PRACTITIONER'S GUIDE

TO THE

UNITED STATES COURT OF APPEALS

FOR THE

TENTH CIRCUIT

NINTH REVISION

January 2016

(local rules effective Jan. 1, 2016)

Distributed by:

OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT
BYRON WHITE UNITED STATES COURTHOUSE
1823 STOUT STREET
DENVER, COLORADO 80257
www.ca10.uscourts.gov

JUDGES AND OFFICERS

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

CIRCUIT JUSTICE:

Sonia M. Sotomayor	Washington, D.C.

CIRCUIT JUDGES:

Timothy M. Tymkovich, Chief Judge	Denver, Colorado
Paul J. Kelly, Jr.	Santa Fe, New Mexico
Mary Beck Briscoe	Lawrence, Kansas
Carlos F. Lucero	Denver, Colorado
Harris L Hartz	Albuquerque, New Mexico
Neil M. Gorsuch	Denver, Colorado
Jerome A. Holmes	Oklahoma City, Oklahoma
Scott M. Matheson, Jr.	Salt Lake City, Utah
Robert E. Bacharach	Oklahoma City, Oklahoma
Gregory A. Phillips	Cheyenne, Wyoming
Carolyn B. McHugh	Salt Lake City, Utah
Nancy L. Moritz	Topeka, Kansas

SENIOR CIRCUIT JUDGES:

Monroe G. McKay	Salt Lake City, Utah
Stephanie K. Seymour	Tulsa, Oklahoma
John C. Porfilio	Denver, Colorado
Bobby R. Baldock	Roswell, New Mexico
David M. Ebel	Denver, Colorado
Michael R. Murphy	Salt Lake City, Utah
Terrence L. O'Brien	Cheyenne, Wyoming

CIRCUIT EXECUTIVE:

Circuit Executive:	David Tighe
Deputy Circuit Executive:	Leslee Fathallah

CLERK:

Clerk:	Elisabeth A. Shumaker
Chief Deputy Clerk:	Chris Wolpert

CHIEF STAFF COUNSEL:

Chief Staff Counsel:	Niki Esmay Heller
Supervising Staff Counsel:	Sara H. Sanford

LIBRARIAN:

Circuit Librarian:	Madeline R. Cohen
Deputy Circuit Librarian:	Diane Bauersfeld

CIRCUIT MEDIATION OFFICE:

Chief Circuit Mediator:	David W. Aemmer
Circuit Mediator:	Kyle Ann Schultz

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OVERVIEW

OF

THE UNITED STATES COURT OF APPEALS

FOR THE TENTH JUDICIAL CIRCUIT

Court Structure

The federal courts of appeals are the intermediate appellate courts between the district (trial) courts and the Supreme Court of the United States. There are thirteen courts of appeals: eleven numbered circuits (First through Eleventh), the District of Columbia Circuit, and the Federal Circuit. The numbered circuits, including the Tenth Circuit, provide appellate review of all cases tried in the district courts within the geographic area of their jurisdiction; they also decide appeals brought to them by residents of the circuit from various administrative tribunals, including the Tax Court and agencies of the federal government. The territorial jurisdiction of the Tenth Circuit includes the six states of Oklahoma, Kansas, New Mexico, Colorado, Wyoming, and Utah, plus those portions of the Yellowstone National Park extending into Montana and Idaho.

Other federal courts also have jurisdiction of cases arising in the Tenth Circuit. The District of Columbia Circuit may hear administrative appeals from most federal agencies regardless of the residence of the litigants. The Federal Circuit has exclusive jurisdiction over appeals of patent cases and most nontort claims seeking monetary recovery against the United States government.

A history of the United States Court of Appeals for the Tenth Circuit was published in 1992. Logan, Hon. James K., ed., *The Federal Courts of the Tenth Circuit: A History* (1992).

Only the United States Supreme Court can review decisions of the Tenth Circuit. In almost all instances the Court has the discretion whether to take the case. Indeed, the United States Supreme Court accepts for review less than one percent of the Tenth Circuit's cases. In most litigation the court of appeals is for practical purposes the court of last resort.

The headquarters of the Tenth Circuit is the Byron White United States Courthouse, 1823 Stout Street, Denver, Colorado, named after Supreme Court Justice Byron R. White who served on the Court from 1962 to 1993. Justice White was a Colorado native and was assigned as our circuit justice during his tenure on the United States Supreme Court. Most oral arguments are heard in Denver, but the court may hear cases at any place within the circuit. The court holds special criminal sessions in the separate states and occasionally will hold a full session in one of the states in the circuit.

Judges

Each of the six states in the circuit has at least one active judge on the court. The court is allocated twelve judges and has eight senior judges. Although all judges on the Tenth Circuit maintain chambers in the Denver courthouse, the non-Colorado judges have their principal working chambers in their home states.

The chief judge is the administrative head of the court. A judge becomes chief by being the circuit judge in regular active service who is both senior in commission and under the age of sixty-five when an opening occurs. The chief judge may not serve more than seven years or after reaching age seventy. The chief judge is also a member of the Judicial Conference of the United States and presides over the annual Judicial Conference of the circuit and over the Judicial Council of the Circuit.

Circuit judges are appointed by the President and are confirmed by the Senate. The active circuit judges are those who have entered upon the service of their office, and have not yet taken senior status or retirement. A judge becomes eligible for senior status or retirement at age sixty-five if he or she has fifteen years of service, or at a later age when a combination of the judge's age and service on the court (with a ten-year minimum) equals eighty. Senior judges continue as members of the court to the extent that they are willing and the court requests their service. All of the senior judges of this court continue to serve and provide great service to the court. It would not be possible for the court to handle its workload without their contribution.

The current active judges (effective October 2015), in order of seniority, are: Chief Judge Timothy M. Tymkovich of Colorado; Paul J. Kelly, Jr. of New Mexico; Mary Beck Briscoe of Kansas; Carlos F. Lucero of Colorado; Harris L Hartz of New Mexico; Neil M. Gorsuch of Colorado; Jerome A. Holmes of Oklahoma; Scott M. Matheson, Jr. of Utah; Robert E. Bacharach of Oklahoma, Gregory A. Phillips of Wyoming, Carolyn B. McHugh of Utah, and Nancy L. Moritz of Kansas. Senior judges (effective October 2015) are Monroe G. McKay of Utah; Stephanie K. Seymour of

Oklahoma; John C. Porfilio of Colorado; Bobby R. Baldock of New Mexico; David M. Ebel of Colorado; Michael R. Murphy of Utah, and Terrence L. O'Brien of Wyoming (effective April 1, 2015).

Non-judge Personnel

Although the chief judge oversees all of the circuit's administration, non-judge personnel supervise many important activities of the circuit more directly. The Circuit Executive, David Tighe, is in charge of most non-judicial administrative duties of the courts within the Tenth Circuit. His specific duties include receipt of all misconduct complaints against judges in the circuit.

The Clerk of the Court, Elisabeth Shumaker, is custodian of the court's records and papers. With the assistance of the Chief Deputy Clerk, Chris Wolpert, and a large staff in the clerk's office, she receives and accounts for monies paid to the court, initiates a docket for each appeal, issues calendars of cases for court sessions, and enters orders and opinions of the court as authorized and issued by the judges. The clerk also has authority to act on certain routine motions. 10th Cir. R. 27.3(A). The clerk's office is located on the first floor of the Byron White United States Courthouse, 1823 Stout Street, Denver, Colorado, and is open for business from 8:00 a.m. to 5:00 p.m., Mountain Time, Monday through Friday, except legal holidays. With the court's electronic filing system, however, it is always open for the purpose of filing appropriate documents. Emergency matters arising outside of regular office hours requiring immediate attention should be directed to the Clerk, Elisabeth Shumaker, or Chief Deputy Clerk, Chris Wolpert, whose cell phone numbers are: Elisabeth Shumaker (303) 521-6468 and Chris Wolpert (510) 207-3952.

The Office of Staff Counsel, headed by Niki Esmay Heller, provides major assistance to the judges on selected types of cases, particularly those that do not require oral argument.

The Circuit Librarian, Madeline Cohen, presides over a large collection of legal materials at the circuit library in Denver. The circuit library is available for use by lawyers admitted to practice before the circuit court, and is located in the Byron Rogers United States Courthouse, 1929 Stout Street, Denver, Colorado.

The Circuit Mediation Office provides mediation services in civil appeals. The Circuit Mediators are David W. Aemmer and Kyle Ann Schultz. You may be contacted by one of them to explore the possibility of settlement of your case. Counsel are

encouraged to request a conference if the Circuit Mediation Office might assist in settling your case. Requests for a conference are confidential.

The names, office addresses, and phone numbers of the key administrative personnel appear at the end of this section.

Names, Addresses, and Telephone Numbers of

Court Officers and Offices

David Tighe, Circuit Executive, U.S. Court of the Tenth Circuit, Byron White U.S. Courthouse, Denver, Colorado 80257; (303) 844-2067

Elisabeth A. Shumaker, Clerk, U.S. Court of Appeals for the Tenth Circuit, Byron White U.S. Courthouse, Denver, Colorado 80257; (303) 844-3157

Niki Esmay Heller, Chief Staff Counsel, U.S. Court of Appeals for the Tenth Circuit, Byron White U.S. Courthouse, Denver, Colorado 80257; (303) 844-5306

Madeline R. Cohen, Librarian, U.S. Court of Appeals for the Tenth Circuit, C-411 U.S. Courthouse, Denver, Colorado 80294; (303) 844-3591

David W. Aemmer, Chief Circuit Mediator, U.S. Court of Appeals for the Tenth Circuit, Byron White U.S. Courthouse, Denver, Colorado 80257; (303) 844-6017; FAX (303) 844-6437

Inquiries Concerning Rules, Procedures, or Cases

The rules, this *Guide* and other information about the court is available on the court's website at http://www.ca10.uscourts.gov. In particular, interested parties will find information and training tools, including a CM/ECF Manual, on the court's website. The website also includes information for lawyers seeking to register to file electronically.

Additionally, access to the court's docket and opinions is available on PACER (Public Access to Court Electronic Records) at www.ca10.uscourts.gov/pacer. To register as a PACER user (which is a separate registration from that allowing electronic filing); use the Registration Wizard at https://pacer.psc.uscourts.gov/pscof/regWizard.jsf. PACER is available around the clock seven days a week. The court's opinions are also available free of charge on the court's website.

As noted above, emergency matters or matters requiring special handling or interpretation of the rules should be directed to the Clerk, Elisabeth Shumaker; Chief Deputy Clerk, Chris Wolpert or a deputy clerk at the central number for the clerk's office, (303) 844-3157. For emergencies arising outside regular office hours which require immediate attention, or on weekends and holidays, inquiries may be directed to one of the following:

Elisabeth Shumaker	**Cell phone** (303) 521-6468
Chris Wolpert	**Cell phone** (510) 207-3952

MAJOR CASE PROCESSING EVENTS

Effective December 1, 2014

Key:

USDC	*United States District Court*	FRAP	*Federal Rules of Appellate Procedure*
USCA	*United States Court of Appeals*	10th CR	*Tenth Circuit Rules*
USTC	*United States Tax Court*	IFP	*In Forma Pauperis*
USC	*United States Code*	NOA	*Notice of Appeal*
		ROA	*Record on Appeal*

WHAT	WHO	WHERE/WHEN	REFERENCE
Notice of Appeal	Appellant	Filed in USDC: Criminal Cases: within **14** days after entry of judgment, or **30** days if U.S. is the appellant; Civil Cases: within **30** days after entry of the order or judgment, or **60** days if U.S. is a party; Filed in USTC: Tax Cases: within **90** days after decision is entered.	FRAP 4(b) FRAP 4(a) FRAP 13
Petition for Review	Petitioner	Filed in USCA: within time provided by statute	FRAP 15
Entry of Appearance	All parties	Within fourteen days of filing appeal or other proceeding	10th Cir. R. 46.1(A)

WHAT	WHO	WHERE/WHEN	REFERENCE
Filing and Docketing Fees	Appellant or Petitioner	Paid to the Clerk, USDC or USTC, when NOA is filed, unless appellant is IFP or U.S.: Filing fee $ 5.00 Docket fee $ 500 (eff. 12/1/13) Paid to Clerk, USCA, in cases seeking review of administrative orders or other original proceedings: Docket fee $500 (eff. 12/1/13)	FRAP 3 28 U.S.C. § 1913
Preliminary Record	Clerk, USDC	Transmitted to USCA within **24** hours after NOA filed	10th CR 3.2
Docketing Statement	Appellant or Petitioner	Filed in USCA: within **14** days after NOA is filed in USDC or USTC, or within **14** days after petition for review is filed in USCA (please note effective January 1, 2013 pro se appellants need not file docketing statements)	10th CR 3.4, 14.1, 15.1
Transcript Order Form	Appellant	Delivered to court reporter and copies filed in USDC and USCA within **14** days after NOA is filed	FRAP 10(b)
Designation of Record	Appellant ***(Appeals with court-appointed counsel only)***	Filed in USCA within **14** days after NOA is filed	10thCR 10.2(A)(2)
Transcript	Court Reporter	Filed in USDC: <u>Criminal Cases</u>: within **30** days after ordered; <u>Civil Cases</u>: within **60** days after ordered.	10th CR 10.1 Appellate Transcript Management Plan
Record on Appeal	Clerk, USDC ***(for appointed counsel or pro se cases only—retained appellant's counsel must file an appendix)***	Filed electronically in USCA: when complete	FRAP 11(b), 10thCR 11.2

WHAT	WHO	WHERE/WHEN	REFERENCE
Appellant's or Petitioner's Opening Brief	Appellant or Petitioner	Filed in USCA: <u>USDC Appeals/Retained Counsel</u>: within **40** days of the date district court notifies the record is complete; <u>USDC Appeals/Appointed Counsel</u>: Per order of USCA entered after ROA is filed; <u>USTC Appeals</u>: within **40** days after ROA is filed; <u>Agency Appeals</u>: within **40** days after certified list or record is filed, whichever occurs first.	10th CR 31.1(A)(1) FRAP 31(a), 10th CR 31.1(A)(2) FRAP 31(a)(1) 10th CR 31.1.3
Appellee's or Respondent's Answer Brief	Appellee or Respondent	Filed in USCA: within **30** days after service of Appellant's/Petitioner's Brief	FRAP 31(a)(1)
Appellant's or Petitioner's Reply Brief	Appellant or Petitioner	Filed in USCA: within **14** days after service of appellee's or respondent's brief	FRAP 31(a)(1)
Oral Argument Calendars	Clerk, USCA	Issued approximately 6-8 weeks prior to oral argument (please see the court's website for additional information)	
Oral Argument Appearance	Appellant/Petitioner **and** Appellee/ Respondent	As **set forth in calendar notice**: Counsel must check in with Clerk, USCA, at least 30 minutes before court convenes the session	10th CR 34.1(A)(1)
Decision	Judges, USCA	Usually several weeks to several months after submission	
Petition for Rehearing	Parties Seeking Rehearing	Filed in USCA: within **14** days after entry of judgment unless a civil case in which U.S. or agency or officer thereof is a party, then **45** days after the entry of judgment	FRAP 40

WHAT	WHO	WHERE/WHEN	REFERENCE
Bill of Costs	Prevailing Party	Filed in USCA: within **14** days after the entry of judgment	FRAP 39
Mandate	Clerk, USCA	Issued **7** calendar days after time for filing petition for rehearing expires, unless petition for rehearing is filed, then issued **7** calendar days after entry of any order denying the petition for rehearing	FRAP 41
Petition for Writ of Certiorari	Parties Seeking Writ	Filed with Clerk, **U.S. Supreme Court**, within **90** days of entry of judgment or denial of timely petition for rehearing	28 U.S.C. § 2101(c) Rule 13, Supreme Court Rules

Parties should note that effective January 1, 2015, the court has instituted an electronic appendix requirement for retained counsel cases. *See* 10th Cir. R. 30.1(A) through (E).

* Note: An electronic version of this *Answers to Frequently Asked Questions* form is available on our website.

I. TO APPEAL OR NOT TO APPEAL

The first decision the losing party in the district court or agency proceeding must make is whether to appeal at all. Counsel should consider the chances of success objectively when advising the client whether to file a notice of appeal. In addition, counsel should consider the costs of delay and possible sanctions if the appeal is found meritless. The statistics are as follows:

A. Duration of Appeal.

During the statistical calendar year ending June 30, 2014 the median time from filing the notice of appeal or petition for review to entry of a decision for all appeals and agency proceedings was 8.3 months. This is faster than the median time for the majority of the courts of appeals. This circuit hears most criminal appeals as soon as they are fully briefed. Civil appeals without priority can, however, take longer. The court has taken some extraordinary steps to speed up the appellate process, but delay remains a factor to consider in civil cases.

B. Chances of Success.

The reversal rate in this circuit for the 12-month period ending December 30, 2014 breaks down as follows:

Criminal	3.7%	
U.S. Prisoner Petitions	.6%	
U.S. Civil	13.8%	
Private Prisoner Petitions	3.4%	
Other Private Civil	4.6%	
Bankruptcy	4.0%	
Administrative Appeals	4.5%	(from 2013)

Counsel and interested parties should note these statistics are taken from reports produced by the Administrative Office of the U.S. Courts. They are very general statistics, and may not reflect nuances in particular case-types or substantive areas.

C. Sanctions for Meritless Appeals.

If the court finds that an appeal is frivolous, it may award damages and single or double costs. Fed. R. App. P. 38. These costs may be awarded against counsel personally if the court finds the fault is with the lawyer. The test under Rule 38, and 28 U.S.C. § 1927, is whether counsel exhibited objectively unreasonable conduct in pursuing the appeal. *Braley v. Campbell*, 832 F.2d 1504, 1512 (10th Cir. 1987) (en banc). Prisoners may forfeit good time credits if the court finds an appeal frivolous. Under the Prison Litigation Reform Act, a prisoner who brings three frivolous suits may not proceed without prepayment of the filing fee. *See* 28 U.S.C. § 1915(g). *See also* 10th Cir. R. 40.1(B) for sanctions imposed for meritless petitions for rehearing.

II. INITIATING A PROCEEDING

A. Jurisdiction.

Lawyers are responsible for determining whether a case is within the appellate jurisdiction of this court and is not premature. Generally speaking, the circuit court only has jurisdiction over final orders of the federal district courts within its territorial jurisdiction, *see* 28 U.S.C. § 1291, and final orders of a variety of federal administrative tribunals involving residents of the circuit. Certain district court orders that are final only as to some claims or some parties may be appealable under a district court certification order pursuant to Fed. R. Civ. P. 54(b). Likewise, a limited class of interlocutory orders may also be reviewed immediately. *See* 28 U.S.C. § 1292(b) and 28 U.S.C. § 1453(c).

The circuit has the power to entertain writs of mandamus, prohibition, or the like, in the rare cases in which they are appropriate. The court of appeals has no power to review decisions of state courts directly. The court may review certain state court decisions indirectly, in criminal cases, on appeal of habeas corpus proceedings initiated in federal district court.

The Federal Rules of Appellate Procedure govern all actions in the United States Courts of Appeals, whether by appeal from a district court, including a magistrate's judgment if authorized by 28 U.S.C. § 636(c)(3), as a matter of right or with permission; by appeal from the United States Tax Court; by petition for review or to enforce an agency order; or by an original proceeding. Fed. R. App. P. 1. In addition, the Tenth Circuit Rules govern all proceedings in this court. Fed. R. App. P. 47 and 10th Cir. R. 1.1. Depending upon the type of appellate proceeding, the initiating party is referred to as "appellant" or "petitioner" and the adversary as "appellee" or "respondent."

B. Appeals from District Courts.

Parties seeking to appeal a final judgment or order of a district court must file a notice of appeal with the district clerk within the time prescribed. Fed. R. App. P. 3(a). The notice of appeal must name all of the parties seeking to appeal. It must also designate the judgment or order on appeal, and must name the court where the appeal is taken. Fed. R. App. P. 3(c). Form 1 in the Forms following the Federal Rules of Appellate Procedure (which you will find on the court's website) is a suggested notice of appeal.

The district clerk notifies the other parties that a notice of appeal was filed. The clerk transmits a copy of the notice, with the preliminary record, to the circuit clerk. The

preliminary record consists of the order or judgment appealed and any post-judgment motions. Fed. R. App. P. 3(d) and 10th Cir. R. 3.2.

1. Time for Filing Notice of Appeal

a. Civil Cases:

(i) If the government is not a party, the notice of appeal must be filed within 30 days after entry of the judgment or order appealed from. Fed. R. App. P. 4(a)(1)(A).

(ii) If the government is a party, any party may file a notice of appeal within 60 days after entry of the judgment or order appealed from. "Government" means the United States or its officer or agency. Fed. R. App. P. 4(a)(1)(B).

(iii) If a party files a timely notice of appeal, any other party may file a notice of appeal within 14 days of that date, even though the otherwise prescribed time to appeal has expired. (For example, if one party files a notice of appeal on the twenty-ninth day in a case in which the government is not a party, any other party may file a notice of appeal up to and including the forty-third day. If, however, one party files a notice of appeal on the fifth day, any other party may still wait until the thirtieth day to file a notice of appeal.)

b. Criminal Cases:

(i) A defendant's notice of appeal must be filed within 14 days after entry of the judgment or order appealed. Fed. R. App. P. 4(b)(1)(A).

(ii) A notice of appeal by the government, when authorized, must be filed within 30 days after entry of the judgment or order appealed. Fed. R. App. P. 4(b)(1)(B).

NOTE –Under appropriate circumstances, the district court may grant a limited extension of time to file a notice of appeal if the application is filed within 30 days of the time permitted for filing the notice of appeal. Fed. R. App. P. 4.

2. Calculation of Time.

a. Final judgments.

As a general rule, appeals of right must be taken from final judgments. Appeals from certain interlocutory orders, however, are expressly authorized by statute. The time for appealing those orders is the same as that for other civil appeals. In addition, Rule 54(b) of the Federal Rules of Civil Procedure authorizes the district court to permit an immediate appeal from an otherwise nonappealable interlocutory order. The court may make a specific finding that there is no just reason for delay and may direct the district court clerk to enter judgment as to one or more, but fewer than all, of the claims or parties. The time for filing the appeal starts from the date the district clerk enters the otherwise interlocutory order as final. Absent a Rule 54(b) certification, a notice of appeal filed before entry of the final judgment is premature and subject to dismissal. The notice may be sufficient if the district court enters a final judgment in the case prior to dismissal of the appeal in this court. *Lewis v. B. F. Goodrich Co., et al.*, 850 F.2d 641 (10th Cir. 1988) (en banc) and *FSLIC v. Huff*, 851 F.2d 316 (10th Cir. 1988) (en banc).

b. Commencement of Time.

The time for filing a notice of appeal runs from the **entry** of judgment, i.e., when the district clerk enters the judgment or order appealed on the district court docket sheet. The district judge's announcement of a decision, sentence or order or an opinion or memorandum decision including the words "so ordered" does not constitute the final judgment. The district clerk must enter a separate judgment, and the time to file a notice of appeal runs from that entry. Fed. R. App. P. 4(a)(7). The district clerk is required to notify all proper parties to an action of the entry of the judgment or order. Absence of notice may be a condition for reopening the time for filing the notice of appeal. Fed. R. App. P. 4(a)(6).

c. Premature Notice of Appeal.

A notice of appeal filed after the announcement of a decision, sentence or order, but before the entry of judgment, in either a civil or criminal case, is treated as filed on the date of and after the entry. Fed. R. App. P. 4(a)(2) & (b)(3)(B). This is also true of a notice of appeal filed after a conditional guilty plea but before

sentencing in a criminal case. *Green v. United States*, 847 F.2d 622 (10th Cir. 1988) (en banc).

d. Effect of Post-judgment Motions in Civil Cases.

Timely filing of any of the following motions in a civil case by any party will suspend the time otherwise prescribed for filing a notice of appeal:

(i) for judgment under Rule 50(b);

(ii) to amend or make additional factual findings under Rule 52(b), whether or not granting the motion would alter the judgment;

(iii) for attorney's fees under Rule 54 if the district court extends the time to appeal under Rule 58;

(iv) to alter or amend the judgment under Rule 59;

(v) for a new trial under Rule 59; or

(vi) for relief under Rule 60 if the motion is filed no later than 10 days (computed using Federal Rule of Civil Procedure 6(a)) after the judgment is entered.

NOTE – A notice of appeal filed in a civil case before disposition of any of the motions enumerated in Fed. R. App. P. 4(a)(4) has no effect until entry of the order disposing of the last such motion and will have no effect as to orders entered after date of the notice of appeal. To appeal the order, or any modification of the judgment, an amended notice of appeal must be filed. *See* Fed. R. App. P. 4(a)(4)(B)(ii). If fees were paid when the first notice of appeal was filed, they will be applied to the subsequent notice of appeal and no additional fees will be required.

e. Post-judgment Motions in Criminal Cases.

Similarly, timely filing of a motion for a judgment of acquittal, for arrest of judgment, or for a new trial other than for newly discovered evidence, or for newly discovered evidence if filed within 14 days after entry of judgment, tolls the time for filing the notice of appeal.

3. Fees.

Every appellant, except the United States or its officer or agency, must pay the required fees ($5 filing fee and $500 docketing fee—eff. 12/1/2013) to the district clerk when a notice of appeal is filed. Failure to pay the required fees may result in dismissal of the appeal, as well as revocation of bond in a criminal appeal. Fed. R. App. P. 3(e). A litigant who is unable to pay the fee may move for leave to proceed without prepayment of fees. That request should be made in the first instance in the district court. Abuse of leave to proceed in forma pauperis may lead to the imposition of filing restrictions. A prisoner who has no funds may pay a portion of the fee and the rest in installments. 28 U.S.C. § 1915(b)(1). A prisoner who has had three prior cases dismissed as frivolous or malicious or for failure to state a claim may not proceed without full prepayment of the fee. 28 U.S.C. § 1915(g).

The *Prison Litigation Reform Act of 1995,* Pub. L. No. 104-134, 110 Stat. 132 (April 26, 1996) imposes special restrictions on prisoners. Among other requirements, they must provide a certified statement of their prison accounts for the six months prior to filing the application to proceed without full prepayment of the fee. Statements must be obtained from every institution in which the prisoner was in custody during the six-month period. If the applicant has insufficient funds to pay the entire fee, the court is required to assess the account and, when funds become available, collect a partial payment of the fee. After the initial assessment, the monthly payments must be deducted from the account until the full fee is paid.

4. Bond for Costs on Appeal in Civil Cases.

In a civil case, the district court may require appellant to file a bond to ensure payment of costs on appeal. Fed. R. App. P. 7. Failure to comply with a district court order requiring a cost bond may be grounds for dismissal of the appeal. The cost bond secures only costs on appeal. It is different from a supersedeas bond, which secures a money judgment while the appeal is prosecuted.

C. Appeals from Judgments Entered by Magistrates in Civil Cases.

A judgment entered by a United States magistrate judge pursuant to 28 U.S.C. § 636(c)(1) may be appealed to this court in accordance with 28 U.S.C. § 636(c)(3). The appeal must be taken the same way as other appeals from district court judgments. Fed. R. App. P. 3(a)(3). Following appeal from a magistrate's decision to a judge of the district court pursuant to 28 U.S.C. § 636(c)(4), a party may petition this court pursuant

to 28 U.S.C. § 636(c)(5) for leave to appeal the district court's decision. The petition will be processed in the same manner as all petitions for permission to appeal. *See* Fed. R. App. P. 5.

D. Appeals by Permission from Interlocutory Orders.

A party may petition for permission to appeal pursuant to 28 U.S.C. § 1292(b), 28 U.S.C. § 1453(c) and Fed. R. Civ. P. 23(f). *See* Fed. R. App. P. 5. A permissive appeal under § 1292(b) requires a particularized statement from the district court. An order may be amended at any time to include the prescribed statement. Fed. R. App. P. 5(a)(3).

NOTE – Interlocutory district court orders certified under § 1292(b) may be appealed only after permission to appeal is obtained from the court of appeals. Absent such permission, even appeals from orders certified by the district court are subject to dismissal for lack of jurisdiction. In contrast, orders made final under Fed. R. Civ. P. 54(b) are directly appealable and do not require discretionary approval by the court of appeals.

1. Requesting Permission to Appeal.

To request permission to appeal, a party must file a petition for permission to appeal with the circuit clerk. *See* Fed. R. App. P. 5. The petition must include proof of service on all parties to the action in the district court. Those petitions may be submitted electronically through the utilities contained in the court's ECF system. In the alternative, they may be emailed to clerk@ca10.uscourts.gov. Instructions for filing the petitions electronically can be found on the court's website under the "Attorneys" tab by selecting "Original Proceedings". Parties should call the clerk's general number with questions at 303-844-3157.

2. Time for Filing.

The petition must be filed within the time specified by the statute or rule authorizing the appeal or, if no time is specified, within the time noted in Rule 4(a) for filing a notice of appeal. Fed. R. App. P. 5(a)(2).

3. Processing the Petition and Answer.

The clerk will enter the petition on the docket. Adverse parties may file an answer within ten days after service of the petition. When the time for filing answers has expired, the clerk will submit the petition and answer, if any, to the court. There will be no oral argument on the petition unless the court orders it. Fed. R. App. P. 5(b)(3).

4. Granting of Permission.

Within ten days of entry of an order granting permission to appeal, the appellant must pay the required docket fee ($505) to the district court clerk and must file a bond for costs if required pursuant to Fed. R. App. P. 7. Upon notification that the docket fee has been paid, the clerk of this court will enter the appeal on the docket. If no fee is required, the clerk must enter the appeal on the docket after the order granting permission to appeal is entered. A notice of appeal need not be filed. The time for performing acts under the Federal Rules of Appellate Procedure and the Tenth Circuit Rules which normally run from the filing of the notice of appeal will run from the date of entry of the order granting leave to appeal. Fed. R. App. P. 5(d)(2).

E. Review of Decisions of the United States Tax Court.

An appeal from a United States Tax Court decision is taken by filing a notice of appeal with the clerk of the Tax Court in Washington, D.C. The Tax Court clerk notifies all other parties that a notice of appeal has been filed. The content of the notice is the same as in appeals from district courts. Fed. R. App. P. 13(b) and (c). Form 2 of the Forms following the Federal Rules of Appellate Procedure is a suggested form of the notice of appeal.

1. Time for Filing.

A notice of appeal from a decision of the Tax Court must be filed within 90 days of entry of judgment. If a timely notice of appeal is filed, any other party may appeal by filing a notice within 120 days after entry of the decision of the Tax Court. Fed. R. App. P. 13(a)(1). A notice of appeal mailed to the clerk and postmarked within the time for filing will be considered timely filed even if the clerk receives it after expiration of the prescribed time. Fed. R. App. P. 13(b).

NOTE – This provision applies only to Tax Court appeals.

2. Tolling of Time for Filing a Notice of Appeal.

A timely motion to vacate or revise a decision, made in conjunction with the Rules of Practice of the Tax Court, tolls the running of time for filing a notice of appeal. The filing time will begin to run again for all parties upon entry of the order disposing of the motion, or from entry of the revised decision, whichever is later. Fed. R. App. P. 13(a)(2).

F. Review or Enforcement of Agency Orders.

Review of an agency order may be obtained by filing a petition for review with the circuit clerk. Petitions for review may be submitted electronically through the utilities found in the court's ECF system. In the alternative, petitions may be forwarded via email to clerk@ca10.uscourts.gov. Instructions and information regarding filing petitions electronically can be found on the court's website under the "Attorneys" tab by selecting "Original Proceedings". The form of a petition is similar to that of a notice of appeal. Form 3 of the Forms following the Federal Rules of Appellate Procedure is a suggested form of a petition for review. The respondent is the appropriate agency, board or officer. The United States may also be a respondent if required by statute. When a statute provides for enforcement of an agency order by a court of appeals, an application for enforcement may be filed with the circuit clerk. The clerk serves the respondents with copies of the petition for review or application for enforcement but the petitioner must serve a copy on all other parties to the administrative proceedings and file with the clerk a list of those parties served. ***Parties should note*** new local rule 15.3 (eff. Jan. 1, 2015) which requires the petitioner to include a list of respondents requiring service by the clerk's office.

No response to a petition for review is required. If an application for enforcement is contested, however, the respondent must serve and file an answer within 20 days after the application for enforcement is filed. Failure to answer will result in judgment by default. A respondent may file a cross-application for enforcement if the court has jurisdiction to enforce the order. All cross-applications will be filed in the proceeding which is already docketed, no new number will be assigned. The two matters will be briefed and submitted as a single proceeding. Fed. R. App. P. 15(a), (b) and (c).

A docket fee of $500 (eff. 12/1/2013) must be paid when a petition for review is filed. That fee may be paid electronically through the court's ECF "pay.gov" system. Alternatively, a check in the proper amount may be forwarded to the office of the clerk. Information and instructions regarding paying fees electronically can be found on the court's website. Failure to pay the required fee is grounds for dismissal. 10th Cir. R.3.3(B) and 20.1.

1. Time for Filing Petition or Application.

A petition for review or application for enforcement must be filed within the time prescribed by the applicable statute. That time varies from agency to agency.

2. Contents and Number of Copies of Petition for Review and Application for Enforcement.

A petition for review or application for enforcement should contain a concise statement describing the underlying proceeding, any reported citation of the order at issue, the facts on which venue is based, and the relief requested. A respondent must serve and file an answer to an application for enforcement within 20 days; otherwise, judgment will be awarded as requested. Fed. R. App. P. 15(b)(2).

G. Original Proceedings.

To submit a petition for a writ of mandamus or prohibition, or a petition for another extraordinary writ, pro se parties must file the original, either in person, by mail, or via email (to clerk@ca10.uscourts.gov), with the circuit clerk. Counseled parties may submit the materials through the court's ECF utility (please see the "Attorneys" tab on court's website and select "Original Proceedings" for additional information). In the alternative, counseled parties may submit petitions via clerk@ca10.uscourts.gov . They may also be delivered in person to the Byron White Courthouse. Proof of service on the respondent judge or judges and on all parties to the action in the trial court is required. In addition, the clerk may not submit the petition to the court until the prescribed docket fee of $500 (eff. 12/1/2013) is paid or the petitioner has submitted a proper motion for leave to proceed in forma pauperis. Fed. R. App. P. 21(a)(3). Prisoners may be required to pay a portion of the fee before the petition is submitted and the rest in installments.

1. Time for Filing a Petition.

Extraordinary writs are usually matters of great urgency; no time limit is prescribed.

2. Contents of the Petition.

The petition must contain a statement of the issues, the facts necessary to an understanding of the issues, the relief sought, and the reasons why the writ should issue. If the case requires a decision by a date certain, that date should be prominently stated. Parties seeking emergency relief should call the clerk's office before filing. Copies of an opinion or order or necessary parts of a record must also be included. Fed. R. App. P. 21(a)(2)(B). The petition must be titled "In re [name of petitioner]." Fed. R. App. P. 21(a)(2)(A).

3. Further Proceedings.

If the court anticipates denying the petition, it generally does so without calling for an answer. It may, however, issue an order fixing a time for filing an answer. The clerk serves the order on all persons directed or invited to respond. Fed. R. App. P. 21(b)(2). All parties other than petitioner are respondents for all purposes. Ordinarily the court will decide the petition on its merits at that point. Occasionally the court will call for briefing and set the matter for oral argument. It is rare for the court to set oral argument on these matters.

III. DOCKETING STATEMENT

A. Appeals from District Courts.

In counseled cases appealing to this court from a district court judgment or order, the appellant must file a docketing statement with the circuit clerk within 14 days after the notice of appeal is filed. 10th Cir. R. 3.4(A). If the court of appeals has not yet assigned a docket number, the district court docket number is sufficient to identify a docketing statement. *Please note* effective January 1, 2013, pro se parties are not required to file docketing statements. *See* 10th Cir. R. 3.4(A).

Docketing statements are used to categorize appeals and identify those with possible jurisdictional defects (*e.g.*, nonappealable orders or untimely notices of appeal) or appeals which, because of their nature or circumstances, may require expeditious or other special processing. The docketing statement is not a brief and does not limit the issues which may ultimately be raised on appeal. Although appellants and their counsel are encouraged to consider carefully the issues raised on appeal and to include them in the docketing statement, omission of an issue from the docketing statement does not preclude argument on that issue in appellant's brief. The docketing statement should not contain argument. The court **strongly** disfavors motions to strike or amend the docketing statement and arguments over its contents.

1. Form and Content of Docketing Statement.

The docketing statement must be in a form approved by this court, 10th Cir. R., Form 1, and must include all of the required information and attachments. Forms are available on the court's website under the "Case Management" tab.

Please note the court has changed the requirements for attaching documents to the docketing statement effective January 1, 2013. **The requirements outlined below are effective on that date.**

A copy of each of the following documents **must be included with** the docketing statement when it is filed in the court of appeals.

- the final judgment or order appealed from;
- any pertinent findings and conclusions, opinions, or orders, which form the basis for the appeal;

- any motion filed under Fed. R. Civ. P. 50(b), 52(b), 54, 59 or 60, including any motion for reconsideration, together with the dispositive order, if any;
- any motion for extension of time to file the notice of appeal, with the dispositive order, if any; and

2. Filing and Service.

Within 14 days after the notice of appeal is filed, appellant must file the docketing statement with the circuit clerk. Copies of the documents listed above and in the docketing statement instructions **must be attached** to the docketing statement. If a docketing statement is not filed, the appeal may be dismissed. 10th Cir. R. 42.1.

3. Appeals by Permission from Interlocutory Order.

In appeals by permission from interlocutory orders, the appellant must file the docketing statement with the circuit clerk within 14 days after entry of the order granting leave to appeal. Fed. R. App. P. 5. All requirements as to form, content, filing, and service of the docketing statement apply to appeals by permission.

B. Review of Decisions of the United States Tax Court and Review or Enforcement of Agency Orders.

In cases involving review of decisions of the United States Tax Court, the appellant/petitioner must file the docketing statement with the clerk of this court within 14 days after the appeal is docketed. 10th Cir. R. 14.1 (applying 10th Cir. R. 3 to Tax Court cases). In cases involving review or enforcement of agency orders, the filing party must file a docketing statement with the clerk of this court within 14 days after the petition for review or application for enforcement is filed. 10th Cir. R. 15.1 (applying R. 3 to agency cases). Docketing statements must be filed in a form approved and provided by the court. 10th Cir. R., Form 1. The filing party must attach copies of the following documents to the docketing statement:

- the order appealed from or to be reviewed or enforced.

The docketing statement must contain proof of service on all other parties to the appeal or proceeding in this court.

IV. RECORDS AND APPENDICES

The record on appeal (or appendix) consists of the original materials and exhibits filed in the district court, a copy of the docket entries prepared by the district clerk, and the transcript of proceedings, if any, filed with the district clerk. Fed. R. App. P. 10(a). Except in pro se appeals and criminal appeals with appointed counsel, the record is submitted to the court *by the appellant* in an appendix. Whether a record or appendix is required in a particular appeal depends upon whether appellant's counsel is court-appointed or retained. In appeals filed with Criminal Justice Act counsel, a designation of record is filed and the district court forwards the electronic record. *See* 10th Cir. R. 10.2(A). In pro se appeals, the district court prepares and transmits an electronic record. *See* 10th Cir. R. 10.2(C). In cases in which the appellant is represented by retained counsel, an *electronic* appendix is required in accordance with 10th Cir. R. 30.1(A) through (E). Counsel should review the rule carefully for new requirements and information, including rules on seeking an exemption to the electronic requirement. The appendix requirement applies to bankruptcy cases as well. 10th Cir. R. 6.1.

If counsel is retained, it is appellant's duty to include all necessary documents and transcripts in the appendix. The court of appeals is not required to remedy appellant's failure to provide an adequate appendix. 10th Cir. R. 10.3(B). Parties should also note that in addition to filing an electronic appendix, counsel must also file a single hard copy. The hard copy must be received in the clerk's office within 2 business days of the electronic filing.

If appellant's counsel is appointed, appellant must designate parts of the record for transmission to the court of appeals by the district court. An appendix is not required. 10th Cir. R. 10.2(A). If **any** appellant in a companioned or consolidated appeal is represented by court-appointed counsel, then all appellants must also designate the record and no appendix is required.

A. Appendices.

Because appellate review is based on the record, the most important part of appellant's case is the presentation of the record in the appendix. What and how much to include presents a dilemma. The court requires a limited appendix because it is easier to work with. At the same time, counsel must provide an appendix that is sufficient for consideration and determination of the issues on appeal. 10th Cir. R. 30.1(A); *see also* 10th Cir. R. 10.3(B). The court may decline to consider an issue if the appendix is inadequate to consider fully that issue. Analogy to the rules governing preparation of a

record on appeal is helpful. If sufficiency of the evidence is an issue, the entire trial transcript must ordinarily be See 10th Cir. R. provided. 10th Cir. R. 10.1(A)(1)(a). When less than the entire transcript is necessary, the elided transcript must clearly identify the speakers. If the transcript provided does not start at the beginning of a witness' testimony, the witness and the other speakers must be identified. The court has ruled that all or certain portions of the record must be provided for review in certain cases. For example, in appeals of social security cases, the entire administrative record must be included in the appendix. In addition, counsel should note that when an objection is made to a magistrate judge's report and recommendation, the objection must be included.

Those items excluded from the record on appeal by 10th Cir. R. 10.3(E) should not be included in an appendix unless they are necessary to support an issue on appeal. In addition, those items required in the record by 10th Cir. R. 10.3(C) and (D) must be included in the appendix.

NOTE – The parties are encouraged to agree on the contents of the appendix.

Please note a Briefing and Appendix Checklist, effective February 26, 2015, is posted on the court's website. It includes information about the new electronic appendix requirement.

1. Form of the Appendix (electronic version)

As noted above, the court now requires an electronic appendix. For information regarding creating that appendix, practitioners are directed to the *CM/ECF User's Manual* at Section II, Part R (page 15), Section III, Part 7 (page 19) and Section IV, Part J (page 77). See also 10th Cir. R. 30.1(D)(as to form).

2. Form of the Appendix (hard copy).

The hard copy of the appendix must be an exact replica of the electronic version. *See* 10th Cir. R. 30.1. In addition, all requirements as to form found in 10th Cir. R. 30.1(D) apply to the hard copy version. The cover of the hard copy should look like the cover of a principal brief. The appendix must also be indexed and paginated throughout. Each page of the appendix must be numbered seriatim. Documents or excerpts of documents included in the appendix should be arranged in chronological order beginning with the oldest document. A copy of the district court docket entries, recent enough to show the filing of the notice of appeal and

any post-judgment motions, should be the first document in the appendix. Individual volumes may not exceed 300 pages, and counsel are cautioned that where an appendix is large, separate volumes should be created to allow for manageable review. *See* 10th Cir. R. 30.1(D)(5).

NOTE – Even though the pertinent orders and the judgment appealed must be in the appendix, they must also be bound with each hard copy of appellant's opening brief and attached electronically to the ECF-filed copy. 10th Cir. R. 28.2(A).

3. Sealed Documents.

Documents that are not part of the public record, including, for example, presentence investigation reports or discovery documents that were sealed by the district court, should be filed in separate volumes. *See* 10th Cir. R. 30.1(D)(6). For additional information regarding filing sealed electronic materials via ECF, please see the court's *CM/ECF User's Manual* at Section III, Part 9 (page 20). It is available on the court's website.

To make an effective cover for the hard copy of the sealed envelope (i.e., containing the sealed materials for the appendix), counsel may tape a copy of the cover of the document to the envelope.

Except for presentence investigation reports, which are sealed by 10th Cir. R. 11.3(E), a motion for leave to file documents under seal is required. Documents tendered under seal will be held under seal provisionally pending a ruling on whether to seal permanently. Counsel may be asked to submit additional justification for the sealing.

4. Exhibits.

After trial, most demonstrative exhibits are returned to the parties who presented them. The district courts cannot store exhibits, nor can the court of appeals. Exhibits returned to the parties may be presented in the appendix. If the nature of the exhibit calls for different handling (for example, if the exhibit is large or not susceptible to digital conversion), counsel should file a motion with the court seeking permission to file that exhibit separately via hard copy only. *See* 10th Cir. R. 30.3(B).

5. Appellee's Appendix.

If appellant fails to provide necessary record items, the appellee may provide them in a supplemental electronic appendix filed with appellee's principal brief. *See* 10th Cir. R. 30.2. Disputes over the contents of the appendix are not productive and are disfavored. Copy costs can be recouped under Fed. R. App. P. 39.

6. Exemptions.

Parties seeking an exemption to the electronic appendix requirement should refer to 10th Cir. R. 30.3(A). Any appellant may move to be exempt, and if an order granting an exemption issues, that appellant will be required to submit two hard copies of the required appendix. In pro bono cases where preparing an appendix would be too costly, parties may file a motion to proceed on a record on appeal. *See* 10th Cir. R. 30.3(C).

B. Record on Appeal.

Though the record on appeal includes, and the court of appeals may examine, anything filed in the district court, some documents on file in the district court may not be necessary for an adequate presentation of the issues on appeal and should not be designated for transmission to the court of appeals. Designating unnecessary record material for transmission to the court of appeals contributes to the delay and expense of the appeal. The court's requirement that the parties specifically designate those portions of the record they wish the district court clerk to transmit is designed to reduce the record to only those materials necessary for the appeal. Because appellate review is based on the record designated, however, and because the court of appeals will not normally consider matters outside the record the parties designated, it is important that the designated record contain **all** materials necessary to an adequate presentation of the issues on appeal. This court may refuse to consider an issue if appellant does not designate an adequate record. 10th Cir. R. 10.3(B).

1. Transcripts.

a. Necessary Transcripts.

"If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant must include in the record a transcript of all evidence relevant to that finding or conclusion." Fed. R. App. P. 10(b)(2). If the appeal challenges the trial court's admission or exclusion of evidence, the giving or failure to give a jury instruction, or any other ruling or order, the record transmitted to this court must include a transcript of those portions of the proceedings where the evidence, offer of proof, instruction, ruling and order and any necessary objections are recorded. 10th Cir. R. 10.3(D)(1). Counsel should exercise discretion in deciding whether to order transcripts because they significantly increase the time and expense of an appeal.

NOTE – While only a portion of the record may be necessary to demonstrate error, harmless error analysis requires the entire transcript.

b. Ordering Transcripts.

To order necessary transcripts, parties must complete a *Transcript Order Form* approved by this court and distributed by the district clerk; must serve copies on the court reporter, the district clerk, and all other parties to the appeal, and file a

copy in the court of appeals. The ordering party must make satisfactory arrangements with the court reporter for payment of the cost of the transcript. If payment will come from the United States under the Criminal Justice Act, the form must identify the appeal as one proceeding under the CJA. The order is not complete until financial arrangements which are satisfactory to the court reporter have been made. 28 U.S.C. § 753(f) and 10th Cir. R. 10.1(B)(3). On completion of the transcript order, the court reporter must acknowledge its receipt, estimate the completion date and the number of pages in the completed transcript, and file a completed copy with this court and with the district clerk. 10th Cir. R. 10.1(B)(2). Within 14 days after service of the transcript order form, the appellee may file and serve on appellant a designation of additional transcript. If within 10 days after service of such designation, appellant does not order the additional transcript, appellee may order it during the next 14 days or may move in the **district court** for an order requiring appellant to do so. Fed. R. App. P. 10(b)(3)(C).

NOTE – Appellant must complete and file a transcript order form even if no transcript is being ordered (that is, counsel must submit a statement in the negative). The reason no transcript is ordered must be stated on the form. If no transcripts are ordered, the transcript order form must be filed in the court of appeals and served on the opposing party, but no copy need be served on the court reporter. 10th Cir. R. 10.1(A)(2).

c. Time for ordering Transcripts.

Appellant must order necessary transcripts (that is, those not already on file) within 14 days after filing the notice of appeal, or, within the same time, must state why no transcript is ordered. Because the time required for the production of transcripts is a major cause of delay in appeals, appellants are urged to order necessary transcripts as soon as possible after the notice of appeal is filed. In a criminal appeal in which appellant requests that the appeal be expedited on the ground that the sentence imposed is one year or less, any necessary transcript must be ordered at the time the notice of appeal is filed. If the transcript is not ordered in a timely fashion, the court does not favor motions for extensions of time to file briefs on the ground that the transcript is not available.

d. Filing Transcripts.

Court reporters must prepare and file transcripts as required by the Tenth Circuit Appellate Transcript Management Plan. When a transcript is complete, the court reporter must file it with the district clerk and notify the circuit clerk and the parties that it was filed. Fed. R. App. P. 11(b)(1)(C) and 10th Cir. R. 10.1(C)(2). Ordering parties should note they are responsible for making a request to redact the transcript if redaction is required.

e. Unavailability of Transcripts.

In the event transcripts are unavailable, the appellant may, as a last option, prepare a statement of the evidence or proceedings from the best available means, including recollection, and serve it on the appellee, who may serve objections or proposed amendments within 14 days. The **district court** then settles and approves the statement and objections or amendments and the resulting statement is included in the record on appeal. Fed. R. App. P. 10(c).

2. Designation of Record.

In order to reduce the size of the record transmitted to this court, parties who are represented by appointed counsel are required to designate record materials for transmission by the district court clerk. 10th Cir. R. 10.2(A). Pro se parties are not required to file a designation. 10th Cir. R. 10.2(C). In preparing the designation, counsel should remember that the record includes everything filed in the district court, *i.e.*, the pleadings and orders on file and the transcript of proceedings. For the appeal, parties should designate only pleadings, orders, and transcripts deemed essential to adequate presentation of the issues on appeal, and only to the extent that they are specifically referred to in the briefs. The court has identified certain items which may not be included in the record without specific authorization unless they are directly relevant to the issues presented on appeal. 10th Cir. R. 10.3(E). These are:

- appearances;
- bills of costs;
- briefs, memoranda, and points of authority (except as specified in 10th Cir. R. 10.3(D)(2));

- certificates of service
- depositions, interrogatories, and other discovery matters, unless used as evidence;
- lists of witnesses or exhibits;
- notices and calendars;
- procedural motions or orders;
- returns and acceptances of service
- subpoenas;
- summonses;
- setting orders;
- unopposed motions granted by the trial court;
- nonfinal pretrial reports or orders; and
- suggestions for voir dire.

In addition to identifying pleadings and orders, the designation should also include necessary parts of the transcript. To repeat: all transcripts on file with the district court should not automatically be included in the record transmitted to this court and counsel should designate only essential parts for transmission. 10th Cir. R. 10.2.1.

a. Form of Designation.

The required *Designation of Record* must be made on a form approved by this court and distributed by the district clerk. A current copy of the district court docket sheet, including the cover and subsequent pages identifying parties and counsel, must be attached to the designation. Documents are designated by marking off or circling the applicable docket entry number on the district court docket sheet.

Portions of transcripts on file with the district court clerk which are required for review on appeal must also be designated for transmission to the court of appeals. Permission of the court is required to designate pleadings or other documents

excluded by 10th Cir. R. 10.3(E) unless they are relevant to the issues raised on appeal.

b. Filing and Serving Designation.

The designating party must file the designation with the district clerk and must certify service on all other parties to the appeal and must file a copy with the circuit clerk. 10th Cir. R. 10.2.2.

c. Time for Filing Designation.

In an appeal or in a group of companion or consolidated appeals in which any party is represented by court-appointed counsel, appellant or appellants must file and serve the designation of record within 14 days after the notice of appeal is filed. The appellees may file a designation of additional record within 14 days after service of appellant's designation.

3. Transmission of Record.

In an appeal or group of companion or consolidated appeals in which any party is represented by court-appointed counsel, or in a pro se appeal, the record will be transmitted electronically to the court of appeals as provided by Fed. R. App. P. 11(b)(2) and 10th Cir. R. 11.2(A).

4. Correction and Modification of the Record.

Before or after the record is transmitted to this court, parties may apply to the district court or this court to correct or modify the record. Fed. R. App. P. 10(e). Motions for correction should be presented first to the district court.

5. Agreed Statement as Record.

Although discouraged, Fed. R. App. P. 10(d) provides that the parties may prepare an agreed statement of the record to be submitted to the district court for approval. If approved, the statement will be certified as the record on appeal and transmitted to the court of appeals by the district clerk. As noted, this is an unusual procedure and the court does not favor it.

C. Record in Appeals from the United States Tax Court.

In appeals from the United States Tax Court, Fed. R. App. P. 10, 11, 12, and 13(d) govern the record and the time and manner of its transmission. Within 14 days

after the notice of appeal is filed, the appellant must order any necessary transcripts of the proceedings or must certify that no transcripts are being ordered. If the appellant is pro se, the clerk of the Tax Court will transmit the record to the court of appeals. If the appeal is proceeding with retained counsel, an *electronic appendix is required*. *See* 10th Cir. R. 14.1 (eff. Jan. 1, 2015).

D. Record on Review or Enforcement of Agency Orders.

In cases involving review or enforcement of agency orders, the agency may file a certified list of the documents, transcripts of testimony, exhibits, and other material comprising the record. In the alternative, the agency may file a certified list of the materials the parties have designated. Fed. R. App. P. 17(b). Electronic copies of the original record materials must be transmitted to this court within 21 days after service of respondent's brief. 10th Cir. R. 17.1. The parties are encouraged to designate only the portions of the agency record that are essential for a thorough review of the issues presented.

V. CIRCUIT MEDIATION OFFICE

The Circuit Mediation Office conducts mediation conferences under Federal Rule of Appellate Procedure 33 and Tenth Circuit Rule 33.1. The office is staffed by attorney-mediators who conduct telephone and in-person conferences primarily to explore the possibilities of settlement, and secondarily to resolve procedural problems.

A. Cases Scheduled for Mediation Conferences.

1. Initiated by the Circuit Mediation Office.

Within 14 days of filing a notice of appeal, appellants are required by Tenth Circuit Rule 3.4 to file a docketing statement in which they state the issues being raised on appeal and the background of the case. The Circuit Mediation Office schedules a case for a mediation conference from the docketing statement, usually before briefing and sometimes before the transcript is completed.

A mediation conference may be scheduled in any civil case except pro se and habeas corpus appeals. Conferences are not scheduled in criminal appeals.

2. Initiated at a Party's Request.

In the event that a case is not scheduled for a conference, a party may request one by calling the Circuit Mediation Office at (303) 844-6017. If appropriate, **the fact that a conference has been requested is kept confidential**. Requested conferences are scheduled and approached in the same manner as those initiated by the Circuit Mediation Office.

B. Mediation Conference.

The primary purpose of the conference is to explore the possibilities of settlement. It is also used to clarify issues and resolve procedural problems that may interfere with the smooth handling or disposition of the case. The conference is ordinarily conducted early in the appeal, prior to briefing. Typically conferences are conducted by telephone, although in some cases counsel and clients are required to attend in person.

The mediators conduct the conferences in a series of joint and separate sessions, talking with both sides together and then with each side separately. While talking together at the beginning, the mediators usually ask counsel about any procedural questions or problems that could be resolved by agreement. These might include questions about the appendix or the need for a specially tailored briefing schedule. The

mediators often review the appellate issues. The purposes of this discussion is **not** to decide the case or reach conclusions about the issues but to understand the issues and evaluate the respective risks on appeal. In many cases a candid examination of these risks is helpful in reaching consensus on the settlement value of the case. The review may be done with all parties present or with each side privately.

Counsel should set aside at least two hours for the initial conference. In some cases, discussions may go no further. In other cases, follow-up discussions may continue for days, weeks, or longer. If a settlement is reached, the parties will be given a date certain for the filing of a stipulation stating that the case has settled. If agreement is reached on matters that would facilitate the handling of the appeal (such as modification of the briefing schedule, etc.), an appropriate order reflecting such agreement is issued.

Counsel should note that the mediation program operates separately from the court's decisional processes. Filing deadlines are not automatically extended. Counsel are required to meet their filing deadlines unless the mediator extends them.

C. Preparation for the Conference.

In order for settlement discussions to be most effective, lead counsel – the attorneys on whose judgment the clients rely when making decisions – are required to consult with their clients regarding settlement prior to the conference and to have as much settlement authority as feasible. Lead counsel should also be thoroughly familiar with the issues of the case and be prepared to discuss them as necessary.

The Circuit Mediation Office attempts to identify lead counsel for all parties when scheduling conferences. This is not always possible, so counsel are asked to advise the Circuit Mediation Office in advance of the conference when other counsel, or parties, should be involved.

D. Mandatory Participation – Voluntary Settlement.

Although mediation conferences are relatively informal, the court considers them official proceedings and requires the participation of all parties, usually through their counsel. *See Pueblo of San Ildefonso v. Ridlon*, 90 F.3d 423 (10th Cir. 1996). Participation in the process is mandatory; decisions regarding settlement are, of course, voluntary. Sometimes the purposes of the conference cannot be achieved without the involvement of individuals or groups who are not parties to the appeal, and they may be invited to participate.

E. Confidentiality.

To encourage full and frank discussion, all communications in the course of a conference or in any subsequent discussions are kept confidential. Nothing said during the discussions is placed in the record or disclosed in any way to any court by the mediator. Similarly, counsel and parties may not refer to or quote any statement made during the course of these discussions in their briefs or at oral argument, or in any proceeding in any other court. *See Clark v. Stapleton Corp.*, 957 F.2d 745 (10th Cir. 1992).

VI. WRITING A BRIEF

Please note a Briefing and Appendix Checklist, effective February 26, 2015, is posted on the court's website.

A. Formal Requirements as to Content.

1. Principal Briefs.

Federal Rule of Appellate Procedure 28 and Tenth Circuit Rule 28 set out the requirements for briefs filed in appeals. The opening and answer briefs must contain the following, under appropriate headings and in the order indicated:

a) A table of contents with page references, and a table of cases, statutes and other authorities cited, alphabetically arranged and referring to the pages of the brief where they are cited. Appended to the table of cases must be a list, with appropriate citations, of all prior or related appeals, or a statement that there are none.

b) Appellant's brief, only, must have a preliminary statement of the grounds for the jurisdiction both of the court or agency appealed from and of this court. The statement must cite to supporting statutes and record dates which show that the appellant timely filed the notice of appeal or the petition for review.

c) A statement of the issues presented for review. (This may be omitted in appellee's brief if appellee is satisfied with appellant's statement; if not satisfied, appellee should simply correct errors or omissions in appellant's statement.)

Please note effective December 1, 2013 Fed. R. App. P. 28 and 28.1 were amended to allow parties to combine the statement of the case and statement of the facts.

d) A statement of the case, which must first briefly indicate the nature of the case, the course of proceedings, and the determinations of the court below.

e) A statement of the facts relevant to the issues presented for review, with appropriate references to the record. References to documents in the record must include identification of the district court (or agency) document, the district court docket number and the page number within that document

(*e.g.*, *Defendant's Motion for Summary Judgment* dated 1/15/2010, docket number 48, at 3). Transcript references must be to page number by date of proceeding and page number (*e.g.*, Transcript of 8/15/2010, Suppression Hearing at 37). Transcripts should be paginated sequentially. In the rare case where they are not, references must be to the type of proceeding, the date of the proceeding and to the page number (*e.g.*, Tr. *Motion In Limine Hearing*, 8/31/2010 at 37). Counsel should consider inserting a footnote with the first record citation to confirm the citation convention that will be used. Trial exhibits should be included in the appendix, if possible. In a court appointed counsel case, where the record was designated and has been transmitted from the district court electronically (and the district court no longer has the trial exhibits), or if the exhibits are not susceptible to copying, they must be included in a separate addendum. A single hard copy of the addendum is required and must be submitted to the clerk at the time the hard copies of the brief are submitted.

f) A summary of the argument. The argument must be preceded by a summary.

g) The argument must contain the contentions of the party with respect to the issues presented and the reasons for them. It must also include citations to relevant authorities, statutes, and portions of the record. Preceding the discussion of each issue, there must be a statement of the standard of review applicable in this court and a precise reference to the place in the record where the issue was raised and decided. If the issue is failure to admit or exclude evidence, refusal to give a particular jury instruction, or any other ruling for which a party must record an objection to preserve the right of appeal, the brief must identify where in the record counsel made the objection and where it was ruled upon.

h) A short conclusion setting forth the precise relief sought.

i) On the front cover, a statement whether oral argument is desired. A statement of the negative is required when no oral argument is desired. If oral argument is requested, an explanation of the reason oral argument is necessary must follow the conclusion of the brief.

j) In appellant's brief only, an attachment containing a copy of the judgment or order to be reviewed, any pertinent written findings, conclusions,

opinions or orders, or, if oral, transcripts of them. If consideration of the appeal requires study of statutes, rules, regulations, contracts (or relevant parts of them), copies of those documents may also be placed in the attachment to the brief. If the district court's ruling was premised on adoption of a magistrate judge's report and recommendation, both must be included.

k) Every brief that relies on the type-volume limitation must contain a certificate of compliance. Fed. R. App. P. 32(a)(7)(C). *See Length and Form*, below.

NOTE – Even though the pertinent orders or judgment may be included in appellant's appendix, copies must also be attached to the appellant's brief. 10th Cir. R. 28.2(A).

2. Additional Briefs.

The only additional brief that may be filed without court permission is the reply brief. Appellant may file a reply brief in response to appellee's brief. Cross-appellant may file a reply brief in response to the answer brief filed by the cross-appellee. *See* Fed. R. App. P. 28.1.

NOTE – Additional authorities published after a brief is submitted may be brought to the attention of the court through submission of a Fed. R. App. P. 28(j) letter.

3. Cross-Appeals.

If there is a cross-appeal, briefing shall proceed in accordance with Fed. R. App. P. 28.1.

4. Designation of Parties.

The Federal Rules of Appellate Procedure specify that designations such as "appellant" and "appellee" should be used as little as possible. In the interest of clarity, the briefs should, as much as possible, use the designations used in the court or agency below, the actual names of the parties, or terms that describe the parties.

5. Joint Briefing.

Joint briefing is encouraged, but not required, in criminal appeals involving more than one appellant or appellee. 10th Cir. R. 31.2. The United States is encouraged to file a consolidated brief whenever possible. *Id.* A motion to file a consolidated brief can be granted even if the appeals are not consolidated. Every effort is made to set co-defendants' appeals before the same panel.

Joint briefing is required to the greatest extent possible in civil appeals involving more than one appellant or appellee. With a limited exception where a government entity is the only other party on a side, any separately filed brief must contain a certificate of counsel stating why a separate brief is necessary. 10th Cir. R. 31.3(B).

6. Amicus Briefs.

Amicus briefs may be filed with the written consent of all parties (the consent must be filed with the brief), if the court grants a motion for permission to file one, or at the request of the court. Consent or permission to file is not required for amicus briefs of the United States, an agency or officer of the United States, or by a State or Territory. Fed. R. App. P. 29.

B. Length and Form.

1. Word Limitations.

Principal briefs may not exceed 30 pages in length, exclusive of the table of contents, tables of citations, and attachments and reply briefs may not exceed 15 pages unless they comply with the type-volume limitations in Fed. R. App. P. 32(a)(7)(B) and (C). Amicus briefs are limited to one-half the length of a principal brief. Fed. R. App. P. 29(d). Motions for permission to exceed these lengths must be filed at least 10 days before the due date of the brief. If counsel believe they need more pages, they should give the court explicit reasons. The court will increase brief lengths only in extraordinary and compelling circumstances. 10th Cir. R. 28.3. For cross-appeal briefing, parties should refer to Fed. R. App. P. 28.1.

2. Covers, Page Size, Type Style and Spacing.

The court prefers a 14-point font as required by Fed. R. App. P. 32(a)(5)(A), but 13-point font is acceptable. The page and type-volume limitations of Fed. R. App.

P. 32 must be closely followed. The judges uniformly prefer a shorter, well-edited brief to one that pushes the limits. Please note that all the characters in citation sentences and footnotes must be counted when evaluating the word count.

In addition, please note the appellant's brief cover should be blue (as should the first brief on cross appeal), and the appellee's should be red (as should the second brief on cross appeal). The third brief on cross appeal should be yellow, and the reply brief (and fourth brief on cross appeal) should be grey. Amicus and intervenor brief covers should be green.

3. Form of Citation.

While no formal requirements are imposed, the court strongly recommends that the parties cite statutes, cases, and other materials according to a uniform system, such as that set out in the *Bluebook: A Uniform System of Citation*. References to the record should follow 10th Cir. R. 28.1.

4. Addendum.

If at all possible, copies of trial exhibits should be included in the appendix. In the alternative, and where the trial exhibits may not be susceptible to copying, they may be included in an addendum separate from, but filed with, the brief. The addendum must include a cover page or label (if the addendum includes large demonstrative exhibits). Only one hard copy of the addendum need be filed.

C. Other Writing Suggestions.

The court is duty-bound to do substantial justice in deciding the appeals before it. Judges, however, must necessarily rely upon the advocates to point out the facts of record, the applicable rules of law, and the equities of the particular case that compel a just decision. An effective and carefully prepared brief and argument is more likely to be successful at persuading the court to decide in one's favor than a perfunctory presentation.

In writing the brief, bear in mind that briefs are the first step in persuasion, because the Tenth Circuit judges read briefs in advance of oral argument. If the case is designated for submission without oral argument, the brief may be the party's only argument. In any event, the briefs should be written in such a fashion that the attorney can forego oral argument without foregoing any important contention.

We add the following additional suggestions for the brief writer:

1) Make the statement of the nature of the case, how the case got to the court, the basis of the court's jurisdiction, and what the court did below succinct. This is also a good place to orient the court to the justice of the party's position by a terse preliminary indication of what was wrong below or why the trial court was right.

2) The statement of the issues or questions presented for review requires careful selection and choice of language. The main issue should be stressed and an effort made to present no more than a few questions. The questions selected should be stated clearly and simply. A brief that assigns a dozen errors and treats each as being of equal importance when some are clearly not lessens the stronger arguments. As Justice Frankfurter once said, a bad argument is like the clock striking thirteen, it puts in doubt the others.

3) The statement of facts should set forth a concise and objective account of the pertinent facts, with references to the record to support and facilitate verification of each important statement. The statement of facts generally should be a narrative chronological summary, rather than a digest of what each witness said. Relevant unfavorable facts should not be omitted or slighted. The judges consider this factual statement to be a most important part of the brief. If the facts are well-marshaled and stated, the relevant and governing points of law often will develop naturally. An effective statement summarizes the facts so the reader is persuaded that both justice and precedent require a decision for the advocate's client. While the rules provide that appellees need not make any statement of the case, they should give their own statement if they believe the relevant facts have not been fairly presented by the appellants; but they should not repeat appellant's statement.

   A long factual statement should be divided into appropriate headings. Nothing is more discouraging to the judicial eye than a great expanse of print with no guideposts and little paragraphing. Short paragraphs with topic sentences and frequent headings and subheadings assure that the court will follow and understand the points being made.

4) The argument should be broken up into the main points with appropriate headings. The arguments should contain the reasons in support of counsel's position, including an argumentative analysis of the evidence, if called for, and discussion of the authorities. If the case turns on the facts, the brief should make clear factual arguments bolstered by record references. If the important record reference is

short enough, quote the record, but not for pages and pages. Record citations also help the court find the important facts in a voluminous record.

When possible, the emphasis should be on reason, not merely on precedent, unless a particular decision is controlling. A few good cases in point, with sufficient discussion to show that they are relevant, are much preferred over a flurry of string citations. Quotations should be used sparingly. If a case is worth citing, it usually has a quote which will drive the point home, and one or two good cases are ordinarily sufficient. If the cited case lacks a good quote, a terse summary will establish it as a case the court should read. A long discussion of the facts of the cited cases is usually unnecessary, except when a precedent is so closely on point that it must be distinguished if the party is to prevail.

Parties should distinguish or state why this court should not follow the opponent's leading authorities. Almost always the court will find the leading cases against a party's position. If those cases are not in the trial court's opinion, they likely will be in briefs filed in the trial court and will be cited again on appeal. Parties must remember also that the judge who writes the decision will research and find any relevant cases which the briefs did not discuss. Briefs need not distinguish an opponent's cases which obviously do not apply. Lawyers should ask themselves whether the judge could reasonably think the opponent's cited case was important. Address those which could trouble the court.

When appropriate, brief writers should argue policy, stressing why the court should adopt the client's view. This is particularly important when there is no controlling precedent – or when the court's opinion will fill a gap or resolve an ambiguity in a statute. Legislative history, the intent of the legislature, and sound public policy are very important.

5) While the brief should be written with attention to style and interest, clarity and simplicity are the paramount considerations. Italics and footnotes should be used sparingly. Above all, accuracy is imperative in statements, references to the record, citations, and quotations. Counsel should carefully proofread briefs for errors in spelling, quotations, or citations. The neater the briefs appear, the better written, the more succinct, the more to the point they are, the better the impression the briefs make on the judges.

6) Finally, brief writers should put themselves in the judges' position – what will the judges see as critical? Write the briefs almost as the opinion the client would like

to see the court write. The appellate courts have constraints under the law: For instance, they cannot substitute their opinion when there are credibility questions. Think about what the judges must do to affirm or reverse, and structure the briefs accordingly.

D. Sample Brief.

To further assist practitioners, there is a sample brief at Appendix A.

E. Opening Brief Checklist.

OPENING BRIEF CHECKLIST

The checklist below includes all the requirements (in both the Federal Rules of Appellate Procedure and 10th Circuit local rules) for filing a *primary* brief (please note memorandum briefs, such as those filed on jurisdictional issues, do not need to comply with all of these requirements). The checklist begins as a brief would begin—at the cover page—then moves through the requirements from there. If you have questions please don't hesitate to contact the clerk's office at 303-844-3157.

- ☐ Is the cover page the correct color (for the required hard copies)?:
  a. The appellant's and the first cross-appeal's brief is blue;
  b. The appellee's and second cross-appeal's brief is red;
  c. The third brief on cross-appeal is yellow;
  d. The appellant's reply and the fourth brief on cross-appeal's is grey;
  e. Amicus and intervenor covers are green.

- ☐ Is the brief in either 13 or 14-point font (14 point font is preferred)? 10th Cir. R. 32(a).

- ☐ Is your brief double-spaced except for quotations and footnotes? Fed. R. App. P. 32(a)(4).

- ☐ Does the cover page of your brief contain the district court case number, district of origin and name of the judge (or agency) who entered the underlying judgment? 10th Cir. R. 28.2(C)(5).

- ☐ Does the cover page of your brief include a statement as to whether or not oral argument is requested? *See* 10th Cir. R. 28.2(C)(4). If argument is requested,

the brief must contain a statement of reasons why argument is necessary (generally that statement must follow the brief's conclusion).

- ☐ Is your brief single-sided? Fed. R. App. P. 32(a)(1)(A).

- ☐ Does the brief contain a corporate disclosure statement if one is required? Fed. R. App. P. 26.1(a)

- ☐ Does the brief contain a table of contents, including page references? Fed. R. App. P. 28(a)(1).

- ☐ Does the brief contain a table of authorities including cases, statutes and other authorities? Fed. R. App. P. 28(a)(3).

- ☐ Does the brief contain a statement of prior or related appeals (including prior state court matters which may be relevant)? 10th Cir. R. 28.2(C)(1). The "prior and related" cases statement should be included following the table of authorities/cases.

- ☐ If applicable, does your brief include a glossary of terms following the table of cases/authorities? 10th Cir. R. 28.2(C)(6).

- ☐ If you are submitting a primary brief in a case with multiple appellants or appellees, and the parties on that side intend to file separate briefs, have you included a statement (following the table of cases/authorities) stating the reasons a separate brief is necessary? 10th Cir. R. 31.3(B). Please note in this regard that even if multiple appellees' briefs are filed the appellant may only file a single reply except upon motion to the court seeking an exemption. 10th Cir. R. 31.3(A).

- ☐ If you are the appellant, does your brief include a jurisdictional statement which satisfies the requirements of the rules? Fed. R. App. P. 28(a)(4).

- ☐ If you are the appellant, does your brief include a statement of the issues, a statement of the case and the facts, and a summary of the argument before the actual argument section? *See* Fed. R. App. P. 28(a)(5) through (8).

  Please note effective Dec. 1, 2013 Fed. R. App. P. 28 and 28.1 were amended to allow parties to combine the statement of the case and statement of the facts.

- ☐ If you are the appellant, does your brief contain an argument section including, for each issue raised, (1) a precise reference, with appendix or record citation to the decision under review, *see* 10th Cir. R. 28.2(C)(2) and 10th Cir. R. 28.1(A)(appendix citations) or 28.1(B)(record on appeal citations); *see also* 10th Cir. R. 28.2(C)(3), **and** (2), a statement of the applicable standard of review. Fed. R. App. P. 28(a)(9)(B)?

- ☐ If you are the appellant, does your brief include "a short conclusion stating the precise relief sought"? Fed. R. App. P. 28(a)(10).

- ☐ If you are the appellee, have you reviewed Fed. R. App. P. 28(b) to determine which parts of the Rule 28 requirements should be included in your brief?

- ☐ If you are the appellant, is a copy of the decision under review (that is, copies of "all pertinent written findings, conclusions, opinions or orders" including a magistrate's Report and Recommendation if applicable) attached to the opening brief? 10th Cir. R. 28.2(A)(1)? In this regard, appellants/petitioners in social security and immigration cases should take special note of 10th Cir. R. 28.2(A)(3) and (4).

- ☐ If you are the appellee, and the appellant has not attached the rulings prescribed in 10th Cir. R. 28.2(A) have you done so? *See* 10th Cir. R. 28.2(B).

- ☐ If your brief exceeds 30 pages (if principal or response), or 15 pages (if reply), does it contain, at the conclusion, a certificate of compliance including verification of the applicable type volume limitations? Fed. R. App. P. 32(a)(7)(B) and (C). Have you included headnotes, footnotes and quotations in the word count? Fed. R. App. P. 32(a)(7)(B)(iii).

- ☐ Does your brief include, at the end, **separate certifications** that **(1)** all required privacy redactions have been made (*see* 10th Cir. R. 25.5), **(2)** that the hard copies to be submitted to the court are exact copies of the version submitted electronically (*see CM/ECF User's Manual*, Section II, Policies and Procedures for Filing Via ECF, Part I(b), pages 11-12), and **(3)** that the electronic submission was scanned for viruses with the most recent version of a commercial virus scanning program, and is free of viruses (*see CM/ECF User's Manual*, Section II, Policies and Procedures for Filing Via ECF, Part I(c), pages 11-12)?
- ☐ Have you signed the brief (please note electronic signatures are proper under the rule)? 10th Cir. R. 46.5(A);10th Cir. R. 46.5(C).

- ☐ Does your brief include a separate and proper certificate of service? Fed. R. App. P. 25(C)(1), 25(C)(2), 25(d)(1)(B) and 10th Cir. R. 25.4.

- ☐ Is the hard copy of your brief (which you will forward to the clerk's office) securely bound and will it lie reasonably flat when opened?

- ☐ Have you made arrangements to have seven (7) hard copies of the brief forwarded to the clerk's office within two business days? 10th Cir. R. 31.5. Please note in this regard that the hard copies should be *received* in the clerk's office in two business days. *See* *CM/ECF User's Manual*, Section III, Part 5, pages 18-19. One (1) hard copy of the electronic appendix filed must also be submitted.

VII. FILING AND SERVING BRIEFS

The Federal Rules of Appellate Procedure describe filing and service of briefs. In this regard, counsel should review carefully the court's *CM/ECF User's Manual*, which is available on the court's website. Electronic case filing is mandatory for all attorneys filing in the Tenth Circuit.

A. Time for Filing.

1. Appellant's Opening Brief in Appeals from District Courts.

a. Cases with Appointed Counsel or Pro Se Cases.

In appeals from district courts where appellant's counsel is appointed or counsel for a co-defendant is appointed or where appellant is pro se, appellant's opening brief is due 40 days after the date the record is filed in the court of appeals.

b. Cases with Retained Counsel.

In cases where all parties are represented by retained counsel, appellant's opening brief must be filed within 40 days of the date on which the district court clerk notifies the court of appeals that the record is complete for purposes of appeal.

2. Tax Court Appeals and Agency Review Proceedings.

In an appeal from the United States Tax Court, appellant's brief is due 40 days after the record is filed. Fed. R. App. P. 31(a)(1). In cases asking for review or enforcement of agency orders, petitioner's brief is due 40 days after the record or certified list is filed. 10th Cir. R. 31.1(B).

3. Answer Briefs.

In every case, the answer brief of the appellee/respondent is due 30 days after service of the opening brief of the appellant/petitioner. Fed. R. App. P. 31(a)(1).

4. Reply Briefs.

The filing of a reply brief is optional. If, however, the appellant/petitioner elects to file a reply brief, it must be filed within 14 days after service of the answer brief of the appellee/respondent. Fed. R. App. P. 31(a)(1).

5. Cross-Appeals.

In situations involving cross-appeals, the party deemed the appellant under Fed. R. App. P. 28.1(b) must file an opening brief in accordance with Fed. R. App. P. 28.1(f)(1). Appellee's answer brief must also contain the issues and argument involved on cross-appeal. Appellant's reply brief, which must also include answers to issues raised by the cross-appeal, is considered an additional answer brief and, therefore, is due within 30 days after service of appellee's answer brief. If appellee/cross-appellant elects to file a reply brief on the cross-appeal issues, it must be filed within 14 days after service of appellant's reply brief. The order in which briefs are filed may be varied by court order on motion of a party or by the court.

B. Calculation of Time.

As with other materials required or permitted to be filed in the court, the filing party must serve the brief on all other parties to the appeal or review proceeding. Fed. R. App. P. 25 and 31(b). All attorneys registered to file electronically through ECF have consented to use of the court's ECF system for service and it may be accomplished through the system. Counsel must continue, however, to include a certificate of service in the brief. In addition, parties are required to forward 7 hard copies of the brief to the clerk's office. Those copies must be *received* within 2 business days of the filing of the brief. *See CM/ECF User's Manual* at 18-19. If pro se users are not registered electronic filers counsel must serve the brief by traditional means.

C. Extensions of Time.

Litigants owe an ethical obligation to avoid delay. The court disfavors motions for extensions of time to file briefs. 10th Cir. R. 27.4(A) and 31.4. Motions for extensions of time must comply with 10th Cir. R. 27.4. *See also* Section XIV, Motions.

D. Copies to be Filed and Served.

As noted above, counsel must file briefs via ECF and must also submit 7 hard copies of the brief to the court within 2 business days. Indigent pro se litigants may file an original and three copies, and must serve one copy on counsel for each party separately represented.

VIII. ORAL ARGUMENT

A. Panel Arguments and Panel Composition.

The court hears oral argument during regularly scheduled sessions of court which take place in January, March, May, September, and November. On occasion, the court may set an oral argument in the off months, particularly in the summer. Litigants may always seek emergency relief by contacting the clerk's office.

Oral arguments generally commence at 8:30 or 9:00 a.m. (and sometimes 8:00 a.m. on the last day of the session) and continue without interruption, except for changes of counsel between cases, until the entire calendar is heard. Some panels will take a brief recess midway through the calendar. The courtrooms are on the first and second floors of the courthouse in Denver. Counsel must check in with the clerk's office on the first floor one-half hour before argument begins in the first case on the calendar.

Unless it is hearing a case en banc, the court sits in panels of three judges, except those two-judge panels that dispose of certain routine calendar and special writ matters.

Assignments to hearing panels are made randomly under the clerk's supervision. Briefs are made available to judges soon after the cases are assigned. That is generally many weeks before the scheduled argument date. Counsel should note all judges read the briefs before oral argument.

Fifteen minutes is allotted to each side for argument. Any extension of that argument time must be obtained from the court in advance of oral argument (via motion), and will be granted only in especially complicated cases. Oral argument is a mix of prepared remarks and responses to questions from the bench. The panel members for each case are made public 7 days before the first day of the calendar (that is, on the Monday prior to the start of the court's week long calendar). Counsel and parties may access that information on the court's website.

Orally argued cases are assigned for opinion after the hearing. The length of time until a decision is entered depends upon the workload of the judge and the difficulty of the case.

In addition to the hearing panels, the court has a number of rotating, randomly assigned or standing panels which consider motions, emergency matters, and any other items requiring immediate attention or not involving oral argument.

B. Calendaring.

All cases are screened for jurisdictional defects. When a jurisdictional defect is suspected, briefs will be ordered. If the court determines it lacks jurisdiction, the proceeding is dismissed.

When merits briefs are filed in civil cases and they are at issue, the appeals are submitted to a judge for screening. Each judge is a member of a three-judge screening panel. In screening, the judges review each case to determine whether it should be directed to the oral argument calendar, assigned to a separate calendar without oral argument, or whether the screening panel should dispose of the matter. If any judge on the screening panel or on a non-argument panel believes oral argument would be helpful, the case is set for oral argument.

For orally argued cases, the length of time between filing the briefs and oral argument will vary depending upon the type of case and the size of the court's backlog, if any. Criminal and other special cases receive priority. Due to extraordinary efforts made in recent years, the court is now current. The median time from filing appellee's brief

until oral argument is 3.1 months. From hearing to disposition the median time is 4.3 months.

C. Time and Attendance.

1. Time for Argument.

In orally-argued cases, each side receives 15 minutes (except for en banc matters, which are 30 minutes per side), which includes time needed to answer the court's questions. In extraordinary cases, like death penalty matters, additional time may be allowed if a party submits a motion prior to the date of the argument. The length of time permitted for oral argument has no relationship to the amount of attention which the court gives a particular case. Limitations on oral argument merely represent the court's estimate of the time needed to present the issues, considering that the panel has read the briefs before argument.

Appeals consolidated for briefing purposes will be treated as one case for oral argument unless the court orders otherwise. Counsel may divide the argument time as they agree, although some limitations are built in by the short time allowed for oral argument. The court does not favor divided arguments on behalf of a single party or multiple parties with the same interests. 10th Cir. R. 34.1(B).

2. Attendance of Counsel.

Counsel for each party must be present for oral argument unless excused by the court for good cause shown. Parties desiring to waive oral argument and submit on the briefs should file a motion as early as possible, but at least 10 days before the scheduled argument or they may be held liable for the expenses incurred by parties prejudiced by the delay. 10th Cir. R. 34.1(A)(4).

3. Postponement.

The court will not grant motions to postpone oral argument except in extraordinary circumstances.

D. Preparation and Presentation.

1. Preparation for Argument.

Counsel preparing to argue the appeal should study the case and record carefully even if he or she worked on the brief and tried the case below. Only counsel who

take the time to familiarize themselves thoroughly with the record will do justice to the oral argument.

Appellant's oral argument must capture the judges' interest and seek to persuade them that an injustice has been done which can be corrected in accordance with governing statutes and established precedents. Appellee, on the other hand, must convince the judges that the issues have been correctly and fairly handled by the court below or that, in any event, the ultimate determination below requires no alteration.

Although the oral argument and brief complement each other, each serves a different purpose. Oral argument should emphasize the critical points so as to persuade the judges that fair play and precedent support the position of the advocate. In contrast, the strength of the brief lies in its lucid, precise, and documented statement of the facts, with fully explained reasoning and law in support of counsel's position.

Before arriving in court for the argument, counsel should review the case thoroughly. The entire record below should be read and reread, even though counsel may have done so previously when preparing the brief. The briefs from both sides also should be reviewed carefully. Counsel should be aware of discrepancies in the two sides' statements of the facts and the case, and counsel should be fully conversant on the legal arguments at issue. Finally, throughout the review process, counsel should imagine themselves in the court's position and think about what the judges will want to know and the order in which they will want to hear it.

On the day of the argument, the attorneys who will argue must check in with the clerk. In Denver, attorneys check in at the clerk's counter in the middle of the first floor of the Byron White Courthouse. Those who will present arguments must be in the courtroom for roll call and announcements 15 minutes before the first argument of the day is scheduled to begin. Counsel must be present when the panel takes the bench. Ordinarily the presiding judge will excuse counsel in the second and subsequent cases from remaining in the courtroom for the other arguments. However, counsel must monitor the cases that precede theirs so they are available to begin their argument when the previous argument finishes.

Counsel may want to become familiar with the court by listening to other arguments and will want to be familiar with the names of the judges. At the

beginning of the argument, counsel should identify themselves to the court, even though their names appear on the court's daily calendar sheet, so that the judges know who is arguing and can address counsel by name. When addressing the judge during oral argument, it is appropriate to address him or her as "Your Honor" or "judge." A common mistake is to refer to a circuit judge as "justice," but that term is typically appropriate only to the judge sitting on the highest court of a particular court system – typically a justice of the United States or a state Supreme Court.

2. Presentation of Oral Argument.

Experience shows that the following guidelines should be observed in arguing an appeal:

a. The opening statement.

The panel will have read the briefs before argument and thus will be familiar with the case. Individual judges, however, will have prepared to hear as many as 30 cases during the week in which oral argument is set. Thus, counsel should say enough about the facts and posture of the case to bring the particular appeal into focus. Beyond that, an effective presentation can take many forms. Obviously, counsel must catch and hold the judges' attention in the first few minutes. The appellant, in particular, should identify the critical issues on appeal immediately and then should move quickly to a lucid, concise, and persuasive argument.

b. The statement of facts.

Counsel should attune themselves to the court's level of comprehension. If the facts are relatively simple, counsel need not spend much time on them. A common mistake lawyers make before this court is to spend half of their oral argument talking about background facts, not the key ones on which the decision turns. If the case is complex factually, however, even though the court has read the briefs, counsel may need to give a clear version of the facts – indeed, a clear factual exposition may be the most appropriate appellate argument an attorney can make.

c. The argument.

(i) *The applicable law.*

Counsel should rely principally on the briefs for the full discussion of the law which supports the appeal. In oral argument, counsel should avoid a minute dissection of case law except when one or a few cases clearly should control the outcome or when cases must be distinguished in order to prevail. Quotations from cases should be avoided and the advocate need not give the citations of cases mentioned in oral argument. Just say, for example, "Your Honor, *Johnson v. Jones*, from this Circuit, cited in the brief, is controlling. It says in essence the following. . . ." If counsel intends to mention cases not cited in the brief, he should refer to such cases by name and court, providing the citations in writing to the court and counsel before argument.

NOTE – Visual aids are not always helpful. However, a panel may grant permission to use visual aids. If possible, a motion should be filed prior to the argument seeking to use the aid. The application to the panel must state whether or where in the record the aid appears and the position of opposing counsel.

(ii) *Emphasis.*

With the time limits this court imposes, counsel must emphasize the important points in oral argument (but not to the point of giving the panel the impression that the others are pure throwaways). By the time the case gets to our level, counsel should know what is critical – he or she should have an instinct for the case's strongest point and the opponent's weaknesses. Stress those in oral argument.

Try not to read the argument. Famous advocate John W. Davis said, "Read sparingly and only from necessity." An advocate cannot hold the audience long without looking it in the face. Counsel needs to know the argument so well that he or she can watch the court, respond to its uncertainties, ascertain the direction of its concern, respond, and maintain a disciplined earnestness.

(iii) *Answering questions – flexibility.*

An important part of oral argument is to answer the court's questions. Counsel should answer questions as directly and

categorically as possible. Answer questions at the time they are asked; do not postpone an answer until later in the argument.

Counsel should aim for controlled flexibility, a relaxed resilience that enables a response to a judge's question and yet permits return gracefully to the counsel's charted course. This is a real art of advocacy. Often a question goes to the heart of what the judge thinks is the decisive issue. Counsel must listen to the judge and respond in a way which disabuses the panel of any misapprehension of the advocate's position. One great advocate says to rejoice when the court asks questions. Not only does it show the panel is awake, but a question enables the advocate to penetrate the mind of the court. Yet, of course, counsel must not let the court keep counsel from reaching the major points that must be made. Oral argument should be spent treating the main issues that counsel relies upon, and counsel must get to those.

(iv) *Talk policy sense.*

Counsel should prepare by asking themselves policy questions about the case. Perhaps there is no room for policy in the case, but if there is, counsel should be able to tell the court why his or her client should prevail and what social ends would be promoted thereby.

The best advocates somehow exude an aura of conviction, radiating a sense of belief in their client's case without making every point a life and death issue. As Judge Frank Coffin has said, "This is an ineffable quality. I know it when I see it but I cannot articulate a formula. Without it the most eloquent speaker falls a bit flat. With it attorneys may bumble, stammer, even read their argument and yet be effective because they have this ability to say to the Court, 'Look, I mean business. This case is important not just to my client but to the development of law. You judges had better do the right thing.'"

One benefit of oral argument may be the opportunity to stress the narrowness of the issue before the court. A party may want to win as big or lose as small as possible. For example, it is sometimes critical to a regulated industry that a decision be a narrow one confined to the special facts of the case rather than one announcing a

broad new rule. Or, if a conviction might be set aside, the prosecutor hopes to create as little precedent as possible. A good advocate looking to the future may try to persuade the court to resist expressing dicta or, conversely, may actively seek the enunciation of a broad rule.

(v) *Avoid personalities.*

Although counsel may, of course, criticize the reasoning of opposing counsel or the court below, **counsel should be careful not to make personal attacks**. Disparaging words will only detract from, and will not advance, counsel's argument.

d. The special position of appellee's counsel.

Appellee's counsel has the advantage of listening to appellant's argument. Counsel should correct appellant's counsel's important misstatements of the facts. Appellee's counsel may also want to give fresh answers to questions which were posed to appellant's lawyer. This can be done by simply noting the question and saying the appellee would like to respond as well. Appellee's counsel can then develop other points and note concessions by the opponent. Appellee's counsel should often be able to ascertain from the court's questions the factors upon which the case will turn. Of course, having won below is a great advantage, especially if the issues turn on disputed facts involving credibility determinations.

e. Rebuttal.

Counsel are welcome to reserve a few minutes of time for rebuttal, but may find questions from the bench make reserving that time challenging. Courtroom deputies will explain rebuttal options prior to the start of court. The last word may be important. If there is nothing more to be said, however, rebuttal can be bypassed. Do not confuse the necessity of raising fresh points on arguments already before the court with the introduction of new arguments, which are not permitted on rebuttal. If on rebuttal counsel attempts a surprise new argument, the court almost surely will either deny consideration or give appellee a chance at surrebuttal. Rebuttal should be short, to correct important errors and mischaracterizations by appellee's counsel. When counsel has concluded argument, he or she should sit down regardless of whether the allocated time has been exhausted.

f. Be succinct.

The court too often sees a lawyer who makes all possible points, then notes that all argument time has not been used up, so starts to go over the points again. The court is grateful when counsel make their arguments and then sit down. That a certain amount of time has been allocated for oral argument does not constitute a contract to fill each minute.

E. Video Conference.

The court has experimented with and may continue to use video technology to hear oral arguments. The potential savings to the government of letting counsel whose travel would be paid by the United States argue cases without leaving their home towns is immense. While the experience is not quite the same as being in the room with the panel judges, it is very close.

If your case is selected for videoconferenced arguments, the clerk will notify you when and where to appear for argument. Generally, you will report to the clerk's office for the U.S. District Court in your district, or in some cases another district within your state. Reporting times will be adjusted to your local time. For example, if court is scheduled to convene at the Byron White U.S. Courthouse, Denver, Colorado, at 9:00 a.m. Denver time (10:00 a.m. Central time) and you are arguing by videoconference from Oklahoma City, you will be directed to report to the district court clerk's office no later than 9:30 a.m. local time. The district court clerk will direct you to the place where the videoconference equipment is installed.

A court representative will greet you, provide further information and answer questions. You will see some things which are familiar to you, including a lectern with a microphone for presenting arguments; however, you will also see a television monitor and video camera some 10 to 15 feet in front of and facing the lectern. When arguments are being videoconferenced, attorneys can see the panel judges on the monitor and hear them through connected speakers. With similar equipment installed in our Denver courtroom, the panel judges can see and hear the arguing attorneys.

During your argument, you may detect a very slight delay between the time words are spoken and the time they are heard at the remote conference site. This could cause

you to continue speaking, and so miss the first word or two of a question posed by a panel judge. The court is exploring enhanced technology which will eliminate this transmission delay. In the meantime, the problem can be minimized by some simple protocols. Judges will preface their questions by a warning remark, such as, "Counsel, I have a question," whereupon you should immediately stop speaking and listen for the question. That way you will hear the entire question and be able to formulate your response.

Here are some other tips that may help you in presenting your argument by interactive videoconference:

- *Act Natural.* The panel judges will be able to see and hear you just as if you were presenting your argument in person.
- *Make Eye Contact.* Since the camera is located on top of the monitor, by looking at the judges on the monitor, you will make eye contact with them.
- *Use Your Normal Voice.* The lectern microphone and system speakers will pick up and transmit your voice as clearly as if you were arguing to the judges in person. There is no need to speak louder or slower than you would in a normal courtroom setting.
- *Avoid Exaggerated and Unnecessary Gestures or Movement.* Remain standing behind the lectern. If you move away from the lectern, you may be out of camera range and not visible to the panel judges. While normal gesturing can enhance your videoconferenced argument, extreme or exaggerated hand and arm movements can be even more distracting than when arguments are presented in person.
- *Dress Conservatively.* Remember you're a TV star. Just as on television, some colors are better than others (whenever practicable avoid white or vivid colors) and bold patterns may cause a strobe effect.
- *Avoid Unnecessary Noise.* Noise such as caused by tapping on the lectern or shuffling papers may be transmitted through the system to the panel judges, thereby making it difficult for them to hear or concentrate on your argument.

F. Motions Seeking Copy of Oral Argument Recording.

Oral arguments are recorded for the use of the court. Parties or others seeking access to a recording may, however, file a motion to obtain a copy. The motion must state the reason or reasons access is sought. Upon issuance of an order from the

hearing panel granting the request the clerk will be directed to forward the mp3 recording via email. *See* 10th Cir. R. 34.1(E)(1),

IX. DECISION – MANDATE – COSTS

A. Deciding the Appeal.

Nearly always, the court reserves judgment at the conclusion of oral argument. The judges confer promptly after completion of a day's calendar. Although the panel may reach a tentative decision at this conference, additional exchanges among the judges are often necessary. If the presiding judge of the panel is in the tentative majority, that judge assigns the case to a panel member to prepare an opinion or order and judgment. A copy of a proposed opinion is circulated by the authoring judge, not only to the other members of the panel but to the whole court. After members of the panel have concurred or had an opportunity to prepare separate opinions, the disposition is filed with, and immediately released by, the clerk. A copy of the final opinion or order and judgment is issued to the parties via NDA (notice of docket activity) at the time it is entered on the docket. Pro se parties who are not registered ECF users will receive a copy via regular U.S. mail.

The court need not write an extensive disposition in every appeal but may, in its discretion, use a terse judgment such as the one word "affirmed." 10th Cir. R. 36.1. Nevertheless, virtually all final dispositions of an appeal are in one of two forms: a published "opinion" or a not-for-publication "order and judgment." All opinions and orders and judgments are made available to the unofficial reporters that serve practitioners in specialized areas of the law. Please note published opinions may be authored by a particular judge or may be issued per curiam.

All opinions and orders and judgments are available electronically through Lexis® and Westlaw®. They are also available on PACER (Public Access to Court Electronic Records) at www.ca10.uscourts.gov/pacer, the evening of the day they are filed. To register as a PACER user (which is a separate registration from that allowing electronic filing); use the Registration Wizard at https://pacer.psc.uscourts.gov/pscof/regWizard.jsf. PACER is available around the clock seven days a week. (Dockets are also available on PACER.) Finally, the decisions are available on the court's website free of charge and are posted throughout the day as they become available. All interested parties may sign up for the court's RSS feed to receive decisions in a prompt manner. Instructions on how to sign up can be found on the court's website.

Unpublished orders and judgments of the circuit court have no precedential value and do not bind other panels of the court. However, they may be cited under Fed. R. App. P. 32.1 and 10th Circuit local rule 32.1. Orders and judgments always show the

names of the judges who constituted the panel. They generally show an "entering" judge who took special responsibility for the drafting, but they may also be issued per curiam. Interim orders not constituting a final disposition on the merits of the appeal may be entered under the name of the chief judge, one or more other judges, or by the clerk. There is no requirement that any order or opinion of this court be signed, either by a judge or the clerk. When the disposition is by opinion, the judgment is prepared separately and signed and entered by the clerk. It repeats the judgment directed by the court in the opinion. The judgment is sent to the district court when the mandate issues and is a signal that jurisdiction in the court of appeals has ended. *See Mandate*, below. When the disposition is by order and judgment, it is the judgment that is entered by the clerk and no separate judgment is prepared.

When a decision on appeal was published by a district court, an administrative agency, or the United States Tax Court, this court will ordinarily dispose of the appeal by a published opinion. Whether issued as an order and judgment or opinion, however, all decisions of the court are available on West® and Lexis® electronically.

B. Mandate.

1. Issuance.

Judgments of the court take effect when the mandate issues. The mandate of the court of appeals is issued seven days after the time for filing a petition for rehearing has passed, unless a timely petition for rehearing is filed or an explicit court order shortens or lengthens the time. If a petition for rehearing is denied, the mandate is issued seven days after denial unless the court shortens or extends the time. On occasion, the court will issue the mandate forthwith, in which case the mandate is issued at the same time the judgment is entered. When this court affirms criminal convictions, bail usually will be revoked at the time the mandate issues but may be revoked sooner. A copy of the final judgment, a copy of the opinion of the court, and directions as to costs, if any, constitute the mandate.

2. Stay Pending Application for Certiorari.

A stay of mandate pending application to the Supreme Court for a writ of certiorari may be sought upon motion, with reasonable notice to all parties. Fed. R. App. P. 41(d)(2). Currently, the stay may not exceed 30 days unless extended by the court for good cause shown. To prevent a stay from being used for purposes of delay, the Tenth Circuit will not grant a stay pending certiorari unless it concludes there is a reasonable chance that certiorari may be granted. Even after

the mandate of the court of appeals has been issued, the parties retain the right to apply for a writ of certiorari. Issuance of the mandate does not affect the power of the Supreme Court to grant the writ.

3. Petition for Writ of Certiorari.

A party has 90 days from the date of entry of judgment or the date of the denial of a timely petition for rehearing to file a petition for writ of certiorari in the United States Supreme Court. The court of appeals has no authority to extend the deadline.

C. Costs.

The items that may be recovered as costs by a prevailing party in an appeal are limited to those set out in Fed. R. App. P. 39 and 10th Cir. R. 39. An itemized and verified bill of costs, along with proof of service on opposing counsel, must be filed with the clerk within 14 days after entry of the judgment. The verification of the bill of costs may be by a party or by counsel, and it should be accompanied by an itemized statement of charges sufficient to determine whether the item is taxable and whether it is within the limit for copy fees. Objections must be filed within 14 days of service on the party against whom the costs are to be taxed, unless the time is extended by the court. Usually the only reasons for objecting would be that the cost bill includes unreasonable charges or improper items.

Although "taxable" in the court of appeals, the money identified as "costs" does not physically change hands at the court of appeals level. The circuit clerk prepares an order or an itemized statement of costs. The costs may then be recovered in the district court after issuance of the mandate with its statement of costs. In some instances, the clerk may issue a supplemental statement of costs with notice to the district court for inclusion in the mandate after the mandate has issued. No time limit is specified for the court of appeals to issue the statement of costs, and district courts are not authorized to impose such a time limit.

X. PETITIONS FOR REHEARING – EN BANC PROCEDURE

A. Petitions for Rehearing.

1. Time for Filing.

A party may file a petition for rehearing within 14 days after entry of the judgment. The time is enlarged to 45 days in **civil** cases in which the United States or an agency or officer of the United States is a party. These time periods may be shortened by the court but may not be extended except for good cause shown.

2. Form and Disposition.

A petition for rehearing must be concise and must clearly identify the points of law or fact the petitioner believes the court has overlooked or misconstrued. The petition is limited to 15 pages. Fed. R. App. P. 40(b). If the petition does not request en banc consideration, it is circulated only to the panel of judges that decided the appeal, who then vote on the petition. A majority, of course, rules. There is no oral argument in conjunction with a petition for rehearing unless ordered by the court. No answer to a petition for rehearing is permitted unless requested by the court. If the court desires a response by a non-petitioning party, the clerk will so advise counsel by order. In the relatively rare instance in which a petition for rehearing is granted, the court may, in its discretion, either call for argument or make a final disposition without argument.

Petitions for rehearing should never assume an adversarial posture with the panel. Challenging the position of an opponent in an argumentative way is an effective adversarial tool, but it may become counter-productive when applied to the panel opinion.

3. Frivolous Petitions – Sanctions.

Although petitions for rehearing are filed in a great many cases, they are granted rarely. Rehearing will be granted only if a significant issue has been overlooked or misconstrued by the court. If the court finds that a petition for rehearing is wholly without merit or filed for purposes of delay, the court may tax a sum of up to $500, and may require counsel personally to pay the amount taxed to the opposing party. 10th Cir. R. 40.1(B).

4. Petitions for Rehearing not Prerequisite to Certiorari.

The filing of a petition for rehearing is not a prerequisite to filing a petition for a writ of certiorari in the United States Supreme Court. The time for seeking certiorari in the Supreme Court, however, is tolled until the disposition of a timely filed petition for rehearing in the court of appeals.

B. En Banc Procedure.

1. Petitions for Rehearing En Banc.

A petition for rehearing may request consideration by the whole court sitting en banc. En banc consideration is often requested but seldom granted. Ordinarily the court will grant en banc review only when necessary to secure or maintain uniformity of the circuit's decisions, to comply with a U.S. Supreme Court ruling in conflict, or to consider an issue of exceptional importance. 10th Cir. R. 35.1.

2. Filing Requirements.

Petitions for initial hearing en banc or rehearing en banc should be in the same form and are subject to the same page and other limitations as a petition for rehearing by a panel, with the following additional requirements:

a. The reference to the en banc request must appear on the cover page and in the title of the petition. 10th Cir. R. 35.2(A).

b. The petition must begin with a statement that either:

(i) the panel decision conflicts with a decision of the United States Supreme Court or of the court to which the petition is addressed (with citation to the conflicting case or cases) and consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions; or

(ii) the proceeding involves one or more questions of exceptional importance, each of which must be concisely stated; for example, a petition may assert that a proceeding presents a question of exceptional importance if it involves an issue on which the panel decision conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue. Fed. R. App. P. 35(b)(1).

c. **12 hard copies** must be filed *in addition to* the required ECF filing. 10th Cir. R. 35.4. Pro se parties proceeding without prepayment of fees, and who are not registered ECF filers, may submit an original and three copies.

3. Defective Petitions.

Any petition for rehearing or rehearing en banc that fails to comply with Fed. R. App. P. 35(b)(1) and 10th Cir. R. 35.2(A) will not be circulated to the court en banc. If the deficiency is not corrected promptly, the pleading will be stricken. If the noncomplying petition for rehearing en banc is included in an otherwise proper petition for rehearing, the petition will be submitted for disposition only to the original panel unless the petition's deficiency is corrected within seven days after notification by the clerk of the noncompliance. Untimely suggestions for en banc rehearing will be transmitted to the full court only on express order of the hearing panel. The court may order a case heard or reheard en banc on its own motion.

4. Matters Not Subject to En Banc Consideration.

Certain procedural and interim matters, such as stay orders, injunctions pending appeal, appointment of counsel, leave to appeal in forma pauperis, leave to appeal a nonfinal order, and leave for an abusive litigant to appeal are not matters subject to en banc consideration. The court will not entertain en banc suggestions with respect to these matters. 10th Cir. R. 35.7. Requests for reconsideration of panel determinations of such matters will be treated as petitions for rehearing to the judges or panel entering the order from which the request for reconsideration arises.

The court will not entertain a petition for reconsideration of the denial of an en banc suggestion or an en banc disposition. An en banc order denying a stay forecloses a successive en banc petition. Review of an en banc order must be by the Supreme Court.

5. Processing an Application.

Nondefective petitions for en banc consideration or reconsideration are distributed to each active judge on the court, plus any senior circuit judge, district judge, or visiting judge who sat on the original panel. Only active circuit judges have a vote on the en banc request, although a senior Tenth Circuit judge who was on the original panel decision may elect to sit on the case if an en banc rehearing is

granted. En banc hearing or rehearing will occur only if a majority of all of the active circuit judges, except any recused in the case, vote to that effect.

6. If Rehearing En Banc Granted.

In the exceptional instance when rehearing en banc is granted, the initial panel's **judgment** is vacated, the mandate is stayed, and the case is restored to the docket as a pending appeal, unless the court specifically orders otherwise. However, the entire panel **opinion** is not necessarily vacated. The rehearing may be limited to particular issues, or the en banc court may affirm, without a new opinion, parts of the panel decision already entered. If the court should be equally divided on en banc rehearing, the judgment of the district court (**not** the judgment of the initial panel) will be affirmed.

XI. STAY OR INJUNCTION PENDING APPEAL

The mere filing of a notice of appeal will not stay the judgment appealed. Failure to obtain a stay may not affect the appeal, but absent a stay the prevailing party may treat the judgment appealed as final. But, failure to obtain a stay from an injunctive order, for example, might moot the appeal. A party who wants a district court judgment to be stayed, or who seeks an injunction pending appeal, must generally make the request in the first instance in the district court. In every motion for relief made to the court of appeals, the movant must show the district court denied or failed to afford the relief requested, and the motion must state the reasons given, or must show an application to the district court would not be practicable. Fed. R. App. P. 8(a)(2)(A). Application for stay of a decision or order of an agency pending review is made the same way. Fed. R. App. P. 18; 10th Cir. R. 20.1.

A motion may also be made for an emergency stay or injunction pending disposition of a petition to the court of appeals for writ of mandamus or prohibition, or for some other extraordinary writ. In this circumstance, it is not necessary to show prior application to the district court.

If a party is considering seeking an emergency stay or injunction of any kind the clerk's office should be contacted as soon as possible. See 10th Cir. R. 8.2(C). Counsel are encouraged to call the clerk's office if they anticipate filing an emergency request.

A. Jurisdiction.

A motion for stay or injunction, standing alone, will not confer or transfer jurisdiction to the court of appeals. In order for the court of appeals to consider such a motion, there must be a pending appeal from a district court judgment, a pending petition for review of a decision or order of an agency, or a pending application for a writ to which the motion for stay or injunction pertains. If emergency relief is requested in this court relating to a trial court proceeding, the moving party must also have a notice of appeal on file in the district court.

B. Fees.

No separate fee is required to file a motion for stay or injunction, but all required fees must have been paid in the underlying action, or leave to proceed in forma pauperis must have been granted, before the court will act on the motion.

C. Content of Motion and Supporting Papers.

In addition to showing prior application to the district court or agency, where practicable, and the action of the district court or agency, with reasons given for the action, the movant must also show the reason for the relief requested and the facts relied upon. Disputed facts should be supported by affidavits or other sworn statements or copies of them. The motion must be accompanied by copies of the relevant parts of the record. Fed. R. App. P. 8(a)(2)(A)(iii). The court will not consider any application for stay or injunction unless the applicant addresses:

1. the likelihood of success on appeal;
2. the threat of irreparable harm if the stay or injunction is not granted;
3. the absence of harm to opposing parties; and
4. any risk of harm to public interest.

10th Cir. R. 8.1. The motion and supporting materials should be as complete as possible, since the court will not accept ex parte oral statements in support of the motion. The court rarely allows oral argument on motions.

D. Filing and Service.

Counsel must file the motion via ECF. It should include a certificate of service, even if service is affected electronically through the system. Pro se parties may submit a

hard copy of the request. The motion will be considered by a panel of judges. **Whenever an application for emergency relief is contemplated, the clerk should be given advance notice so that arrangements can be made for timely submission to the court.** In addition, every application that requires the court to act either ex parte or in less than 48 hours in order to effect the relief requested must be plainly marked with the word "Emergency" on its face, must state the effective date of the order, judgment, or other action to be stayed, and must be accompanied by a certification of counsel stating why the application was not made earlier. 10th Cir. R. 8.2(A)(1).

Although Fed R. App. P. 8 authorizes these motions to be considered by a single judge in exceptional cases, the court does not favor submission to a single judge. 10th Cir. R. 8.3(A). In this electronic age the procedure is rarely required. Nevertheless, reasonable notice of every application for stay or injunction must be given to all parties, including when, where, and to whom the application is to be presented. Fed. R. App. P. 8(a)(2)(C); 10th Cir. R. 8.3(B)(2). In certain circumstances, this may involve more than the usual service required by Fed. R. App. P. 25(b). Every application made to a single judge and every application for ex parte relief, whether to a single judge or not, must be accompanied by a sufficient showing: (1) that the written or oral notice of the application was furnished to opposing counsel, or (2) what, if any, efforts have been made to furnish notice or the reasons why notice should not be required and/or is not possible. 10th Cir. R. 8.3.

E. Responses.

Although the court may grant temporary relief ex parte in appropriate cases, rarely will the court grant a stay or injunction pending appeal without first giving opposing parties time to respond to the motion. All responses received by the clerk before action on the motion will be presented to the court for consideration.

F. Disposition.

A panel is assigned as soon as it is clear action is required quickly. Now that the court operates electronically, the motion and response can be in the hands of the judges in minutes – almost faster than they could be carried to a judge in the Byron White Courthouse. The physical location of the panel members is immaterial to their readiness for prompt dispositive action. Rather, timely notice of urgency and adequate supporting documentation are crucial. The court must know as soon as possible that a request for emergency relief will be filed, and any supporting materials must be complete. If the panel has to wait for a critical document, there will be unnecessary delay in disposition.

XII. RELEASE IN CRIMINAL CASES

The court of appeals may review district court orders respecting release and bail, whether entered before or after a judgment of conviction. Review of a district court order respecting release entered before judgment must be by appeal, 18 U.S.C. § 3145(c), and should be initiated like any other criminal appeal. After reasonable notice to the appellee, the appeal will be heard on the materials and portions of the record the parties present or that the court may require. *See* Fed. R. App. P. 9(a).

Review of a district court order respecting release pending a defendant's direct criminal appeal, if initiated by the *government*, must also be by appeal. 18 U.S.C. § 3145(c) and § 3731. A *defendant* may, however, seek review of a district court order respecting release pending appeal by initiating a separate appeal, 18 U.S.C. § 3145(c), *or* by filing a motion in the pending direct criminal appeal. Fed. R. App. P. 9(b). The court prefers the latter approach. All proceedings for review of a district court order respecting release or bail conditions, whether initiated by appeal or by motion, must be expedited and are heard on memorandum briefs and an appendix presented by the party requesting relief. Fed. R. App. P. 9; 10th Cir. R. 9.2. Please note the appendices filed in bail matters must be forwarded to the court *electronically*. *See* 10th Cir. R. 9.2(B); *CM/ECF User's Manual* at 19.

A. Tenth Circuit Requirements.

1. Docketing Statement.

A docketing statement need not be filed in bail appeals.

2. Preliminary Record.

If review is by appeal, upon the filing of a notice of appeal the district clerk will transmit to the circuit clerk a preliminary record, which in bail appeals must include:

a) the notice of appeal;

b) the district court docket entries;

c) the order or oral ruling respecting release which contains the reasons (findings and conclusion) given by the district court for the action taken; and

d) a statement regarding the fee status of the appeal.

3. Memorandum or Brief with Appendix.

The court will decide bail appeals and motions for release or modification of detention on memorandum briefs which must contain 1) a statement of the facts and grounds for relief, 2) citation of relevant authorities and 3) a statement as to the defendant's custodial status or reporting date. The court must be kept apprised of any change in custodial status. The party seeking relief must also file *electronically* an appendix containing:

a) all release orders or rulings, *see* 10th Cir. R. 9.2(B);

b) the motion, including supporting memoranda, that was filed in the district court;

c) relevant transcripts;

d) the judgment of conviction, if the motion is post-judgment; and

e) any other parts of the district court record that support appellant's position.

B. Disposition.

Appeals from district court orders respecting release and motions for release pending appeal will be considered at issue after the appellee has had an opportunity to respond, usually 14 days after service of appellant's memorandum brief and appendix. *See* 10th Cir. R. 9.3. The court may, after reasonable notice to the parties, defer disposition of a bail appeal or a motion for release until the underlying direct criminal appeal is fully briefed and a full record on appeal is prepared and transmitted. Should the court, after consideration of the memorandum briefs, determine the appellant has not met the burden of showing the judgment and conviction represent a substantial question of law or fact, the court may consolidate the appeal on the merits with the bail issue and summarily dispose of the entire case on the merits.

XIII. HABEAS CORPUS PROCEEDINGS

A. Application for Writ.

An application for writ of habeas corpus may be made by a state or federal prisoner. Generally, the application should be made to the federal district court in whose jurisdiction the applicant is detained. If petitioner was convicted in a federal court, the application must be made to the court of conviction. The district court's action on an application may be appealed, but renewal of the application to this court is not favored. A renewed application may be transferred to the appropriate district court for treatment as a notice of appeal. Fed. R. App. P. 22(a). A second or successive petition may not be filed without permission of the court of appeals. 28 U.S.C. § 2244(b)(3)(A).

B. Certificate of Appealability.

Appeals of adverse judgments in habeas corpus matters may not be appealed absent issuance of a certificate of appealability. If the district judge denies a certificate, the notice of appeal from that denial may constitute a request to this court for a certificate of appealability. Fed. R. App. P. 22(b)(2). Nevertheless, in order to elicit additional information which can assist the court in determining whether a certificate of appealability should issue, the court may require appellant to file an application as part of the opening brief on a form provided by the court. Failure to file the required application within the prescribed time may result in dismissal of the appeal. 10th Cir. R. 22.1.

C. Special Procedures in Death Penalty Cases.

Because of the extraordinary nature of the interests in cases involving the death penalty, and because appeals in cases in which an execution date is set may require an expedited decision or a stay of execution to prevent the appeal from becoming moot, the court has adopted special procedures governing appeals in such cases. 10th Cir. R. 22.2.

1. Notification of District Court Action.

Counsel for the parties in any death penalty case in which an execution date is set are encouraged to notify the clerk of this court as soon as it appears that an application for relief (in the form of a stay of execution or otherwise) will be made to a federal district court in this circuit. The district clerk must notify the circuit clerk immediately upon the filing of any new habeas petition or other new proceeding. 10th Cir. R. 22.2(B)(2).

2. Lodging of Papers Prior to Appeal.

The court of appeals does not acquire jurisdiction until a notice of appeal is filed. Nevertheless, if an application for stay of execution is filed in the district court, the applicant is encouraged to transmit copies, together with supporting documents, to the clerk of this court. The court's email address [clerk@ca10.uscourts.gov] may be utilized in transmitting these papers. 10th Cir. R. 22.2(C)(2). Counsel should alert the clerk's office by phone when these materials are forwarded.

D. Antiterrorism and Effective Death Penalty Act.

In April 1996, the habeas corpus provisions of the federal civil code were extensively amended. Pub. L. No. 104-132, 110 Stat. 1214 (April 24, 1996). Under this legislation, there is a one-year statute of limitations on filing a petition for writ of habeas corpus. 28 U.S.C. § 2244(d). There are also limits on the standards of review the federal courts may apply to judgments of state courts. 28 U.S.C. § 2254 and 2255.

As noted, generally federal as well as state prisoners must obtain a certificate of appealability before a habeas appeal will be considered on the merits. A certificate of appealability will only be granted in limited circumstances. Before a second or successive petition for a writ of habeas corpus may be filed in district court, petitioner must first obtain leave of a three-judge panel of the court of appeals to file the successive petition. The court of appeals must act on the request to file a second or successive petition within 30 days of the date the request was filed. 28 U.S.C. § 2244.

In capital cases in states which implement certain procedures for providing representation by counsel in state post-conviction proceedings, time constraints are imposed on both petitioner and the courts. The time limits may be enforced by petition for a writ of mandamus. 28 U.S.C. § 2266. At this time the Tenth Circuit does not include any states taking advantage of this provision.

XIV. MOTIONS

Counsel should review the court's *CM/ECF User's Manual* for additional information regarding filing motions electronically. *See* www.ca10.uscourts.gov.

A. Relief Sought.

Although certain types of relief are referenced specifically in the Federal Rules of Appellate Procedure and the Tenth Circuit Rules (*e.g.*, stay or injunction, release in criminal cases, enlargement of time, stay of mandate, and dismissal, voluntary or otherwise), other kinds of relief may be obtained. Parties may apply by motion for any relief within the authority and discretion of the court. The court is prohibited by the Federal Rules of Appellate Procedure from granting certain relief, and Tenth Circuit Rules restrict applications for other specified types of relief.

1. Prohibited Relief.

The court has no authority to enlarge the time for filing a notice of appeal, a petition for permission to appeal, or a petition to review or enforce an administrative order, except as specifically authorized by law. Fed. R. App. P. 26(b)(1) & (2).

2. Restricted Relief.

The court will consider motions to affirm or dismiss only on one of the following grounds: the appeal is not within the jurisdiction of the court, there is a supervening change of law, the appeal is moot, the appeal should be remanded for additional trial court or administrative proceedings, or based on a motion from the government to enforce a plea waiver. 10th Cir. R. 27.2(A). The court does not favor motions to enlarge the time for filing briefs. 10th Cir. R. 27.4(A). If one is filed, however, it must meet certain criteria. 10th Cir. R. 27.4(C) thru (F).

B. Contents of Motions.

Every motion must state the facts relied upon, the particular grounds on which it is based, and the relief sought. In addition, the motion must contain or be accompanied by any matter required by specific provisions of the Federal Rules of Appellate Procedure or Tenth Circuit Rules governing that type of motion. If the request is supported by affidavits, or other materials, they must be served and filed with the motion. Fed. R.

App. P. 27(a)(2)(B)(1). *Every motion must state the position of the opposing party*. 10th Cir. R. 27.3(C).

C. Responses.

Any party may file a response in opposition within 14 days after service of the motion. 10th Cir. R. 27.2(A)(4). The court may shorten or extend the time for responding to any motion, and may act upon motions authorized by Fed. R. App. P. 8, 9, 18, and 41, after reasonable notice. The court may act on motions for procedural orders at any time, without waiting for a response. Any party adversely affected by that action may request reconsideration, vacation or modification of the order. Fed. R. App. P. 27(a) and (b). Timely opposition filed after the motion is granted in whole or in part does not constitute a request to reconsider, vacate, or modify the disposition; a motion requesting that relief must be filed.

D. Form and Service.

A motion or response must contain a caption setting forth the name of the court, the title of the case, the file number, and a brief descriptive title indicating its purpose. Text must be double-spaced. Filing parties must serve copies of all motions and responses on all other parties to the appeal or review and must file proof of service with the court. Counsel must file motions via the court's ECF system. Parties may use the system to serve other parties to the proceeding, but where any party to the appeal is pro se or otherwise exempt from electronic filing service must be accomplished by traditional means.

E. Disposition.

One or more judges may grant or deny any request for relief, but a single judge may not dismiss or otherwise determine an appeal or other proceeding. Fed. R. App. P. 27(c). The action of a single judge or panel of judges may be reviewed by the court, except that orders on procedural and interim matters and leave to appeal from a nonfinal order will not be reviewed by the court en banc. Fed. R. App. P. 27(c); 10th Cir. R. 35.7. The court has provided by local rule that specified types of procedural orders may be disposed of by the clerk, but any party affected by such action may seek review by the court. Fed. R. App. P. 27(b) and 10th Cir. R. 27.3.

XV. RESPONSIBILITIES OF COUNSEL

A. Admission to Practice.

All counsel, including counsel appointed pursuant to the Criminal Justice Act, who represent litigants in the Tenth Circuit Court of Appeals must be admitted to the bar of the court. An attorney who has been admitted to practice before the Supreme Court of the United States, the highest court of a state, another United States court of appeals, or a United States district court, and who is of good moral and professional character is eligible for admission to the bar of this court. Application for admission must be made on a form approved by the court and furnished by the clerk and must be supported by a written or oral motion of a member of the bar of this court. Forms for admission are available on the court's website. As is noted below, the court now allows for electronic submission of application forms, as well as electronic payment of the admission fee. *See* www.ca10.uscourts.gov. It is not necessary that the applicant appear before the court for the purpose of being admitted.

Application for admission may be made at any time, but an attorney not previously admitted, who files a case or enters an appearance in a case in this court, should be admitted before engaging in further practice before the court. The current fee for admission is $225, payable to the clerk of the court. Fed. R. App. P. 46(a); 10th Cir. R. 46.2(A) & (B). Practitioners should note that effective January of 2012 the fee may be paid on line via the court's ECF system. The court will waive the admission fee for any attorney representing the United States or its agency and for any attorney appointed by the court, in particular pursuant to the Criminal Justice Act, to represent a party to an appeal. A certificate of admission will be issued by the clerk's office.

All attorneys admitted to the bar of the court are subject to disciplinary rules, including the possibility of fines, suspension or disbarment for misconduct or failure to comply with the Federal Rules of Appellate Procedure and the Tenth Circuit Rules. No attorney appearing in a case before the court may withdraw without the court's consent.

B. Appearance by Counsel or Parties.

1. Entry of Appearance.

Attorneys who authorize their names to appear on pleadings filed in this court will be deemed to have entered an appearance in the subject case. Within 14 days after

an appeal or other proceeding is filed in this court, counsel for the parties must file an entry of appearance. An attorney whose name appears for the first time on subsequently filed papers must likewise submit a written appearance. 10th Cir. R. 46.1(A). Parties appearing without counsel must enter their appearance on a pro se entry of appearance form provided by the court. 10th Cir. R. 46.1(B). 10th Cir. R., Form 3. In order to file electronically counsel must register with the PACER Service Center. The court's website includes a step-by-step guide to registration. On the website, counsel should proceed to the "CM/ECF & Court Filing" tab on the home page.

So that the judges of the court may evaluate possible disqualification or recusal, each entry of appearance must include a certificate setting forth the names of any and all parties to the litigation not revealed by the caption on appeal, including all persons, associations of persons, firms, partnerships, corporations, guarantors, insurers, affiliates, or other legal entities who or which are financially interested in the outcome of the litigation. The certificate must also list the names of attorneys not entering an appearance in this court who have appeared for any party in a prior trial court or administrative proceeding, or in any related proceedings that preceded the action being pursued in this court. New counsel may adopt by reference a prior filed certificate of interested parties. The adoption must appear on the certificate included with counsel's entry of appearance. Counsel are under a continuing obligation to update the certification, as necessary, to keep the court currently advised. 10th Cir. R. 46.1(C)(6).

2. Consequences of Appearance.

After entering an appearance, attorneys are responsible for the contents of all papers filed in their names. 10th Cir. R. 46.1(A). Digital signatures are allowed, and an electronic signature constitutes an original signature under the rules. 10th Cir. R. 46.5(C). Parties not represented by counsel must sign the original of every paper filed and include a current address, email address, if applicable, and telephone number. By signing papers filed in the court, attorneys and parties certify that they have read the filings, and that to the best of their knowledge, information and belief, formed after reasonable inquiry, the pleadings are well-grounded in fact and are warranted by existing law or good faith argument for the extension, modification, or reversal of existing law; and that they are not interposed for any improper purpose, such as to harass or cause unnecessary delay or needless increase in the cost of litigation. Filings not signed (as noted, digital

signatures are allowed) as required by the rules of court will be stricken. 10th Cir. R. 46.5.

3. Continuance of Representation in Criminal and Post-Conviction Cases.

Retained or appointed trial counsel for a criminal defendant who wishes to appeal a conviction after trial or a conditional guilty plea must continue representation of the defendant unless relieved by the court of appeals. That counsel must file an entry of appearance and docketing statement before moving to withdraw. 10th Cir. R. 46.3(A). In addition, please note signing a notice of appeal on behalf of a petitioner or moving party in a post-conviction proceeding under 28 U.S.C. § 2254 or 28 U.S.C. § 2255 is equivalent to entering an entry of appearance in this court and the attorney may not withdraw without leave of the court. *Id.*

C. Withdrawal and Dismissal.

1. Withdrawal of Counsel.

An attorney who has entered an appearance in a case in this court may not withdraw without consent of the court. 10th Cir. R. 46.1(A). A retained or appointed attorney who seeks to withdraw from a criminal appeal or from an appeal involving post-conviction relief must state the reasons for requesting withdrawal in a motion. The motion must include a statement that the client has been advised to obtain other counsel promptly, or, if the client intends to proceed pro se, that the client has been advised of any currently pending obligation under the Federal Rules of Appellate Procedure or the rules of this court. Preliminary prosecution of the appeal (filing the entry of appearance and docketing statement) must be completed before the motion will be granted. In addition, the motion must contain one of the following:

a. showing that new counsel has been retained or appointed; or

b. a showing that appellant has been granted leave to proceed in forma pauperis or has been found eligible for appointment under 18 U.S.C. § 3006A, or that a completed motion for a finding that appellant is eligible for appointment of counsel on appeal has been filed in the district court; or

c. a signed statement from the client demonstrating knowledge of the right to retain new counsel or apply for appointment of counsel and expressly electing to appear pro se; or

d. a showing that exceptional circumstances prevent counsel from meeting any of the requirements stated in subdivisions (a) through (c) above.

Proof of service on the client, as well as all opposing parties, must be furnished. 10th Cir. R. 46.4(A)(4).

2. Frivolous Appeals.

If counsel in a direct criminal appeal believes the action is frivolous, a brief must be filed, *see Anders v. California*, 386 U.S. 738 (1967). Counsel must advise the court of the client's address. Appellant will be given an opportunity to personally respond to the brief.

3. Dismissal of Appeal.

a. Voluntary Dismissal.

Civil appeals not involving post-conviction relief may be voluntarily dismissed by an agreement of the parties or on motion of the appellant, and on such terms as may be agreed upon by the parties or fixed by the court. Fed. R. App. P. 42(b). Similarly, pro se appellants may voluntarily dismiss criminal appeals and appeals involving post-conviction relief. However, any motion to voluntarily dismiss a criminal appeal or an appeal involving post-conviction relief which is filed by counsel must be accompanied by a signed statement from the appellant demonstrating knowledge of the right to appeal and expressly electing to withdraw the appeal; alternatively, counsel must show that exceptional circumstances prevent presentation of a statement. 10th Cir. R. 46.3(B).

b. Dismissal by the Court.

The court may dismiss an appeal if the appellant, acting pro se or through retained counsel, fails to comply with the Federal Rules of Appellate Procedure or the rules of this court after being notified of the failure to comply and being given an opportunity to comply. 10th Cir. R. 42.1. Dismissal of an appeal will not necessarily relieve counsel from possible disciplinary action.

In a criminal case, the appeal will not be dismissed, but counsel may be required to show cause why he or she should not be disciplined 10th Cir. R. 46.6(B) and (C).

D. Suspension, Disbarment, and Discipline.

1. Effect of Suspension or Disbarment by Another Court.

Any member of the bar of this court who is suspended or disbarred from practice in any other court of record, or who is found guilty of conduct unbecoming a member of the bar of this court, will be ordered to show cause why he or she should not be suspended, disbarred, or otherwise disciplined by this court. After a response is filed and after a hearing, if permitted, or on expiration of the time for a response, if no response is made, the court will enter an appropriate order under the court's Plan for Attorney Disciplinary Enforcement. Fed. R. App. P. 46(b); Plan for Attorney Disciplinary Enforcement, 10th Cir. R., Add. III.

2. Discipline for Practice in this Court.

The court may, after reasonable notice and an opportunity to show cause to the contrary, and after hearing if permitted, take any appropriate disciplinary action against any attorney who practices before it for conduct unbecoming a member of the bar or for failure to comply with the Federal Rules of Appellate Procedure or any rule of the court. Fed. R. App. P. 46(c). Counsel may also be disciplined for failure to comply with 10th Cir. R. 33.1(D) and 33.2(D) which require confidentiality of settlement discussions. *See Pueblo of San Ildefonso v. Ridlon*, 90 F.3d 423 (10th Cir. 1996).

XVI. JUDICIAL MISCONDUCT COMPLAINT PROCEDURE

Sections 351 to 364 of title 28 of the United States Code provide a way for any person to complain about a federal judge who the person believes "has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts" or "is unable to discharge all the duties of office by reason of mental or physical disability." The Tenth Circuit Rules Governing Complaints of Judicial Misconduct and Disability apply only to judges of the Court of Appeals for the Tenth Circuit and to district judges, bankruptcy judges, and magistrate judges of federal courts within the circuit. The circuit includes the States of Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming.

The purpose of the complaint procedure is to improve the administration of justice in the federal courts by taking action when judges have engaged in conduct that does not

meet the standards expected of federal judicial officers or are physically or mentally unable to perform their duties. The law's purpose is essentially forward looking and not punitive. The emphasis is on correction of conditions that interfere with the proper administration of justice in the courts.

"Conduct prejudicial to the effective and expeditious administration of the business of the courts" is not a precise term. It includes such things as use of the judge's office to obtain special treatment for friends and relatives, acceptance of bribes, improperly engaging in discussions with lawyers or parties to cases in the absence of representatives of opposing parties, and other abuses of judicial office.

The complaint procedure is not intended to provide a means of obtaining review of a judge's decision or ruling in a case. "Judicial misconduct" *does not include making wrong decisions – even if a litigant thinks they are very wrong decisions – in cases.* The law provides that a complaint may be dismissed if it is "directly related to the merits of a decision or procedural ruling."

Complaints are filed with the circuit executive on a form that has been developed for that purpose. Each complaint is referred first to the chief judge of the circuit, who decides whether the complaint raises an issue that should be investigated. (If the complaint is about the chief judge, pursuant to the rules, another judge will make this decision).

The chief judge will dismiss a complaint if it does not properly raise a problem that is appropriate for consideration under the statute. The chief judge may also conclude the complaint proceeding if the problem has been corrected or if intervening events have made action on the complaint unnecessary. If the complaint is not disposed of in either of these two ways, the chief judge will appoint a special committee to investigate the complaint. The special committee makes its report to the judicial council of the circuit, which decides what action, if any, should be taken. The judicial council is the statutory governing body of the circuit and consists of the chief circuit judge, four judges of the court of appeals, and four district judges from the Tenth Circuit. The rules provide, in some circumstances, for review of decisions of the chief judge or the judicial council.

Judicial misconduct complaints are confidential and no filing fee is required. Questions regarding procedures should be addressed (preferably in writing in an envelope clearly marked "Confidential – Complaint of Judicial Misconduct") to the circuit executive at the following address:

Office of the Circuit Executive
Byron White United States Courthouse
1823 Stout Street
Denver, Colorado 80257

A complete copy of the rules and procedures are in Addendum IV to the Tenth Circuit Rules.

Appendices

Appendix A – Sample Brief

Appendix B – Links to Current CJA Advice to Counsel Letter, CJA Rates, and CJA Voucher Instructions

Appendix C – Helpful Links

APPENDIX A

CASE NO. 13-0000

IN THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,	)
	)
Plaintiff – Appellee,	)
	)
v.	)
	)
JOHN DOE,	)
	)
Defendant – Appellant.	)

On Appeal from the United States District Court
For the District of Anywhere
The Honorable Judge XXX
D.C. No. 2:13-CR-00001-XYZ

APPELLANT'S OPENING BRIEF

Respectfully submitted,

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Federal Public Defender

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Oral Argument is requested.
SCANNED PDF FORMAT ATTACHMENTS ARE INCLUDED

Date, 2014

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U.S.S.G. § 2D1.11(e) 14

U.S.S.G. § 2D1.11(e)(3) 14

U.S.S.G. § 2D1.11(e)(4) 14

U.S.S.G. § 5G1.1(a), (b) 16

U.S.S.G. § 5G1.1(c)(1) 16

U.S.S.G. § 5G1.2(b) 16

U.S.S.G. § 6A1.3(a) 10

PRIOR OR RELATED APPEALS

None.

The Office of the Federal Public Defender, by undersigned counsel, on behalf of John Doe, defendant-appellant, for his opening brief states:

STATEMENT OF JURISDICTION

The United States District Court for the District of Anywhere, had jurisdiction over this matter pursuant to 18 U.S.C. § 3231. Mr. Doe was convicted after trial of attempt to manufacture methamphetamine, and possession of precursor chemicals.

After sentencing, the judgment and commitment order was entered on the docket on August 3, 2005. (v. 1, doc. 42). (*Attachment 1*). The notice of appeal was timely filed in accordance with Rule 4(b)(1), F.R.A.P., on August 5, 2005. (v. 1, doc. 43). This appellate court's jurisdiction derives from 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

STATEMENT OF THE ISSUES

IN SENTENCING MR. DOE, THE COURT ERRED IN USING AN UNEXPLAINED CONVERSION RATE RATHER THAN THE METHODOLOGY OF THE GUIDELINES.

ALTERNATIVELY, BECAUSE THE STATUTORY MAXIMUM SENTENCE IS 10 YEARS FOR COUNT 4, THE CONCURRENT SENTENCE OF 151 MONTHS IMPOSED ON ALL COUNTS IS ILLEGAL AS TO THAT COUNT.

STATEMENT OF THE CASE

The government obtained a superseding indictment against Mr. Doe, charging him with attempt to manufacture methamphetamine (count 1) in violation of 21 U.S.C. § 846, and punishable under 21 U.S.C. § 841(b)(1)(C). The three other counts in the indictment charged possession of pseudoephedrine, red phosphorus, and iodine, respectively, with the intent of manufacturing methamphetamine, in violation of and punishable under 21 U.S.C. § 841(c). (v. 1, doc. 1).

At trial, the government presented its case largely through the testimony of Officer Joe Smith, of the DEA, who was certified as an expert in clandestine methamphetamine laboratories. (v. 1, doc. 17; v. 4 at 112). At the conclusion of trial, the jury found Mr. Doe guilty of all 4 counts against him.

A presentence report was prepared. (v. 7, PSR). Mr. Doe filed several objections to the PSR, particularly with respect to the conversion rates of the precursor chemicals to methamphetamine. At the conclusion of sentencing, the court found that the amount of drugs had been established by a preponderance of the evidence through the DEA report and through the testimony at trial. (v. 6 at 20). With offense level 34 and criminal history category I, Mr. Doe's guideline range was 151-188 months. (v. 6 at 9). The court imposed a term of 151 months imprisonment. (v. 6 at 20-21, 23).

STATEMENT OF THE FACTS

Methamphetamine Laboratory and Charges

This case has its origins in a Drug Enforcement Administration investigation of the purchase of iodine from local retailers in the Anywhere County area. Mr. Doe became a suspect, and authorities obtained a warrant to search his residence. In the course of executing the search warrant, officers discovered various items associated with a clandestine methamphetamine laboratory, as well as quantities of several precursor chemicals. (Rec. Vol. 4 at 199).[1]

Officer Smith's Testimony on Chemical Conversion Rates

At trial, the government presented its case largely through the testimony of Officer Joe Smith, of the DEA, who was certified as an expert in clandestine methamphetamine laboratories. (Rec. Vol. 1, doc. 17; v. 4 at 112). Through Officer Smith, the government introduced its exhibits. Exhibit 47, the DEA Metro Narcotics Evidence Receipt & Property Report, reflected the quantities of precursor chemicals found, specifically: 15 grams of pseudoephedrine, 110 grams of red phosphorous, and 113.4 grams of iodine. Exhibit 49, the toxicology report, confirmed the nature of the substances.[2] (Rec. Vol. 4 at

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[1] **Note—include citation convention here.**

[2] These two exhibits are submitted in a separate Addendum, as required by Rule 10.3(D)(5), Tenth Circuit Rules. For the court's convenience, however, these are attached here as well as *Attachments 2 and 3*.

154). This report did not provide a basis for converting the precursor chemicals into methamphetamine.

The only evidence presented by the government concerning the conversion of precursor chemicals into methamphetamine was the testimony of Officer Smith in response to the question: "Is there any way to determine what the potential capacity of this lab may have been?" (Rec. Vol. 5 at 159). Officer Smith answered:

> For the – in order to determine the capacity, you basically take the largest quantity of chemicals they have, I believe the largest quantity of chemicals of this one was the red phosphorous, we had 110 grams of red phosphorous. Red phosphorous will actually convert on a one-to-one ratio to methamphetamine, so for 110 grams of red phosphorous you can actually produce 110 grams of actual methamphetamine.

(Rec. Vo.. 4 at 159-160). Actual methamphetamine, he explained is "pure methamphetamine, 100% pure meth." (Rec. Vol. 4 at 160).

Presentence Report (v. 7 PSR)

Accepted Practices in the District

Critical to Mr. Doe's appeal was the PSR author's statement concerning the conversion rate of the precursor chemicals into methamphetamine. The author set forth that the 15 grams of pseudoephedrine converted at a 50% rate to 7.5 grams of methamphetamine (actual); the 110 grams of red phosphorous converted at a 100% rate to 110 grams of methamphetamine (actual); and the 113.4 grams of iodine converted at a 33% rate to 34.4 grams of methamphetamine (actual). (PSR ¶ 20). Although the author cited to ¶ 11 of the report, that paragraph contains no explanation of these conversion rates. (*Attachment 4*, PSR ¶¶ 11, 20).

Using the chemical that resulted in the greatest offense level, the 110 grams of red phosphorus (110 grams of methamphetamine (actual)), the PSR author assigned a base offense level 32 to Mr. Doe's offense. *See* § 2D.1.1(c)(4) (at least 50 grams but less than 150 grams of methamphetamine (actual)). (PSR ¶ 20). With a 2-level enhancement because the offense involved the unlawful transportation, treatment, storage or disposal of a hazardous waste, *see* § 2D1.1(b)(6)(A) (PSR ¶ 21), Mr. Doe's adjusted offense level was 34.

With no criminal history points, Mr. Doe's criminal history category was Category I. (PSR ¶ 34). His guideline range was 151–188 months. (PSR ¶ 49). The statutory penalties for the four counts of which Mr. Doe was convicted were 0-20 years imprisonment for counts 1-3, and 0-10 years imprisonment for count 4. (PSR ¶ 48).

Mr. Doe filed several objections to the PSR, including that the jury had to find the quantities of the drugs under United States v. Booker, 125 S. Ct. 738 (2005). But the objection pertinent to this appeal is his objection "as a factual and a legal matter" to the PSR conversion rates of the precursor chemicals to methamphetamine. (Rec. Vol. 1, doc. 37 at p. 8). Mr. Doe argued, "These conversion rates are not found in the Federal Sentencing [G]uidelines and therefore should not be used in the computations." (Id.) In the Response to Objections, the PSR author stated only: "The conversion is determined by *accepted practices* in the District of Anywhere and determined by *testimony in*

previous cases." (PSR, Response to Objection Two) (*emphasis added*) (*Attachment 5*).

Sentencing (Attachment 6)
Insufficient Proof of the Quantity of Methamphetamine

At sentencing, the parties and the court discussed the quantities of the chemicals, the conversion rates, and the evidence that had been presented at trial, but the accepted practices in the District of Anywhere were never mentioned.

Instead, the court said, "It looks to me like the main objection is a question of converting "pseudoephedrine" into methamphetamine. (Rec. Vol. 6 at 4). (It appears the court misspoke, because the main objection was to the red phosphorous conversion rate because it yielded the highest base offense level.) The court correctly stated that "it is the government's burden to show some kind of a conversion factor." (Rec. Vol. 6 at 4). Government counsel stated that evidence about conversion rates was introduced through Officer Smith's testimony. The court asked whether the officer testified that 110 grams of "phosphorus" converted into 110 grams of actual methamphetamine. (Here, the court referred to the precursor chemical that was the focus of Mr. Doe's objection.) Government counsel responded that Officer Smith had done so. (Rec. Vol. 4 at 4.)[3] The court found that the evidence at trial established the "pseudoephedrine" conversion rate. (Rec. Vol. 6 at 9).

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[3] Defense counsel did not argue further about the conversion rates specifically, but instead urged that the jury should have found the quantity of drugs, in light of United States v. Booker, 125 S. Ct. 738 (2005), and it predecessor decisions. (Rec. Vol. 4 at 5-7). The court overruled the Booker objection.

At the conclusion of sentencing, the court found that the amount of drugs had been established by a preponderance of the evidence through the DEA report and through the testimony at trial. (Rec. Vol.6 at 20). With offense level 34 and criminal history category I, Mr. Doe's guideline range was 151 – 188 months. (Rec. Vol. 6 at 9). In imposing sentence, the court stated it had considered all of the factors in 18 U.S.C. § 3553(a). (Rec. Vol. 6 at 20). Noting that it was unlikely the laboratory was only used once, the court imposed a term of 151 months imprisonment. (Rec. Vol. 6 at 20-21, 23).

SUMMARY OF THE ARGUMENTS

Mr. Doe does not dispute on appeal the nature and the quantities of substances found during the search of his residence. Nor does Mr. Doe dispute that, at trial, Officer Smith testified that the 110 grams of red phosphorous converts at a 1 to 1 conversion rate to 110 grams of methamphetamine. Mr. Doe does dispute, on appeal as he did below, the conversion method ultimately used by the court.

After United States v. Booker, 125 S. Ct. 738 (2005), district courts are to first *correctly* calculate the advisory guideline range, and are then to consider the other factors set forth in 18 U.S.C. § 3553(a). A sentence imposed, based upon an incorrectly calculated guideline range, is subject to harmless-error review. *See* United States v. Kristl, 437 F.3d 1050, 1062 (10th Cir. 2006).

The government, of course, has the burden of proving the quantities of drugs that form the basis of a sentence. At sentencing, no mention was made of the accepted

practices in the district. Instead, the court relied on Officer Smith's extremely brief trial testimony, without explanation, that the conversion rate was 1 to 1 between red phosphorus and methamphetamine. Officer Smith is an expert in clandestine methamphetamine labs; he is not a chemist. The government failed to provide the court with the sort of testimony on which the court could justifiably rely. *See* United States v. Andersen, 940 F.2d 593 (10th Cir. 1991). The court erred in finding that the quantity arrived at through use of this conversion rate was supported by a preponderance of the evidence.

Nor can the conversion rate testified to by Officer Smith be supported by the PSR author's equally brief reference to the "accepted practices" in the District of Anywhere, and testimony in "previous cases." In the face of Mr. Doe's objection the government did not present, and the court did not require, evidence concerning these practices and prior testimony.

The court should have used the methodology in the guidelines, under § 2D1.1 and § 2D1.11, that is set forth at length herein.

In addition, the statutory maximum applicable to count 4, possession of iodine with intent to manufacture methamphetamine, was 10 years, not 20 years like the maximums applicable to the other counts. The 151-month sentence imposed is illegal with respect to count 4.

In any event, if Mr. Doe prevails on his argument regarding the conversion rate, on remand his sentence should be well below 10 years.

For these reasons, a remand for resentencing is necessary.

IN SENTENCING MR. DOE, THE COURT ERRED IN USING AN UNEXPLAINED CONVERSION RATE RATHER THAN THE METHODOLOGY OF THE GUIDELINES

Review is De Novo Pursuant to The Two-Step Approach Recently Adopted By the Court for Review of Sentences for Reasonableness

This court recently adopted a two-step approach to the reasonableness standard of review announced in United States v. Booker, 125 S. Ct 758 (2005). *See* United States v. Kristl, 437 F.3d 1050, 1060 (10th Cir. 2006). First, the court determines "whether the district court considered the applicable Guidelines range, reviewing its legal conclusions *de novo* and its factual findings for clear error." Id. "[A] sentence that falls within the *properly calculated* Guidelines range is presumptively reasonable." Id. at *2 (*emphasis added*). "A non-harmless error in this calculation entitles the defendant to a remand for resentencing." Id. at *4. "The defendant may rebut this presumption by demonstrating that the sentence is unreasonable in light of the other sentencing factors laid out in § 3553(a)." Id.

For the reasons explained below, Mr. Doe's sentence is not "presumptively reasonable" because the district court did not *correctly* determine the base offense level under the sentencing guidelines.

The District Court Erred in Relying on the Conversion Rate

Testified to by Officer Smith

Although the PSR author explained that the conversion rates used in the report were based on accepted practices in the District of Anywhere, at sentencing, the court did not refer to these practices. Instead, the court focused on the government's proof.

The government bears the burden of proving the quantity of drugs by a preponderance of the evidence. United States v. Sloan, 65 F.3d 861, 865 (10th Cir. 1995). "Where there is no drug seizure or the amount seized does not reflect the scale of the offense, the court shall approximate the quantity of the controlled substance." *See* § 2D1.1, comment (n.12). In making this determination, the court may consider a number of factors, including pertinent here, "the size or capability of any laboratory involved." The information used to calculate drug quantities must have "sufficient indicia of reliability." *See* § 6A1.3(a); United States v. Richards, 27 F.3d at 465, 468 (10th Cir. 1994).

"[A] district court may sentence a defendant based on expert testimony regarding how much methamphetamine could be produced from precursor chemicals possessed by the defendant." United States v. Havens, 910 F.2d 703, 705 (10th Cir. 1990). "The factual question is what each defendant could have actually produced, not the theoretical maximum amount produceable from the chemicals involved." Id. At 706.

In United States v. Andersen, 940 F.2d 593, 597 (10th Cir. 1991), this court approved the district court's reliance upon the expert trial testimony of a DEA chemist whose opinion was that the defendant could have produced approximately 29 kilograms

of methamphetamine from L-ephedrine. *See also* United States v. Pace, 981 F.2d 1123, 1134 (10th Cir. 1992) (holding that the district court was entitled to rely on the expert testimony of a forensic chemist that 50 pounds of precursor chemical could produce 14-20 pounds of methamphetamine).

In this case, the only testimony was from Officer Smith who, almost in passing, said that the 110 grams of red phosphorous converted at a 1 to 1 ration to 110 grams of methamphetamine. From the perspective of this trial, such brevity was understandable. Because Mr. Doe was charged under 21 U.S.C. § 841(b)(1)(C), and not § 841(b)(1)(A) or (B), the government did not have to prove a particular quantity of drugs for purposes of obtaining a *conviction* on attempt to manufacture methamphetamine. Put another way, no enhanced statutory penalty was charged that required such proof. Likewise, in 21 U.S.C. § 841(c), quantity is not an element of the offense. *See* Apprendi v. New Jersey, 530 U.S. 466 (2000).

Sentencing is another matter. Officer Smith is an expert in clandestine methamphetamine laboratories; but a chemist he is not. His expertise may lie in discussing the beakers and burners, funnels and glassware, that comprise a meth lab. And he can certainly set forth the sorts of precursor chemicals ordinarily found in such a lab. But he cannot – and did not – explain the scientific properties of the precursor chemicals, how the conversion rates are determined, or otherwise explain why these rates are reliable. Officer Smith's testimony was "theoretical" only, Havens, 910 F.2d at 706, and not a reliable or sufficient basis on which to base Mr. Doe's sentence.

Nor Was There Any Evidence Presented As to the Accepted Practices in the District

The conversion rates in the PSR were based on "accepted practices" in the District of Anywhere and testimony from "previous cases." (v. 7 PSR, Response to Objections). At sentencing, no mention was made of such practices and testimony.

Counsel for Mr. Doe could find no published case dealing with the District of Anywhere's conversion rates for precursor chemicals. But attached is United States v. Hemsley, 160 Fed. App'x 804, 810 (10th Cir. 2005) (*unpublished*) (*Attachment 7*), an appeal from a District of Anywhere sentencing where, due to the absence of an objection to the conversion method, this court found no plain error in using the 33% rate for converting iodine into methamphetamine for purposes of determining the base offense level.

Mr. Doe objected to the conversion rates set forth in the PSR. Yet the government did not present any evidence regarding the practices in the district or testimony from other cases. The district court's sentence cannot, therefore, be justified on such basis.

The Following Is the Guideline Methodology Mr. Doe Urges Should Have Been Used to Determine the Base Offense Level for His Offense

Attempt to Manufacture Methamphetamine

The guideline to be used for an attempt to manufacture methamphetamine is § 2D1.1. As will be explained, under § 2D1.1, Mr. Doe's base offense level should be level 26.

Subsection (a)(3), of § 2D1.1, directs that the offense level in the Drug Quantity Table in subsection (c) be used. But the Drug Quantity Table contains no offense level for pseudoephedrine, red phosphorus or iodine. In that situation, where a controlled substance is not specifically referenced in the guidelines, § 2D1.1, comment (n.5) states that the base offense level should be determined by using the marijuana equivalency of the most closely related controlled substance referenced in the guideline.

Turning to the Drug Equivalency Tables in comment (n.10), neither red phosphorous nor iodine is listed. The Tables do, however, list pseudoephedrine with a conversation ratio of 1 gram of pseudoephedrine equaling 10 kilograms of marijuana. *See* List I Chemicals (relating to the manufacture of amphetamine or methamphetamine).[4]

Mr. Doe's case involves 15 grams of pseudoephedrine or 150 kilograms of marijuana, yielding level 26. *See* § 2D1.1(c), DRUG QUANTITY TABLE, Level 26 (at least 100 KG but less than 400 KG of Marijuana).

Possession of Precursor Chemicals
With Intent to Manufacture Methamphetamine

The guideline for possession of precursor chemicals with intent to manufacture, the subject of counts 2-4, is § 2D1.11. The Cross Reference, subsection (c)(1), states that when the offense involves an attempt to manufacture a controlled substance, as in Mr. Doe's case, the court should apply § 2D1.1 ***if*** the resulting offense level is greater than

[4] This List is found at p. 147 of the 2004 Guidelines Manual.

determined under subsections (a) and (b) of § 2D1.11. The calculation under § 2d1.11 has to be performed in order to make this comparison. Using § 2D1.11 results in the same base offense level as under § 2D1.1, that being level 26.

Under § 2D1.11, the 15 grams of pseudoephedrine found in Mr. Doe's residence call for a base offense level 26. *See* § 2D1.11(d)(7)[5] (at least 10 grams but less than 40 grams of pseudoephedrine).

Red phosphorus and iodine are included under the chemical quantity table in § 2D1.11(e).[6] The 110 grams of red phosphorous fall within level 26. *See* § 2D1.11(e)(3) (List I Chemicals) (at least 71 G but less than 214 G of Red Phosphorus). The 113.4 grams of iodine call for base offense level 22. *See* § 2D1.11(e)(4) (List II Chemicals) (at least 87.8 G but less than 125.4 G of Iodine).

In calculating the base offense level where, like here, the offense involves two or more chemicals, the court should "use the quantity of the single chemical that results in the greatest offense level, regardless of whether the chemicals are set forth in different tables or in different categories." *See* § 2D1.11, comment (n.4(A)). Hence, Mr. Doe's base offense level should be level 26 under § 2D1.11.

Correct Guideline Range

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[5] Section 2D1.11(d) is the EPHEDRINE, PSEUDOEPHEDRINE, AND PHENYLPROPANOLAMINE QUANTITY TABLE (Methamphetamine and Amphetamine Precursor Chemicals).

[6] Section 2D1.11(e) is the CHEMICAL QUANTITY TABLE (All Other Precursor Chemicals).

With a 2-level enhancement for hazardous materials (applicable under both § 2D1.1(b)(6)(A) and § 2D1.11(b)(3)(A)), Mr. Doe's adjusted offense level should be 28. With criminal history category I, his guideline range should be 78-97 months, a substantial reduction from his 151-month sentence. This error in calculating the guidelines is hence not harmless, and Mr. Doe's sentence cannot be said to be "presumptively reasonable." *See* Kristl, 437 F.3d at 1055. A remand for resentencing is necessary.

ALTERNATIVELY, BECAUSE THE STATUTORY MAXIMUM SENTENCE IS 10 YEARS FOR COUNT 4, THE CONCURRENT SENTENCE OF 151 MONTHS IMPOSED ON ALL COUNTS WAS ILLEGAL AS TO THAT COUNT

Here, Mr. Doe raises a claim that only need be decided in the event he does not prevail on the foregoing issue. Prevailing on his claim that the base offense level for his offenses must be recalculated will require resentencing on all the counts, and result in a sentence below even the 10-year statutory maximum sentence.

Plain-Error Review

This is a purely legal question and, as such, is reviewed *de novo* by this court. Because there was no objection below, review is for plain error. United States v. Gonzalez-Huerta, 403 F.3d 727 (10th Cir. 2005). Here, the error in imposing a sentence above the statutory maximum is plain, affects Mr. Doe's substantial rights, and this court should exercise its discretion to correct such error.

Illegal Sentence on Count 4

In sentencing a defendant on multiple counts of conviction, the Sentence

Commission has directed:

> Except as otherwise required by law (see § 5G1.1(a), (b)), the sentence imposed on each other count shall be the total punishment as determined in accordance with Part D of Chapter Three, and Part C of this Chapter.

See § 5G1.2(b). As the Commission has explained, "the total punishment is to be imposed on each count and the sentences on all counts are to be imposed to run concurrently to the extent allowed by the statutory maximum sentence of imprisonment for each count of conviction." *See* § 5G1.2, comment (n.1). With regard to a sentence on a single count of conviction, "the sentence may be imposed at any point within the applicable guideline range, provided that the sentence – (1) is not greater than the statutorily authorized maximum sentence." *See* § 5G1.1(c)(1).

The PSR author correctly noted that the penalty for attempted manufacture of methamphetamine under 21 U.S.C. § 841(b)(1)(C) is 0-20 years imprisonment. The PSR author was also correct in stating that counts 2 and 3, possession of the pseudoephedrine and phosphorus, List I chemicals, are punishable under 21 U.S.C. § 841(c), which provides a 0-20 year term of imprisonment. But count 4, charging possession of iodine, a List II chemical, carries a range of only 0-10 years imprisonment. (PSR face page and ¶ 48). *See* § 841(c) and § 802(35)(1) (defining List II chemicals and listing iodine).

Yet, at sentencing the court simply imposed a sentence of 151 months imprisonment. (v. 6 at 21) (*Attachment 2*). And the judgment and commitment order also reflects a term of "151 months, grouped for counts 1s, 2s, 3s, 4s." (v. I, doc. 43) (*Attachment 1*).

Because the statutory maximum sentence applicable to count 4 is 10 years, the 151 month sentence as to that count is illegal and must be corrected on a remand.

STATEMENT OF COUNSEL AS TO ORAL ARGUMENT

Because of the novel issue presented, counsel thinks oral argument may be helpful to the court.

CONCLUSION

Mr. Doe's sentence should be reversed, and his case remanded to the district court for purposes of imposing a sentence within the correct guideline and statutory ranges.

Respectfully submitted,

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Certificate of Compliance

Section 1. Word count

As required by Fed. R. App. P. 32(a)(7)(c), I certify that this brief is proportionally spaced and contains 3669 words.

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By: /S/ Jack Doe_____
Assistant Federal Public Defender (Digital)

CERTIFICATE OF DIGITAL SUBMISSION AND PRIVACY REDACTIONS

I hereby certify that a copy of the foregoing **APPELLANT'S OPENING BRIEF**, as submitted in Digital Form via the court's ECF system, is an exact copy of the written document filed with the Clerk and has been scanned for viruses with the Symantec AntiVirus Corporate Edition version 10.0.0.359, Virus Definition File Dated: 3/1/2012 rev. 6 and, according to the program, is free of viruses. In addition, I certify all required privacy redactions have been made.

By: /S/ Legal Assistant_____
Legal Secretary (Digital)

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **APPELLANT'S OPENING BRIEF** was furnished through (ECF) electronic service to the following on this the XX day of XX, 2014:

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APPENDIX B

CJA Advice to Counsel Letter, Rate Chart and Voucher Instructions

Due to the regular updating of these materials, counsel should go to the CJA page on the website for the most up to date information. *See* http://www.ca10.uscourts.gov/cja.

APPENDIX C

Helpful Links

United States Court Of Appeals for the Tenth Circuit
www.ca10.uscourts.gov

Pacer
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Frequently Asked Questions
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