

MEMO

To: All Interested Parties

Date: November 30, 2018

Re: *10th Circuit Local Rules Changes for 2019*

Effective **December 1, 2018** there will changes/amendments to the Federal Rules of Appellate Procedure. *Please note in particular* the changes made with respect to the time for filing reply briefs. The memo below outlines all of the rules changes for this year.

In addition, effective **January 1, 2019** 10th Circuit local rules changes will take effect. Please review this memo carefully as there are a number of important changes this year including additional rules on sealing and filing attorneys' fees motions, and with respect to requirements for filing docketing statements.

Changes to the Federal Rules of Appellate Procedure

Fed. R. App. P. 8 (Changes to Conform to Fed. R. Civ. P. 62(b))

The changes to Rule 8 conform the appellate rules to changes made in Fed. R. Civ. P. 62. Specifically, parties were previously required to post a "supersedeas bond" and the language has now been changed to direct parties to provide a "bond or other security." The word surety has also been changed to "security provider." Finally, and this change is found in other rules as well, the word "mail" has been changed to "send" to avoid restricting the method of service.

Fed. R. App. P. 11 (Changes to Conform to Fed. R. Civ. P. 62(b))

Like Fed. R. App. P. 8, the change here updates "supersedeas bond" to "bond or other security provided."

Fed. R. App. P. 25 (Changes to Conform to Fed. R. Civ. P. 5—electronic filing)

The amendments to Fed. R. App. P. 25 are fairly extensive, and they conform the Rule to Federal Rule of Civil Procedure 5. The changes relate to electronic filing, signatures, and service. The changes establish, in Rule 25(a)(2)(B), a new national rule that generally makes electronic filing mandatory. The Rule recognizes certain exceptions, including for

pro se litigants and for “good cause.” The changes also create national rules regarding the method used to sign and serve electronic documents.

Fed. R. App. P. 26 (Clerical Adjustments)

The changes to Rule 26 are minimal, and simply update internal citations to Fed. R. App. P. 25.

Fed. R. App. P. 28.1 (*Important*—Change to the Period for Filing a Reply Brief)

Subdivision 4(f) has been revised in the cross appeal briefing rule to give appellants 21 days, rather than 14, to file optional reply briefs.

Fed. R. App. P. 29 (Adding Language Regarding Judge Disqualification)

This rule was amended to add language stating that the “court of appeals may prohibit the filing of or may strike an amicus brief that would result in a judge’s disqualification.”

Fed. R. App. P. 31 (*Important*--Change to the Period for Filing a Reply Brief)

The change here is consistent with Rule 28.1, which applies to cross appeals. This rule applies to regular briefing schedules, and extends the time for filing a reply from 14 days to 21 days.

Fed. R. App. P. 39 (Changes to Conform to Fed. R. Civ. P. 62(b))

Like the change to Rule 11, this revision removes the prior wording (“supersedeas bond”) and replaces it with “bond or other security.”

Fed. R. App. P. 41 (Changes to the Mandate Rule Involving Staying the Mandate)

Subdivision (b) of the Rule was revised to clarify that an order is required to stay the mandate (in 1998 the “by order” language in the rule was removed, which has caused some confusion over the years). The remaining revisions involve 1) updates to streamline language, 2) updates to make clear that if the mandate is stayed it must issue immediately once the court of appeals receives a copy of the Supreme Court’s order denying certiorari unless “extraordinary circumstances” exist and 3) replacing the word “filing” with “receipt” when referencing the trigger for acting on the Supreme Court’s order.

Form 4 (Financial Affidavit—Removing References to Last Four Digits of the SSN)

Removal of the social security number requirement is the only change here.

Form 7 (Updating Internal Citation to Fed. R. App. P. 25(a)(2))

The updating of internal citations is the only change here.

Proposed Changes to the 10th Circuit Local Rules

The changes to the Tenth Circuit Rules are numerous, but they fall primarily into three categories. First, the rules were reviewed holistically to confirm rules and subsections were in the proper order and that all subsections were placed in the correct rule category. Second, updates have been made to clarify rule language. Some unnecessary and/or obsolete language and subsections have been deleted. Finally, *please note* new rules have been added to address sealing and attorney's fees.

Also—all counsel should note changes have been made to the docketing statement form.

10th Cir. R. 3.2 (Preliminary Record Materials)

In this rule the subsections have been reordered to list in chronological order the documents required when the district court sends a preliminary record.

10th Cir. R. 5.1 (Reply Briefs for Petitions for Permission)

In this rule the language has been updated. This is not a substantive change.

10th Cir. R. 9.1 (Bail Appeals)

In this rule the subsections have been reordered to highlight procedural requirements (and in particular to highlight rules that are not applicable in bail appeals).

10th Cir. R. 10 (Records on Appeal)

Rule 10.1

The language in Rule 10.1 is new, and it includes clarifying language regarding the various ways records are filed in this circuit.

Rule 10.2(A)(2)

In this rule the language has been updated. This is not a substantive change.

Rule 10.3(D)

This (former) section has been removed.

Rule 10.4

This rule addresses the required content of the record or appendix. The language has been updated and the section reordered.

10th Cir. R. 11 (Forwarding Records)

There are several changes here. First, the language has been clarified. Second, prior local Rule 11.3, which addressed the assembly of paper records, has been deleted. Finally, current Rule 11.4 has been moved and a reference to new rule 25.6 has been added.

10th Cir. R. 15 (Agency Proceedings)

This rule addresses agency proceedings. New Rule 15.1, which codifies the requirement that petitioners attach the order under review to the petition for review, has been added, and in addition the subsection addressing service has been moved.

10th Cir. R. 17.2 (Filing the Record)

We have deleted prior rule 17.2. That section addressed the assembly of paper records in agency cases, and is obsolete (a cross reference is included to Rule 11.3, which as noted above has also been deleted).

10th Cir. R. 25 (Filing and Service)

Rule 25.3 (Electronic Filing)

This rule addresses electronic filing. New language has been added, and certificate of compliance requirements have been added and emphasized (currently requirements regarding certificates of compliance, etc., are only contained in the court's ECF Manual, and with these changes they have been added to the local rules).

Rule 25.4 (Electronic Service)

The change here is simply a language update.

Rule 25.6 (Filing Under Seal—*Important Change*)

Previously, the only section of the rules addressing filing under seal was Rule 30.1(D)(6), which is the appendix rule. The new rule is fairly detailed, and draws directly from 10th Circuit case law. It requires counsel to address the need to seal with particularity, and also requires any motion filed to address whether redaction is appropriate.

Rule 25.7 (Technical Failure)

This rule addresses the impact of technical failures (that is, when CM/ECF is unavailable). There are language updates here which change “court day” to “business day” to make clear that if ECF is down deadlines are extended to the next week day.

10th Cir. R. 26.1 (Corporate Disclosures)

This rule requires attorneys to include additional disclosures regarding citizenship in diversity cases filed per 28 U.S.C. §1332. There are two changes. The first is a word change to make clear parties must identify all members and the citizenship of all members, and the second is to add a citation to the Supreme Court’s 2016 decision in *Americold Realty Trust v. Conagra Foods, Inc.*, 136 S. Ct. 1012 (2016).

10th Cir. R. 27 (Motions)

Rule 27.2 (Certification of Questions of State Law)

Previously, the local rule on certified questions came before some of the more general rules on summary disposition motions. This change reorders the rule.

Rule 27.2 (New Rule on Paper Copies)

Although the CM/ECF Manual makes clear hard copies of motions and responses are not required, this change adds that language to the local rules.

Rule 27.6 (Motion to Extend Time—5 Day Rule)

Rule 27.5(F), which was previously located at the end of the general rule on filing motions to extend, requires counsel to file these motions at least 5 days before the pending deadline. This change moves that requirement up to make it more prominent.

10th Cir. R. 28 (Briefs and Record/Appendix Citations)

Rule 28.1 (Record References-Important)

This change deletes obsolete language and updates the language of the rule to be consistent with the realities of electronic filing. The changes necessitated other updates to the rule.

Rule 28.2 (Additional Requirements)

Here the rule has been updated to add a new section identified as 28.2(A)(5). Previously the rules did not state explicitly that a copy of the judgment needed to be attached to the appellant’s brief (the prior version simply required that “pertinent written findings” be attached). This change clarifies the requirement.

Rule 28.2(C)

The record reference section noted above was previously contained in this rule, and as a result reordering was necessary.

(New) Rule 28.2(C)(5)

(Including Brief Attachments in the Table of Contents) *Important*

This is a new rule. *It requires counsel to include in the Table of Contents brief attachments.*

10th Cir. R. 30.1 (Appellant’s Appendix)

This rule addresses the requirements for filing an appendix. The changes are to a great extent language updates, but there are numerous changes, all of which are intended to make the court’s requirements more clear. The Rule cites to Rule 10.1, which has also been updated.

Rule 30.1(D)(6)(Sealed Materials in Appendices)

As noted above, the court has added a new sealing rule, which is Rule 25.6. This rule directs parties seeking to file appendix materials under seal to that rule.

10th Cir. 31 (Serving and Filing Briefs—Number of Copies)

This rule addresses service requirements for briefs. These are language updates to add clarity.

10th Cir. R. 35.7 (Matters Not Heard En Banc)

This rule addresses matters not subject to en banc review, and the proposed change removes a single word for clarity.

10th Cir. R. 39.2 (New Rule—Motions for Attorneys’ Fees-*Important*)

Previously the Tenth Circuit Rules did not currently address motions for attorneys’ fees. This new rule adds requirements in that regard.

10th Cir. R. 46 (Attorneys and Motions to Withdraw)

Rule 46.1(D)(3)(Regarding Certificates of Interested Parties)

This rule addresses descriptions of parties in the certificate of interested parties. The word “specified” has been changed to “identified” for clarity.

Rule 46.4 (Motions to Withdraw In Criminal Cases)

This rule governs motions to withdraw in criminal appeals. The changes reorder some of the subsections and, in addition, language has been added to try to bring additional clarity to counsel’s obligations.

Rule 46.5 (Signing pleadings)

This rule addresses signatures on pleadings. In light of the updates made to Fed. R. App. P. 25 with regard to electronic signatures the court has deleted certain language in this rule, as it is now redundant.

Rule 46.6(C) (Inadequate Representation)

This rule addresses inadequate attorney representation and provides the court may, after giving notice, refer counsel for disciplinary action. This change adds language to the rule which states specifically that “inadequate representation” is not limited to, but does includes, failing to follow court rules and directives.

10th Circuit Form 1--Docketing Statement - *Important*

The court has made several changes to the Docketing Statement (Form 1). The changes shorten the form and eliminate attachments.