



Office of the Clerk  
 UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT  
 James R. Browning United States Courthouse  
 95 Seventh Street  
 Post Office Box 193939  
 San Francisco, California 94119-3939



Cathy A. Catterson  
 Clerk of Court

(415) 556-9800

**February 9, 2007**

**Notice and Opportunity for Comment on  
 Proposed Amendments to the Circuit Rules**

Pursuant to 28 U.S.C. § 2071(b), comments are invited on proposed amendments to the Circuit Rules and Advisory Committee Notes (“ACN”).

- Circuit Rule 17-1.6 and 30-1.6. . . . . Format of Excerpts of Record
- Circuit Rule 27-1. . . . . Filing of Motions (Corporate Disclosure Statements)
- Circuit Rule 28-6. . . . . Citation of Supplemental Authorities
- Circuit Rule 29-2. . . . . Reply Brief of an Amicus Curiae
- Circuit Rule 39-1.6. . . . . Costs and Attorneys Fees on Appeal
- Circuit Rule 39-2. . . . . Attorneys’ Fees and Expense under the Equal Access to Justice Act

New language is highlighted and amended language is redlined and struck through. Comments should be submitted to Cathy A. Catterson, Clerk of Court/Circuit Court Executive ([cathy\\_catterson@ca9.uscourts.gov](mailto:cathy_catterson@ca9.uscourts.gov)), no later than **March 30, 2007**.

CIRCUIT RULE 17-1

EXCERPTS OF RECORD ON REVIEW OR  
 ENFORCEMENT OF AGENCY ORDERS

**17-1.6 Format of the Excerpts of Record**

The first volume of the excerpts of record shall be limited to specific portions of the transcript containing any oral statements of decisions, the orders to be reviewed, and any reports, opinions, memoranda or findings of fact or conclusions of law prepared by the agency, board, commissioner or officer that relate to the orders to be reviewed. All additional documents shall be included in subsequent volumes of the excerpts.

(New \_\_\_\_\_)

The form of the excerpts shall otherwise be governed by Ninth Circuit Rule 30-1.6, with references in Rule 30-1.6 to appellant and the district court to be read as references to petitioner and agency, respectively. (Rev. \_\_\_\_\_)

## CIRCUIT RULE 30-1

### THE EXCERPTS OF RECORD

#### **30-1.6 Format of Excerpts of Record**

The first volume of the excerpts of record shall be limited to specific portions of the transcript containing any oral statements of decisions, the orders to be reviewed, and any reports, opinions, memoranda, or findings of fact or conclusions of law prepared by the district, magistrate, bankruptcy judge or bankruptcy appellate panel that relate to the issues being appealed. All additional documents shall be included in subsequent volumes of the excerpts. The documents which comprise the excerpts of record need not be certified as true copies, but if possible the district court or agency's "filed" stamp should appear on each document. The documents in the first volume of the excerpts shall be arranged by file date in chronological order beginning with the document with the earliest file date on top. The documents in subsequent volumes also shall be arranged by file date in chronological order beginning with the document with the earliest file date. The document with the earliest file date should appear under the first tab or should be paginated beginning with page 1. The trial court docket shall sheet should always be the last document in the excerpts. The five (5) copies of the excerpts are to be reproduced on letter size light paper by any duplicating or copying process capable of producing a clear black image. , and Each copy must be securely bound on the left side and must have a white cover styled as described in FRAP 32(a), except that the wording "Excerpts of Record" shall be substituted for "Brief of Appellant." The cover shall also include the volume number. The excerpts must be either consecutively paginated beginning with page 1, or the documents marked with tabs corresponding to the tab number, if any, of the documents in the clerk's record. If tabs are used, the pages within the tabs must be consecutively paginated. The excerpts must begin with an index organized in the order the documents are presented chronologically describing the documents, exhibits and portions of the reporter's transcript contained therein, the location where the documents and exhibits may be found in the district court record, and the page where the documents, exhibits or transcript portions may be found in the excerpts. The information on the front cover of the excerpts of record should be styled exactly as a brief except that the wording "Excerpts of Record" should be substituted for "Brief of Appellant." In those unusual cases in which the total number of pages in the excerpts exceeds 300 pages, the excerpts shall be filed in multiple volumes, with each volume containing 300 pages or fewer. (Rev. 7/1/98, 12/02, \_\_\_\_)

Appellants proceeding without the assistance of counsel who file the form brief provided by the Clerk pursuant to Circuit Rule 28-1 and who are required to file an excerpt of record need not comply with the technical requirements of this rule if they attach to their form briefs the documents comprising the excerpts of record. (Rev. 1/96)

**Purpose of Amendments to Circuit Rule 17-1 and Circuit Rule 30-1: To require the mandatory contents of the excerpts of record to be contained in the first volume for ease of use by judicial officers. Commentators are requested to comment specifically on whether requiring two volumes of the excerpts is too much work, and also whether the documents should be in chronological order as the rules currently require or should their order be left to the discretion of the filing party.**

CIRCUIT RULE 27-1

FILING OF MOTIONS

All motions must be filed with the Clerk in San Francisco. Except for same-day emergencies as described in Circuit Rule 27-3(2), counsel should not contact a circuit judge regarding any motion.

**(1) Form of Motions**

(a) [abrogated 7-1-2006]

(b) \* \* \* \*

(c) \* \* \* \*

(d) The court requires that each substantive motion, petition for writ of mandamus, petition for permission to appeal, and any opposition thereto include a corporate disclosure statement as required by Fed. R. App. P. 26.1(b).

The provisions of Fed. R. App. P. 27(d) apply except that the court requires an original and 4 copies of motions, responses to motions, and any supporting papers and appendices.

**Purpose of Amendment: To remind counsel of the need to file corporate disclosure statements in substantive motions and petitions, so as to provide the Court with necessary information to determine possible recusals.**

---

---

CIRCUIT RULE 28-6

CITATION OF SUPPLEMENTAL AUTHORITIES

The body of letters filed pursuant to Federal Rule of Appellate Procedure 28(j) shall not exceed two (2) pages, unless it complies with the alternative length limitations of 350 words or 39 lines of text. Litigants shall submit an original and four (4) copies of a Fed. R. App. P. 28(j) letter. (New, 12-1-02)

Cross-reference: Circuit Rule 25-4, Calendared Cases (New 7-1-06)

***CIRCUIT ADVISORY COMMITTEE NOTE TO RULE 28-6***

*In the interests of promoting full consideration by the court and fairness to all sides, the parties should file all Fed R. App. P. 28(j) letters as soon as possible. When practical, the parties are particularly urged to file Rule 28(j) letters at least seven (7) calendar days in advance of any scheduled oral argument or within seven (7) calendar days after notification that the appeal will be submitted on the briefs. (New \_\_\_\_\_)*

**Purpose of Note: To provide guidance to the bar about when to file FRAP 28(j) letters.**

## CIRCUIT RULE 29-2

**BRIEF OF AMICUS CURIAE**  
**SUBMITTED TO SUPPORT OR OPPOSE A PETITION FOR PANEL**  
**OR EN BANC REHEARING OR DURING THE PENDENCY OF REHEARING**

(a) **When Permitted:** An amicus curiae may be permitted to file when the court is considering a petition for panel or en banc rehearing or when the court has granted rehearing. The United States or its officer or agency, or a State, Territory, Commonwealth, or the District of Columbia may file an amicus curiae brief without the consent of the parties or leave of court. Subject to the provisions of subsection (f) of this rule, any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing.

(b) **Motion for Leave to File:** The motion must be accompanied by the proposed brief and include the recitals set forth at Fed. R. App. P. 29(b).

(c) **Format/Length:**

(1) A brief submitted while a petition for rehearing is pending shall be styled as an amicus curiae brief in support of or in opposition to the petition for rehearing or as not supporting either party. A brief submitted during the pendency of panel or en banc rehearing shall be styled as an amicus curiae brief in support of appellant or appellee or as not supporting either party.

(2) A brief submitted while a petition for rehearing is pending brief shall not exceed 10 pages unless it complies with the alternative length limits of 2,800 words or 260 lines of monospaced text. Motions for leave to file an oversize brief are disfavored.

(3) Unless otherwise ordered by the court, a brief submitted after the court has voted to rehear a case en banc shall not exceed 15 pages unless it complies with the alternative length limits of 4,200 words or 390 lines of monospaced text. Motions for leave to file an oversize brief are disfavored.

(d) **Number of Copies:**

If the brief pertains to a petition for panel rehearing, an original and four (4) copies shall be submitted. If the brief pertains to a pending petition for rehearing en banc, an original and fifty (50) copies shall be submitted. If a petition for rehearing en banc has been granted, an original and thirty (30) copies of the brief shall be submitted.

(e) **Time for Filing:**

(1) **Brief Submitted to Support or Oppose a Petition for Rehearing**

An amicus curiae must serve its brief along with any necessary motion no later than 7 calendar days after the petition or response of the party the amicus wishes to support is filed or is due. An amicus brief that does not support either party must be served along with any necessary motion no later than 7 calendar days after the petition is filed. Motions for extensions of time to file an amicus curiae brief submitted under this rule are disfavored.

(2) Briefs Submitted During the Pendency of Rehearing

Unless the court orders otherwise, an amicus curiae supporting the position of the petitioning party or not supporting either party must serve its brief, along with any necessary motion, no later than 21 days after the petition for rehearing is granted. Unless the court orders otherwise, an amicus curiae supporting the position of the responding party must serve its brief, along with any necessary motion, no later than 35 days after the petition for panel or en banc rehearing is granted. Motions for extensions of time to file an amicus curiae brief submitted under this rule are disfavored.

(f) Briefs Presenting Potential for Recusal: The court will ordinarily deny motions and disallow stipulations for leave to file an amicus curiae brief where the filing of the brief would result in the recusal of a member of the en banc court. Any member of the court who would be subject to disqualification in light of the amicus curiae brief may, of course, voluntarily recuse, thereby allowing the filing of the amicus curiae brief. If a member of the panel or en banc court subsequently discovers that the filing of a brief creates the need for recusal, the court may elect to strike the brief. The amicus curiae brief and any motion seeking leave to file the brief shall inform the court of any known potential for recusal presented by the filing of the brief. The opposing party is also obligated to inform the court of any known potential for recusal posed by the filing of an amicus brief. If the brief was submitted without a motion, the opposing party shall apprise the court of the potential for recusal by letter filed within seven (7) calendar days after service of the brief; if a motion accompanied a proposed brief, the opposing party shall apprise the court of the potential for recusal in a response to the motion.

(g) Circulation: Motions for leave to file an amicus curiae brief to support or oppose a petition for panel rehearing are circulated to the panel. Motions for leave to file an amicus curiae brief to support or oppose a petition for en banc rehearing are circulated to all members of the court. Motions for leave to file an amicus curiae brief during the pendency of en banc rehearing are circulated to the en banc court.

*Cross-reference:* Fed. R. App. P. 29; Circuit Rule 25-4

*CIRCUIT ADVISORY COMMITTEE NOTE TO RULE 29-2*

*Circuit Rule 29-2 only concerns amicus curiae briefs submitted to support or oppose a petition for panel or en banc rehearing and amicus curiae briefs submitted during the pendency of rehearing. The court considers the filing of amicus curiae briefs related to petitions for rehearing or en banc review to be appropriate only when the post-disposition deliberations involve novel or particularly complex issues.*

*The procedures set forth in Circuit Rule 29-2 reflect the Court's intent to avoid the filing of amicus curiae briefs that would present the potential of a recusal.*

**Purpose of New Rule: To provide guidance to the bar concerning the filing of amicus curiae briefs with respect to petition for rehearing or rehearing en banc.**

---

## CIRCUIT RULE 39-1

### COSTS AND ATTORNEYS' FEES ON APPEAL

#### 39-1.6 Request for Attorneys' Fees

**(a) Time Limits:**

Absent a statutory provision to the contrary, a request for attorneys' fees, ~~including a request for attorneys fees and expenses in administrative agency adjudications under 28 U.S.C. § 2412(d)(3)~~, shall be filed with the Clerk, with proof of service, ~~within~~ **no later than** 14 days ~~after~~ **after** from the expiration of the period within which a petition for rehearing ~~or suggestion for rehearing en banc~~ may be filed, unless a timely petition for rehearing ~~or suggestion for rehearing en banc~~ is filed. If a timely petition for rehearing ~~or a suggestion for rehearing en banc~~ is filed, a **the** request for attorneys fees shall be filed **no later than** within 14 days after the court's disposition of such **the** petition or suggestion. The request must be filed separately from any cost bill.

**(b) Contents:**

A request for an award of attorneys' fees must be supported by a memorandum showing that the party seeking fees is legally entitled to them and must be accompanied by Form 9 (appended to these rules) or a document that contains substantially the same information, along with: **(a 1)** a detailed itemization of the tasks performed each date and the amount of time spent by each lawyer and paralegal on each task; **(b 2)** a showing that the hourly rates claimed are **legally justified** the prevailing rates in the relevant market; and **(c 3)** an affidavit **or declaration** attesting to the accuracy of the information ~~submitted~~. **All applications must include a statement that sets forth the application's timeliness. The request must be filed separately from any cost bill.** (New 7/2001, Rev. \_\_\_\_\_)

#### ***CIRCUIT ADVISORY COMMITTEE NOTE TO RULE 39-1.6***

*Forms for **attorneys' fees and cost bills and attorneys fees** are found as Appendices 9 and 10 to these Rules. The forms are also available from the Clerk's Office or may be accessed via the Court's Website ([www.ca9.uscourts.gov](http://www.ca9.uscourts.gov)).*

*Calculation of **Cost Bill Filing Deadline**: Litigants are reminded that a cost bill must be received by the Clerk in San Francisco by the due date. See Federal Rule of Appellate Procedure 25(a)(1) and (2)(A) and Circuit Rule 25-2; but see Federal Rule of Appellate Procedure 25(a)(2)(C) (document filed by inmate timely if deposited in institution's internal mailing system on or before due date). The deadline is strictly enforced. See Mollura v. Miller, 621 F.2d 334 (9th Cir. 1980). (New, 1-1-05, **Rev. \_\_\_\_\_**)*

***Equal Access to Justice Act Applications: Counsel filing applications under 28 U.S.C. § 2412 should carefully review the statutory requirements concerning the timeliness and the contents of the application. In computing the applicable hourly rate under the Equal Access to Justice Act, adjusted for cost-of-living increases, counsel should be aware of the formula set forth in Thangaraja v. Gonzales**, 428 F.2d 870, 876-77 (9th Cir. 2005). (New \_\_\_\_\_)*

**Purpose of Amendments: To reflect the filing deadline set forth in EAJA, and to improve the clarity of the rule.**

---

---

CIRCUIT RULE 39-2

ATTORNEYS' FEES AND EXPENSES  
UNDER THE EQUAL ACCESS TO JUSTICE ACT

[To be Abrogated \_\_\_\_\_.]

~~39-2.1 Applications for Fees~~

~~An application to this Court for an award of fees and expenses pursuant to 28 U.S.C. § 2412(d)(1)(B) shall identify the applicant and the proceeding for which an award is sought. The application shall show the nature and extent of services rendered in this appeal, that the applicant has prevailed, and shall identify the position of the United States Government or an agency thereof in the proceeding that the applicant alleges was not substantially justified. The party applying shall submit the required information on Form A.O. 291, available from the Clerk of the Court.~~

~~39-2.2 Petitions by Permission [abrogated 1/96]~~