the appellant mistakenly files the notice of appeal with the Fourth Circuit, the Fourth Circuit clerk must forward it to the district court. The district court deems the notice of appeal filed as of the date the Fourth Circuit received it. (FRAP 4(d).)

Filing and Serving the Notice of Appeal

Unless an exemption applies, attorneys must generally file the notice of appeal using the district court's CM/ECF system (FRCP 5(d)(3)(A)).

When filing by CM/ECF, attorneys can electronically link the notice of appeal to the judgment or order appealed from, rather than including a copy of the judgment or order in the PDF file. Once the filing is complete, the CM/ECF system automatically serves all other parties. For more information on electronically filing a notice of appeal, see Practice Note, E-Filing in Federal District Court: Special Filing Issues: Notice of Appeal (6-521-5950).

If filing by CM/ECF is problematic, attorneys should determine whether paper filing is permissible by either:
- Consulting the district court's local rules and CM/ECF procedures.
- Contacting the district court's appeals clerk.

Where paper filing is available, the appellant's attorney delivers paper copies of the notice of appeal to the district court clerk (FRAP 3(a)(1)). The district court clerk must receive the notice of appeal by the applicable deadline. It is not enough for the appellant to place the notice of appeal in the mail before the deadline, unless the appellant is an inmate confined to an institution. (FRAP 4(c) and 25(a)(2).)

Attorneys must file enough paper copies of the notice of appeal for the district court to:
- Retain a copy for its own files.
- Provide a copy to the Fourth Circuit.
- Serve a copy on each of the other parties in the action.

(FRAP 3(a)(1) and (d).)

The appellant's attorney does not need to serve paper copies of the notice of appeal. The district court clerk serves the notice of appeal on the other parties. (FRAP 3(d).)

The district court clerk forwards copies of the notice of appeal and district court docket sheet to the Fourth Circuit clerk whether the appellant uses paper or electronic filing (FRAP 3(d)).

Paying the Filing Fee

The appellant's counsel must pay a $505 filing fee when filing the notice of appeal (FRAP 3(e); 4th Cir. R. 3(a) and 4th Cir. Fee Schedule). Appellant's counsel should promptly pay the fee in the manner directed by the district court clerk. District courts typically accept payment by money order or certified check. Some district courts also accept cash, credit cards, law firm checks, or personal checks.

Multiple appellants filing a joint notice of appeal only need to pay a single filing fee. Multiple appellants filing individual notices of appeal each must pay the filing fee. A cross-appellant also must pay the filing fee. (FRAP 3(e).)

A party filing an amended notice of appeal need not pay any additional fee (FRAP 4(a)(4)(B)(iii)).

PETITIONING FOR PERMISSION TO APPEAL

Normally only final orders and judgments and certain specific interlocutory orders are appealable as of right (see How to Take an Appeal as of Right). Orders not appealable as of right may, however, be appealable with judicial permission. A party may obtain permission to appeal an otherwise non-appealable order by filing with the Fourth Circuit a petition for permission to appeal, sometimes referred to as a motion for leave to appeal. This section discusses:

- The types of district court orders or judgments a party may appeal with permission (see Orders Appealable by Permission).
- The time to petition for permission to appeal (see Time to Request Permission to Appeal).
- How to petition for permission to appeal (see How to Petition for Permission to Appeal).
- Serving and filing a petition (see Serving and Filing the Petition for Permission to Appeal).
- Responding to a petition (see Responding to the Petition for Permission to Appeal).
- The court's disposition of a petition (see Disposition of the Petition for Permission to Appeal).

ORDERS APPEALABLE BY PERMISSION

Federal law expressly gives parties the right to seek permission to immediately appeal certain interlocutory orders. For example, a party may seek permission to appeal an order granting or denying either:

- Class-action certification under FRCP 23 (FRCP 23(f) and see Practice Note, Appealing a Class Certification Decision Under FRCP 23(f) (W-001-1093) and Standard Document, Petition for Permission to Appeal a Class Certification Decision Under FRCP 23(f) (W-001-4370)).
- A motion to remand to state court a class action removed under the Class Action Fairness Act of 2005 (CAFA) (28 U.S.C. § 1453(c)(1) and see Practice Note, Class Actions: Appeals: Remand Orders (W-000-6908)).

If no statute or rule authorizes a particular interlocutory appeal, a party must seek permission to appeal under 28 U.S.C. § 1292(b), which allows a district court to certify an order for interlocutory appeal where both:

- The order involves a controlling question of law on which there is substantial ground for difference of opinion.
- An immediate appeal from the order may materially advance the ultimate termination of the litigation.

A party seeking review under Section 1292(b) may preemptively request in its original motion paper the district court to certify an adverse decision for interlocutory appeal. Alternatively, the district court may certify the order for interlocutory appeal sua sponte.

If the district court's order does not include a certification to seek permission to appeal under Section 1292(b), the aggrieved party may move the district court to amend its order to include the requisite language (FRAP 5(a)(3)). However, federal appellate courts rarely grant permission to take interlocutory appeals.

TIME TO REQUEST PERMISSION TO APPEAL

A party must file its petition for permission to appeal within the time set by the statute or rule authorizing the appeal (FRAP 5(a)(2)). For example, a party must file a petition for permission to appeal from an order:

- Granting or denying class-action certification within:
  - 14 days after the order's entry (FRCP 23(f)); or
  - 45 days after the order's entry, if the US, a federal agency, or a federal officer sued in connection with the officer's official duties is a party to the case.

  (FRCP 23(f).)
- Granting or denying a CAFA remand motion within ten days after the order's entry (28 U.S.C. § 1453(c)(1)).
- Under Section 1292(b) within ten days after the order's entry (28 U.S.C. § 1292(b)).

If the applicable statute or rule does not establish a deadline, a party may file its petition within the time for filing a notice of appeal had the order been appealable as of right (FRAP 5(a)(2) and see Time to Appeal as of Right).

If a district court amends an order to add language necessary for a permissive appeal, the time to request permission to appeal runs from the date of the amendment rather than from the date of the original order (FRAP 5(a)(3)). For example, if a district court denies a defendant's motion to dismiss the complaint on April 1 and on April 15 amends the order to add language required for an appeal under Section 1292(b), the defendant has until April 25 to move for leave to appeal.

The Fourth Circuit cannot enlarge the time to petition for permission to appeal (FRAP 26(b)(1)). In calculating the time to request permission to appeal, attorneys should consult FRCP 6(a) (see Calculating the Time to Appeal).

HOW TO PETITION FOR PERMISSION TO APPEAL

A party requests the Fourth Circuit's permission to appeal by serving and filing a petition.

Drafting the Petition for Permission to Appeal

A petition for permission to appeal to the Fourth Circuit must contain:

- A Disclosure of Corporate Affiliations statement, if the movant is a non-governmental corporate party.
- The pertinent facts and procedural history.
- The questions that would be presented in the interlocutory appeal.
- The relief sought (permission to take an interlocutory appeal).
- The argument for granting permission to appeal, including:
  - what statute or rule authorizes this interlocutory appeal; and
  - why the Fourth Circuit should consider the question or questions presented now, rather than after a final judgment.
- A signature block.
- A certificate of compliance with the type-volume limit if the petitioner prepared the petition using a computer.
- A copy of the order from which the petitioner seeks to appeal, together with any related opinion or memorandum.

- A copy of any separate order stating that the district court has granted permission to appeal or finding that the conditions for an interlocutory appeal are satisfied.
- Proof of service.

(FRAP 5(b)(1), (c), 25(a)(2)(B)(iii), (d), 26.1, and 32(d), (g); 4th Cir. R. 5 and 4th Cir. R. 26.1.)

Some attorneys also include:

- A cover.
- A table of contents.
- A table of authorities.
- A preliminary statement.

The rules neither require nor forbid these.

If the petitioner's attorney uses a cover it must be white. In the absence of a cover, the petitioner's attorney must include a case caption on the first page of the petition. (FRAP 32(c)(2)(A).) The caption should be the same as that used in the district court except that it should:

- Use the name of the Fourth Circuit rather than that of the district court.
- Refer to the party seeking to appeal as "Petitioner" and to the opposing party as "Respondent." The caption may also combine the parties' designations in the district and appellate courts (for example, "Plaintiff-Petitioner").
- Although not contemplated by the rules, counsel should consider including a short section explaining why the district court's decision was wrong. The Fourth Circuit is more likely to agree to review a decision that it believes is erroneous.

The petition may not exceed:

- 5,200 words if the petitioner prepared it on a computer.
- 20 pages if the petitioner prepared it on a typewriter or by hand.

(FRAP 5(c).)

The word or page limits do not include:

- The district court orders attached to the petition under FRAP 5(b)(1)(E).
- A cover.
- The certificate of interested persons and Disclosure of Corporate Affiliations statement.
- A table of contents.
- A table of authorities.
- The signature block.
- A certificate of compliance with the word limit.
- Proof of service.

(FRAP 5(c) and 32(f).)

A party wishing to file an oversize petition must move the Fourth Circuit for permission (FRAP 5(c)).

Counsel must prepare the petition on 8.5" by 11" pages with one-inch margins. Only page numbers may appear in the margins. Attorneys must use either a 14-point proportionally spaced font with serifs (for example, Times New Roman) or a monospaced font with no more than 10.5 characters per inch (for example, 12-point Courier). The type must be black and appear in a plain roman style, although counsel may use italics and boldface for emphasis. Case names must be italicized or underlined. Text must be double-spaced, except for headings, footnotes, and quotations more than two lines long. (FRAP 5(c) and 32(a), (c)(2).)

The Fourth Circuit initially enters a petition for permission to appeal on the miscellaneous docket. There is no fee for the petition, unless the court grants the petition. (4th Cir. R. 5.) If the court grants the petition it transfers the case to the regular docket.

Serving and Filing the Petition for Permission to Appeal

The Fourth Circuit Rules direct counsel to file a petition for permission to appeal in either:

- Electronic format using CM/ECF, by selecting "Submit New Case" under CM/ECF Utilities and uploading the petition as a new case.
- Paper format, by filing the original with the Fourth Circuit.

(4th Cir. R. 25(a)(1)(A).)

Either way, counsel must serve the petition conventionally. Conventional service includes:

- Personal delivery.
- First-class mail.
- Third-party commercial carrier for delivery within three days.

(FRAP 25(c)(1).)

The Fourth Circuit does not require the petitioner to pay the $505 filing fee unless the court grants the petition (4th Cir. R. 3(a) and 4th Cir. R. 5).

Responding to the Petition for Permission to Appeal

Within ten days after service of the petition, any other party may serve and file an answer or cross-petition (FRAP 5(b)(2)).

A party receiving service by US mail or commercial carrier may add three days to the time otherwise available to respond. Parties receiving a document by electronic service no longer may add three days to a response time calculated from the date of service. (FRAP 26(c).)

A cross-petition should have the same contents as a petition.

The rules do not specify an answer's contents other than:

- A Disclosure of Corporate Affiliations statement (FRAP 26.1).
- A signature block (FRAP 25(a)(2)(B)(iii) and 32(d)).
- A certificate of compliance with the type-volume limit if the respondent prepared the cross-petition on a computer (FRAP 5(c)(1) and 32(g)).
- A certificate of service (FRAP 25(d); 4th Cir. R. 25(b)(3)).

The respondent's counsel also may want to include:

- A cover.
- A table of contents.
- A table of authorities.
- A preliminary statement.
- A statement of facts.
- An argument.

The respondent's counsel should explain in an answer why the court should decline to hear the interlocutory appeal. For example, the answer may explain why the statutes or rules do not actually permit the appeal. Or it may explain why the Fourth Circuit should wait until the end of the case to consider the question presented. Further, it should explain why the district court's decision was correct and why there is no need for the appeal.

The answer should follow the same formatting rules and conventions as a petition. Like the petition, an answer or cross-petition may not exceed 5,200 words if prepared on a computer or 20 pages if prepared on a typewriter or by hand. For detailed formatting guidance, see Drafting the Petition for Permission to Appeal.

Disposition of the Petition for Permission to Appeal

The Fourth Circuit normally considers a petition and any answer or cross-petition without oral argument (FRAP 5(b)(3)).

If the Fourth Circuit grants the petition, the petitioner (now the appellant) must pay the district court clerk the $505 appellate fee within 14 days after entry of the Fourth Circuit's order (FRAP 5(d)(1); 4th Cir. R. 3(a) and 4th Cir. R. 5; 4th Cir. Fee Schedule and see Paying the Filing Fee). Attorneys should consult the district court's local rules or the appellate clerk in the district court about how to pay the fee. The same is true for a cross-petition.

A successful petitioner does not need to file a notice of appeal. Any time periods that would be calculated from the notice of appeal in an appeal as of right are calculated instead from the order granting permission to appeal (FRAP 5(d)(2)).

POSTING A BOND FOR COSTS

Appellants generally need not post a bond for costs on appeal, but a district court may require it in a particular case (FRAP 7).

Although courts rarely require a cost bond, an appellee may move the district court for an order of this type. In deciding these motions, district courts in the Fourth Circuit have considered the following factors:

- The appellant's financial ability to pay.
- Whether there is a risk of non-payment if the appellants lose their appeal.
- The likely merits of the appeal.
- Any previous bad faith or vexatious conduct on the part of the appellants.

(See *In re Meabon*, No. 3:15-CV-00398-RJC, 2017 WL 374921, at *2 (W.D.N.C. Jan. 25, 2017) (observing that the Fourth Circuit has not set out a specific test governing Rule 7 costs bonds, but other courts have considered the above factors); *Durham v. Jones*, No. WMN-10-CV-2534, 2013 WL 12242047, at *1 (D. Md. Feb. 6, 2013) (same).)

However, some district courts do not consider the appellant's alleged bad faith or vexatious conduct. In their view, this factor is inconsistent with Rule 7's stated purpose of not imposing an independent penalty on the appellant. (See, for example, *Durham*, 2013 WL 12242047, at *1.)

The costs covered by a bond under FRAP 7 are the costs of litigating the appeal, not those incurred in litigating in the district court. Covered costs include those taxable under FRAP 39, such as copying, printing, or binding. Costs may also include attorneys' fees for the appeal, depending on the terms of any substantive statutes at issue in the particular case (*Sky Cable, LLC v. Coley*, 2017 WL 437426, at *3-*6 (W.D. Va. Jan. 31, 2017)).

If the court directs the posting of a cost bond, it may order any form and amount of security that it reasonably deems necessary to ensure the payment of costs on appeal (FRAP 7.) An appellant generally may post a bond by cash or by using a surety. A surety usually must be on the US Treasury Department's Listing of Approved Sureties.

02-19

Fourth Circuit Civil Appeals: Post-Initiation Filings and Mediation

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This Practice Note explains the process between initiation and briefing in an appeal to the US Court of Appeals for the Fourth Circuit from a federal district court's order or judgment in a civil action. This Note discusses using the Fourth Circuit's Case Management/Electronic Case Filing (CM/ECF) system, ordering transcripts, preparing the record on appeal, and filing notices of appearance. It also explains the Fourth Circuit's mediation program.

After commencing an appeal to the US Court of Appeals for the Fourth Circuit but before briefing its merits, the parties must complete some preliminary steps. This Note discusses those steps, including electronic service and filing, the documents parties must file after the appeal begins, and how to prepare for Fourth Circuit mediation.

ELECTRONIC FILING IN THE FOURTH CIRCUIT

After initiating the appeal (see Practice Note, Fourth Circuit Civil Appeals: Initiating an Appeal (W-014-1281)), parties must serve and file almost all appellate papers using the Fourth Circuit's Case Management/Electronic Case Filing (CM/ECF) system (FRAP 25(a)(2)(B)(i) and (c)(2); 4th Cir. R. 25(a)). Although e-filing is mandatory in the Fourth Circuit, the court allows reasonable exceptions to this requirement on motion and a showing of good cause (4th Cir. R. 25(a)(1)).

Registered CM/ECF users file documents with the court by:

- Logging on to the court's CM/ECF system.
- Entering information about the appeal and the filing, including:
  - the docket number;
  - the filing party;
  - the document type; and
  - the date and method of service.
- Uploading an electronic version of the filing.

(Fourth Circuit CM/ECF Attorney Manual section I.)

The electronic transmission, together with the transmission of a notice of docket activity from the court, constitutes both the:

- Filing of the document under the Federal Rules of Appellate Procedure.
- Entry of the document onto the official court docket.

(4th Cir. R. 25(a)(3).)

Once a user completes a filing, CM/ECF emails a filing notice to all attorneys who have appeared in the appeal and registered with CM/ECF. Registration on the CM/ECF system constitutes consent to receive electronic service and electronic notice of correspondence, orders, and opinions. The notice, which contains a hyperlink providing one free view of the filed document, constitutes service of the document on each registered CM/ECF user receiving the notice. (4th Cir. R. 25(a)(2), (4); Fourth Circuit CM/ECF Attorney Manual sections I.A & II.B).)

When filing in the Fourth Circuit, counsel must consider:

- The scope of Fourth Circuit CM/ECF (see Applicability of Fourth Circuit CM/ECF).
- Formatting requirements for electronic documents (see Formatting Requirements for Fourth Circuit CM/ECF Documents).
- Privacy protection requirements for using CM/ECF (see Privacy Protection).
- Handling material under seal (see Serving and Filing Sealed Documents).
- Calculating time when using CM/ECF (see Calculating Time When Using CM/ECF).

APPLICABILITY OF FOURTH CIRCUIT CM/ECF

Attorneys must serve and file almost all documents using CM/ECF unless either:

- The court grants the filing attorney an exception for good cause.

- The attorney files only a motion to withdraw from representation.

(FRAP 25(a)(2)(B)(i) and (c)(2); 4th Cir. R. 25(a)(1).)

Pro se litigants do not have to file documents electronically but may request permission to do so (FRAP 25(a)(2)(B)(ii); 4th Cir. R. 25(a)(1)).

Even counseled parties may serve and file case-initiating papers, such as petitions for permission to appeal and writ petitions, in paper form (4th Cir. R. 25(a)(1)(A)).

Serving *Pro Se* Parties and Exempt Counsel

If any party appears *pro se* or an attorney successfully moves for an exemption, other attorneys must serve paper copies of all filings on that party by any of the following traditional means:

- Personal delivery.
- First-class mail.
- Third-party commercial carrier for delivery within three days.

(FRAP 25(c)(1); 4th Cir. R. 25(a)(4).)

After serving exempt parties with paper copies, attorneys must use CM/ECF to serve non-exempt parties and to file with the Fourth Circuit. The electronically filed document must include a certificate of service proving proper service on each party. (FRAP 25(d); 4th Cir. R. 25(a)(4); 4th Cir. R. 25(b)(3).)

FORMATTING REQUIREMENTS FOR FOURTH CIRCUIT CM/ECF DOCUMENTS

The Fourth Circuit's local rules and CM/ECF instructions govern the format of electronic documents served and filed using CM/ECF.

File Format

Attorneys can only upload PDF files to CM/ECF. Briefs must be text-searchable. Other documents should be in text-searchable PDF format whenever possible and not created by scanning. (4th Cir. R. 25(a)(1).) Attorneys should convert documents in an electronic format directly to PDF because this produces the smallest document (see File Size) and best image.

File Size

Documents uploaded to CM/ECF may not exceed 50 MB in size. If a document is larger than 50 MB, counsel must divide the document into separate files, each not exceeding 50 MB. Counsel can upload a maximum of 250 MB per docket entry. (Fourth Circuit CM/ECF Attorney Manual section I.)

Signatures

A filing attorney's typed name on a signature block and use of an assigned log-in and password to submit a document electronically is for all purposes the equivalent of a signature. The filing attorney must type s/ followed by their name on the signature line to signify that the document is signed, followed by the attorney's business address, telephone number, and email address. (FRAP 25(a)(2)(B)(iii); Fourth Circuit CM/ECF Attorney Manual section II.I.1.)

If a document requires multiple signatures, counsel may electronically file the document in one of the following ways:

- Submitting a scanned document with all necessary signatures.
- Representing the other parties' consent on the document.
- Identifying the other parties whose signatures are needed and submit a notice of endorsement by the other parties within three days.
- Any other manner approved by the court.

(4th Cir. R. 25(a)(9); Fourth Circuit CM/ECF Attorney Manual section II.I.2.)

If someone other than the filer signs a document (for example, if a client signs an affidavit), counsel must keep the signed original for three years after the court issues the mandate at the conclusion of the appeal (4th Cir. R. 25(a)(8)).

Proof of Service

All filings in the Fourth Circuit must include a certificate of service even if all parties receive service by CM/ECF (FRAP 25(d); 4th Cir. R. 25(a)(4); 4th Cir. R. 25(b)(3); Fourth Circuit CM/ECF Attorney Manual section II.D).

PRIVACY PROTECTION

Attorneys must redact or omit certain personal information to protect the privacy of individuals referenced in filed materials, whether the attorneys file those documents using the CM/ECF system or in paper format (4th Cir. R. 25(c)(3)).

Unless an exemption applies, attorneys may only:

- Use the last four digits of a Social Security number or taxpayer identification number.
- Reference the year of a person's birth date rather than the full birth date.
- Refer to a minor by the minor's initials rather than full name.
- Use the last four digits of a financial account number.

(FRAP 25(a)(5); FRCP 5.2(a); 4th Cir. R. 25(c)(3).)

For more information about privacy protection requirements, see Practice Note, Filing Documents in Federal District Court: Redact Personal Identifiers Before Filing (2-519-0032).

SERVING AND FILING SEALED DOCUMENTS

Parties must follow special procedures to electronically file sealed documents and serve paper copies of those documents (4th Cir. R. 25(a)(7)).

If the district court sealed materials, those materials remain under seal unless the Fourth Circuit orders otherwise. When filing material sealed by the district court, counsel must include a certificate of confidentiality:

- Identifying the sealed material.
- Listing the dates of the orders sealing the material or, if there is no order, the district court's general authority to treat the material as sealed.
- Specifying the terms of the protective order governing the information.
- Identifying the appellate document that contains the sealed information.

(4th Cir. R. 25(c)(1).)

If the need to seal material arises during the appeal or if there are new circumstances warranting reconsideration of the district court's sealing decision, counsel may make a motion to the Fourth Circuit. A motion of this kind must:

- Specifically identify the material that the moving party wants sealed.
- Explain why sealing is necessary and a less drastic alternative is inadequate.
- State how long the party wants the material maintained under seal.
- Describe how the material is to be handled on unsealing.

(4th Cir. R. 25(c)(2).)

If the sealed material appears in the appendix, counsel must place the sealed material in a separate volume of the appendix, the cover of which they must conspicuously mark SEALED. Counsel must serve paper copies of the sealed appendix volume on the other parties and then file the sealed volume using the Sealed Appendix entry in CM/ECF. (4th Cir. R. 25(c)(3).)

If the sealed material appears in a brief or other non-appendix document, counsel must create two versions of the document, one containing the sealed material (and having a conspicuous SEALED label on its cover) and one redacted. Counsel must serve paper copies of the document containing sealed material and file if using the Sealed Brief or Sealed Document entry in CM/ECF. Counsel serve and file the redacted copy using CM/ECF, as they can with any other document. (4th Cir. R. 25(c)(3).)

CALCULATING TIME WHEN USING CM/ECF

Filing documents electronically in the Fourth Circuit does not alter filing deadlines. When a court order or stipulation sets a specific time of day deadline, a party must complete the electronic filing by that time. Otherwise, a party must complete the electronic filing before midnight Eastern Time to be considered timely filed that day. (4th Cir. R. 25(a)(3).)

When a party's deadline to take some action is measured from service of another document, a party receiving service by US mail or commercial carrier may add three days to the time otherwise available to respond. For appeals filed on or after December 1, 2016, parties receiving a document by electronic service no longer may add three days to a response time calculated from the date of service. (FRAP 26(c).)

For example, the time to respond to a motion in a federal court of appeals is normally ten days after service (FRAP 27(a)(3)(A)). If a motion is served on a Wednesday, the tenth day after service is a Saturday. This gives the opposing party until the following Monday, the 12th day after service, to respond (FRAP 26(a)(1)(C)). If the movant served the motion by US Mail, the opposing party adds three days to the otherwise applicable deadline (Monday, not Saturday). This gives the opposing party until Thursday, the 15th day after service, to respond. (FRAP 26(c) (2009 advisory committee notes).)

The three extra days are available only if the time to act is calculated from service of another document. No extra days are added to the deadline if the deadline is a particular date or if the time to act is calculated from any act other than service, including the filing of a document or the entry of an order or judgment. (FRAP 26(c).)

DOCKETING THE APPEAL

After receiving the notice of appeal and district court docket sheet, the Fourth Circuit clerk dockets the appeal (FRAP 12(a)). The clerk assigns the appeal a docket number and short case style (which includes the name of the first-listed plaintiff or petitioner and first-listed defendant or respondent), of which counsel and any *pro se* parties are advised in the court's docketing notice.

The court's docketing notice typically:

- Identifies the appeal's docket number and caption, which must appear on all filings the parties submit to the court.
- Instructs the parties to make certain initial filings with the court (see Post-Initiation Filings).
- Includes the name and contact information of the assigned case manager.

POST-INITIATION FILINGS

After the court of appeals' clerk dockets the appeal, the parties and the district court must make several preliminary filings with the Fourth Circuit before the parties can address the merits of the appeal. These filings include:

- The Docketing Statement (4th Cir. R. 3(b); and see Docketing Statement).
- The Disclosure of Corporate Affiliations statement (commonly known as the Disclosure Statement) (4th Cir. R. 26.1; see Disclosure of Corporate Affiliations (Disclosure Statement)).
- The Transcript Order Form (4th Cir. R. 10(c); see Transcript Order Form).
- The Appearance of Counsel form (4th Cir. R. 46(c); see Appearance of Counsel Form).
- The record on appeal (4th Cir. R. 10(a) to 10(d); see Record on Appeal).

DOCKETING STATEMENT

The appellant must serve and file a Docketing Statement (Civil/Agency Cases) with the Fourth Circuit within 14 days after the court of appeals' clerk dockets the appeal, which occurs when the Fourth Circuit receives the notice of appeal. Failure to timely file the statement may lead to dismissal of the appeal. (4th Cir. R. 3(b).)

The appellee does not need to file a response, unless it concludes that appellant's Docketing Statement is inaccurate, incomplete, or misleading. If so, within ten days of service of appellant's Docketing Statement, the appellee should file with the Fourth Circuit a written notification of any errors and any proposed additions or corrections. The appellee must provide copies of this notification to all other parties. (4th Cir. R. 3(b).)

Contents of the Docketing Statement

The Docketing Statement is a form that provides the Fourth Circuit with basic information to understand the nature of the appeal, including:

- The parties' names.
- The name, address, telephone number, fax number, and email of counsel for each party to the appeal.
- The bases for district court and Fourth Circuit jurisdiction.

- Information about any ongoing judicial or administrative proceedings relating to the appeal.
- Information regarding the nature of the case.
- Information about the proposed issues on appeal, including jurisdictional challenges. Although the appellant may later raise an issue not listed in the Docketing Statement, counsel should try to include all their issues.

(4th Cir. R. 3(b); see Docketing Statement (Civil/Agency Cases).)

If any necessary information does not fit in the space provided on the form, counsel should include it on a separate sheet following the form. For example, if there are too many attorneys to list in the space provided, counsel should list them on a separate sheet.

The appellant must attach the Transcript Order form, if one is appropriate, to the Docketing Statement (4th Cir. R. 3(b) and see Transcript Order Form).

Serving and Filing the Docketing Statement

Attorneys must use CM/ECF to serve and file the Docketing Statement (FRAP 25(a)(2)(B)(i) and (c)(2); 4th Cir. R. 25(a)(1), (4); Docketing Statement (Civil/Agency Cases)). Attorneys must serve any exempt parties or attorneys by paper means (see Serving Pro Se Parties and Exempt Counsel).

DISCLOSURE OF CORPORATE AFFILIATIONS (DISCLOSURE STATEMENT)

Within 14 days after the clerk dockets the appeal or when filing pleadings if that is earlier, the parties must serve and file with the Fourth Circuit the Disclosure of Corporate Affiliations form, available on the Fourth Circuit website. This form, commonly referred to simply as the Disclosure Statement, provides the court with a complete list of all people and entities known to have an interest in the outcome of the appeal. (4th Cir. R. 26.1; see Disclosure of Corporate Affiliations form).

Each party in a civil action must file the disclosure statement, unless the party is one of the following:

- The US.
- An indigent party.
- A state or local government in a *pro se* case.

(4th Cir. R. 26.1(a)(1); see Disclosure of Corporate Affiliations form.)

Contents of the Disclosure Statement

The filing party must identify any parent corporation and any publicly held corporation that owns 10% or more of the party's stock, or state that there is no such corporation. For purposes of the Disclosure Statement, a publicly held corporation includes a master limited partnership, real estate investment trust, or other legal entity whose shares are publicly held or traded. (4th Cir. R. 26.1(a)(2); FRAP 26.1; see Disclosure of Corporate Affiliations form.)

The party must also identify any publicly held corporation that has a direct financial interest in the outcome of the litigation. A direct financial interest may include a franchise, lease, insurance, indemnity, or other contract. (4th Cir. R. 26.1(a)(2)(B).)

If the party is a trade association, the form must identify any publicly held members whose stock or value can be affected by the outcome of the litigation (4th Cir. R. 26.1(a)(2); Disclosure of Corporate Affiliations form).

If the appeal arises out of a bankruptcy proceeding, the form must identify any trustee and all the members of any creditors' committee (Disclosure of Corporate Affiliations form).

Serving and Filing the Disclosure Statement

Attorneys must use CM/ECF to serve and file the Disclosure Statement (FRAP 25(a)(2)(B)(i) and (c)(2); 4th Cir. R. 25(a)(1), (4)). Attorneys must serve any exempt parties or attorneys by paper means (see Serving Pro Se Parties and Exempt Counsel).

A party must serve and file an amended disclosure statement if any of the information changes during the course of the appeal (FRAP 26.1(b); 4th Cir. R. 26.1(e)).

TRANSCRIPT ORDER FORM

The appellant must serve and file the Fourth Circuit Transcript Order Form within 14 days of docketing the appeal if ordering a transcript (4th Cir. R. 10(c)(1); 4th Cir. R. 3(b) (requiring party to attach transcript order form to Docketing Statement, which is due within 14 days of the court's docketing of the appeal); see Fourth Circuit Transcript Order Form). Failure to order the transcript may lead to dismissal of the appeal (4th Cir. R. 10(c)(2)).

Contents of the Transcript Order Form

The Transcript Order Form requires the appellant to:

- Provide the case information.
- Identify the proceeding(s) the appellant has ordered a transcript for and the dates of the proceeding(s) and what portions of the transcript it has ordered.
- Specify the estimated number of pages.
- Certify that appellant has made satisfactory financial arrangements with the court reporter for the cost of the transcript.
- Request the transcript(s) in either paper format or electronic format.

(Fourth Circuit Transcript Order Form.)

The ordering party must make financial arrangements for payment to the court reporter before signing and submitting the order form (4th Cir. R. 10(c)(1)).

If ordering some or all the transcript, the appellant must describe the proceedings for which it needs a transcript. However, an appellant ordering only some of the transcript need not provide a separate statement of the issues presented on appeal, as stated in FRAP 10(b)(3)(A). The Docketing Statement serves that purpose in the Fourth Circuit. (4th Cir. R. 10(c)(1).)

The appellee then has 14 days after service of the form to file and serve on the appellant a designation of additional transcript portions to be ordered (FRAP 10(b)(3)(B)). The appellant, in turn, has 14 days to order the additional portions (FRAP 10(b)(3)(C)).

If the appellant fails to notify the appellee that appellant is ordering the additional portions, the appellee then has 14 days to either:

- Order the additional portions.
- File a motion in the district court to compel the appellant to order the additional portions.

(FRAP 10(b)(3)(C).)

In cross-appeals, each party must order the parts of the transcript pertinent to its appeal. The court encourages the parties to agree on those transcript portions necessary for both appeals and apportion the cost of them. (4th Cir. R. 10(c)(1)).

Ordering the Transcript

The appellant must order as much of the transcript as is necessary for the appeal (FRAP 10(b)(1)(A); 4th Cir. R. 10(c)(1)).

Counsel may order only part of the transcript if the issues on appeal relate only to part of the proceedings (4th Cir. R. 10(c)(1)). For example, if the appeal concerns only the jury charge, the entire trial transcript may be unnecessary.

It is inappropriate to order only so much of the transcript as is favorable to the appellant while omitting other relevant portions that the appellee needs to make its appellate arguments (4th Cir. R. 10(c)(1)).

Serving and Filing the Transcript Order Form

When ordering the transcript, the appellant must attach the form to the Docketing Statement when filing it with the Fourth Circuit using CM/ECF. The appellant must also provide a copy of the Transcript Order form to the district court. (4th Cir. R. 3(b); CTA4 App. IV (4th Cir. R. App. IV Fourth Circuit Guidelines for Preparation of Appellate Transcripts, at II.B.5).)

Court Reporter's Response to the Transcript Order Form

After receiving the appellant's transcript order form, the court reporter must complete the transcript within 60 days (4th Cir. R. 11(b)). If the court reporter believes there is a problem with the transcript or order, it must inform the Fourth Circuit clerk within seven days of receiving the transcript order form (4th Cir. R. 11(a)).

The court reporter may request an extension of time from the Fourth Circuit clerk if the reporter cannot complete and file the transcript within 60 days (FRAP 11(b)(1)(B); 4th Cir. R. 11(b) CTA4 App. IV (App. IV Fourth Circuit Guidelines for Preparation of Appellate Transcripts, at IV.A).

Because the filed transcript eventually becomes publicly available on CM/ECF, attorneys should review the transcript to ensure that no sealed or private materials are published. Counsel must file notice of intention to make redactions within seven days of the transcript's filing and make the actual redactions within 21 days of the transcript's filing (Fourth Circuit Transcript Information Sheet ¶ 4).

The appellant also must ensure that any previously ordered transcripts of court proceedings have been filed with the district court. If a party ordered a transcript of in-court proceedings before the end of the district court case (for example, the transcript of a summary judgment hearing), the court reporter likely filed the transcript with the district court clerk. It is always possible, however, that for some reason a transcript did not make it into the district court's file.

APPEARANCE OF COUNSEL FORM

Each attorney of record must file a written appearance with the Fourth Circuit clerk within 14 days after either:

- The clerk dockets the appeal (within 14 days of the docketing notice).
- The attorney is retained or appointed.

(4th Cir. R. 46(c).)

To comply with this requirement, counsel must complete and submit the court-provided Appearance of Counsel Form (4th Cir. R. 46(c)). The form requires basic information about the case, which party the attorney represents, and the attorney's contact details.

An attorney must file an appearance in the appeal even if the attorney filed an appearance in the district court. The appellant's attorney also must file an appearance even though the attorney signed the notice of appeal or petition for permission to appeal. (FRAP 12(b).) Attorneys not currently admitted to the Fourth Circuit must move for admission (see Practice Note, Fourth Circuit Civil Appeals: Initiating an Appeal: Obtain Admission to the Fourth Circuit Bar (W-014-1281)).

Attorneys should use CM/ECF to serve and file their appearances and should serve any parties exempt from CM/ECF by paper means (FRAP 25(a)(2)(B)(i) and (c); 4th Cir. R. 25(a)(1), (4)).

RECORD ON APPEAL

The federal courts of appeals are limited on appeal to the record made in the district court, which is referred to as the record on appeal or simply as the record.

Contents of the Record on Appeal

The record consists of:

- The papers and exhibits filed in the district court.
- Any transcript of proceedings in the district court.
- A certified copy of the district court's docket sheet.

(FRAP 10(a).)

The record includes only transcripts of in-court proceedings, such as hearings, arguments, and trials. It does not include transcripts of depositions or other out-of-court proceedings unless those transcripts were filed as exhibits in the district court.

The Parties' Responsibilities for the Record

The appellant must ensure that the record on appeal is complete (FRAP 11(a); 4th Cir. R. 10(b)). For example, the appellant must:

- Order any necessary transcript of court proceedings using the Transcript Order Form (FRAP 10(b); 4th Cir. R. 10(c)(1) and see Transcript Order Form).
- Assist the district court in assembling the record and preparing the record index (FRAP 11(a); 4th Cir. R. 10(b)).

Attorneys should consult the district court's appeals clerk regarding what, if anything, the particular district court requires of the appellant's counsel. The court generally assembles the record on its own (particularly in e-filed cases), but it may require counsel's assistance if the parties filed documents in paper form rather than by using CM/ECF, or if there are other complications.

The District Court Clerk's Responsibilities for the Record

The district court clerk is responsible for preparing the record on appeal and determining when it is complete for purposes of the appeal (4th Cir. R. 10(b)).

In cases where all parties are represented by counsel on appeal, the district court clerk transmits to the court of appeals a certificate that the record of docket entries is available on request. The district court clerk transmits this certificate with the notice of appeal. The district court clerk also notifies the court of appeals if the court reporter later files any transcripts (4th Cir. R. 10(a); FRAP 11(e)(1)), which then become part of the record on appeal (FRAP 10(a)).

Once the record is complete, the clerk certifies that the record (including the transcript and all necessary exhibits) is complete for purposes of appeal. However, where all parties to the appeal are represented by counsel, the record on appeal generally remains with the district court during the appeal, unless a judge of the court of appeals requests it, in which case the district court clerk assembles and transmits the record to the court of appeals (4th Cir. R. 10(a); 4th Cir. R. 11(d)).

Incomplete Records

Sometimes the record prepared by the district court clerk does not contain every item that the Fourth Circuit needs to decide the appeal. It is counsel's obligation to complete the record.

The appellant, for example, must order any outstanding transcripts from the court reporter within 14 days after taking the appeal and ensure that any previously ordered transcripts of court proceedings have been filed (see Transcript Order Form).

If there are letters to the court or other unfiled documents that are relevant to the appeal, the parties should consult the district court appeals clerk to determine how to get those items into the record as soon as possible. Depending on the district court's rules and preferences, the parties may be able to complete the record in a variety of ways, including by:

- Making a motion.
- Asking the district court to file the documents.
- Filing a stipulation supplementing the record.
- Stating that the parties are holding certain record documents and can make them available to the Fourth Circuit on request.

(FRAP 10(e).)

Incorrect Records

If either party believes that the record does not reflect what actually occurred in the district court:

- The parties may correct the record by stipulation.
- A party may move the district court for appropriate relief.

(FRAP 10(e); 4th Cir. R. 10(d).)

Although the courts of appeals may also correct the record under FRAP 10(e)(2)(C) and 4th Cir. R. 10(d), the parties should make those requests to the district court in the first instance.

Notifying the Court of Constitutional Challenges to Statutes

When the district court clerk files the record or record index with the Fourth Circuit, a party that is challenging the constitutionality of a state or federal statute must notify the Fourth Circuit clerk in writing if none of the following are parties to the appeal:

- The governmental entity whose statute is being challenged.
- An agency of the governmental entity whose statute is being challenged.
- An officer or employee of the governmental entity whose statute is being challenged, sued in connection with that person's official duties.

(FRAP 44.)

The written notice can take the form of a letter from counsel to the clerk of the court. Attorneys should serve and file the notice using CM/ECF. Attorneys should serve any party exempt from using CM/ECF by paper means. (FRAP 25(a)(2)(B)(i) and (c); 4th Cir. R. 25(a)(1), (4); 4th Cir. R. 25(b)(3).)

After receiving the notice, the Fourth Circuit clerk must notify the attorney general of the appropriate governmental entity (FRAP 44) to provide an opportunity for intervention (28 U.S.C. § 2403).

If the constitutional challenge arises after the record index is filed, the party challenging a statute's constitutionality must notify the Fourth Circuit clerk as soon as the issue arises (FRAP 44).

MEDIATION IN THE FOURTH CIRCUIT COURT OF APPEALS

Parties represented by counsel may need to participate in a mediation conference with one of the Fourth Circuit's circuit mediators. The purposes of this mediation conference include:

- Discussing jurisdictional questions or procedural issues.
- Simplifying, clarifying, and reducing issues on appeal.
- Providing the parties with a candid evaluation of the case.
- Exploring settlement.
- Addressing any other matter related to efficiently managing and disposing of the appeal.

(4th Cir. R. 33; Fourth Circuit, About Mediation.)

One of the court's three circuit mediators reviews each civil and agency appeal in which all parties have counsel to determine if a mediation conference can assist the parties or the court. Counsel may also request a mediation conference and, in rare instances, a panel of judges may refer an appeal to mediation. (4th Cir. R. 33.)

If the circuit mediator schedules a conference, the lead attorney must participate. Clients normally do not need to attend but the circuit mediator may require the presence of the parties or their insurers. Even if not required, counsel may want a client present or available by telephone. (4th Cir. R. 33; Fourth Circuit, About Mediation; Fourth Circuit, FAQs - Mediation.)

To prepare for a conference, counsel should review the case and prepare to answer questions from the circuit mediator about the legal arguments in the case and their client's interests (both within and beyond the litigation) and willingness to settle. Counsel must also consult with their client and obtain whatever settlement authority the client is willing to provide. (Fourth Circuit, FAQs - Mediation; Fourth Circuit, Preparing for a Mediation.)

Conferences usually occur by telephone, but the circuit mediator has discretion to direct an in-person conference. Participants in a telephonic conference must use a landline. The court forbids the use of mobile phones for mediation conferences. Mediations typically taken about an hour but can be shorter or longer. (4th Cir. R. 33; Fourth Circuit, About Mediation; Fourth Circuit, FAQs - Mediation.)

Before the mediation the circuit mediator usually reads the decision below and the docketing statement. Circuit mediators typically ask about settlement and the parties' interests in the case. They may meet with all parties together or caucus separately with each. Depending on how the conference proceeds, the circuit mediator may require additional mediation sessions. (Fourth Circuit, About Mediation; Fourth Circuit, FAQs - Mediation.)

Statements and comments made during mediation, as well as papers or electronic information generated during the mediation proceedings, do not become part of the court record. Information the mediation program participants disclose during mediation, as well as all statements, documents, and discussions during mediation remain confidential and are not disclosed to the judges or anyone outside the mediation proceedings. (4th Cir. R. 33.)

Mediation proceedings do not automatically toll the time to file a brief. However, the mediator, through the Fourth Circuit clerk, does have the power to extend the briefing period. (4th Cir. R. 33; see Fourth Circuit, FAQs - Mediation.)

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