

FEDERAL CIVIL LITIGATION SEMINAR

SEVENTH CIRCUIT PRACTICE

The New Civil Appeal: Judgment to Briefing

by

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THE NEW CIVIL APPEAL: JUDGMENT TO BRIEFING

*When there is confusion in handling an appeal, it is often at the beginning. This outline therefore sketches the law with respect to basic issues that ordinarily arise in any new civil appeal, up to the briefing stage: Is the order appealable? If it is, what do I need to do to perfect the appeal? As appellee's counsel, what do I need to file with the court? etc. While this outline may be used as a reference source, **always** consult the federal and local rules (and any interpretative case law) when handling an appeal before the Seventh Circuit.*

I. APPEALABILITY AND JURISDICTION

A. Final Judgment Rule

The Seventh Circuit has jurisdiction over appeals from “final decisions of the district courts.” 28 U.S.C. § 1291.

1. “Final Decision” Defined: A decision that “ends the litigation on the merits and leaves nothing more for the court to do but execute the judgment.” *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994) (quoted source omitted).
2. Attorneys’ Fees: If the district court has entered a final judgment on the merits of a case, but has not yet ruled on the issue of attorneys’ fees, there is still a final appealable decision. *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 199 (1988) (“A question remaining to be decided after an order ending litigation on the merits does not prevent finality if its resolution will not alter the order or moot or revise decisions embodied in the order.”). Entry of a subsequent order granting or denying an award of attorneys’ fees for the case at hand is a separate proceeding having no effect on the finality of the merits judgment, and a separate notice of appeal is required, *id.*, unless the district court, acting under Fed. R. Civ. P. 58, enters an order extending the time to appeal. See FED. R. APP. P. 4(a)(4)(iii).

B. “Interlocutory” Appeals as of Right

1. Collateral Order Doctrine: The collateral order doctrine is a narrow exception to the final judgment rule. *But see Digital Equip.*, 511 U.S. at 867 (“The collateral order doctrine is best understood not as an exception to the ‘final decision’ rule

laid down by Congress in § 1291, but as a ‘practical construction’ of it”) (internal and quoted citations omitted)). It permits an immediate appeal under § 1291 of an interlocutory decision if the decision (1) conclusively determines an important issue, (2) collateral to the merits of the action, (3) which would be effectively unreviewable if immediate appeal were not available, and (4) which threatens the appellant with irreparable harm if no appeal is permitted. *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 799 (1989).

Two examples of collateral orders are orders denying a claim of immunity and orders granting a motion to disqualify counsel. Two examples of orders that are not considered collateral orders are orders refusing to disqualify opposing counsel and orders denying dismissal for forum non conveniens. Not all categories of collateral orders are treated uniformly across the circuits.

A party who has the right to take an immediate appeal under the collateral order doctrine does not forgo his right of review if, instead of taking the appeal in the middle of the case, he waits until after a final judgment has been entered (assuming the issue has not been mooted). *Otis v. City of Chicago*, 29 F.3d 1159, 1167 (7th Cir. 1994) (en banc).

2. Injunctions: 29 U.S.C. § 1292(a)(1) confers jurisdiction on the court of appeals to immediately hear interlocutory orders of the district courts “granting, continuing, modifying, refusing or dissolving injunctions.”

The grant or denial of a temporary restraining order is not appealable, *Geneva Assurance Syndicate, Inc. v. Medical Emergency Assocs. (MESA) S.C.*, 964 F.2d 599, 600 (7th Cir. 1992), unless the order granting the TRO is not limited in time as Fed. R. Civ. P. 65(b) requires. See *Sampson v. Murray*, 415 U.S. 61, 86-88 (1974). The character of the relief sought, not the motion’s title (its “verbal surface”), will determine whether the order is appealable. *Geneva Assurance*, 964 F.2d at 600.

3. Denial of Motion to Compel Arbitration: Section 16 of the Federal Arbitration Act *generally* permits immediate appeal of orders hostile to arbitration, whether the orders are final or interlocutory, but bars appeal of interlocutory orders

favorable to arbitration. *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 86 (2000). Therefore, the denial of a motion to compel arbitration is typically immediately appealable, see 9 U.S.C. § 16(a)(1)(C), but the grant of a motion to compel arbitration is typically not. See *McCaskill v. SCI Mgmt. Corp.*, 298 F.3d 677, 678 (7th Cir. 2002). Likewise, the denial of a petition to stay proceedings during arbitration is typically immediately appealable, 9 U.S.C. § 16(a)(1)(A), but a decision to grant a petition to stay is typically not. *McCaskill*, 298 F.3d at 678.

When, however, a court both compels arbitration and dismisses all of the claims before it, then there is a “final decision” and an immediate appeal may be taken. *Green Tree*, 531 U.S. at 520-21.

*There are other types of interlocutory orders that are appealable as of right. These are just some of the more common ones.

C. Discretionary Interlocutory Appeals

1. FED. R. CIV. P. 54(b): A district court may certify for immediate appeal an order that disposes of one or more but fewer than all claims or parties “only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.”
 - (a) *Separateness Required*: There must be a final disposition as to either a separate claim for relief, or a dispute between parties. *Buckley v. Fitzsimmons*, 919 F.2d 1230, 1237 (7th Cir. 1990), *vacated on other grounds by* 502 U.S. 801 (1991). The claims designated in the 54(b) order must lack substantial overlap with those claims that remain in the district court. *Lawyers Title Ins. Corp. v. Dearborn Title Corp.*, 118 F.2d 1157, 1162 (7th Cir. 1997); *Horn v. Transcon Lines, Inc.*, 898 F.2d 589, 592 (7th Cir. 1990).
 - (b) *Appeal Required*: A judgment certified under Rule 54(b) is a final judgment and must be appealed, if at all, within the usual time for appeals in civil cases (see Section II “Perfecting Appeals” *infra*). *Construction Indus. Retirement Fund v. Kasper Trucking, Inc.*, 10 F.3d 465, 467-68 (7th Cir. 1993).

2. 28 U.S.C. § 1292(b): A party seeking to appeal an order under section 1292(b) must get permission to do so from both the district court *and* the court of appeals.

(a) *District Court Petition*: Four criteria must be satisfied to warrant section 1292(b) certification: (1) there must be a question of *law*, (2) it must be *controlling*, (3) it must be *contestable*, and (4) its resolution must promise to *speed up* the litigation. *Ahrenholz v. Board of Trustees of Univ. of Ill.* 219 F.3d 674, 675-76 (7th Cir. 2000).

A petition for section 1292(b) certification must be filed with the district court within a “reasonable” time after the issuance of the order sought to be appealed — within **10 DAYS** of its entry, to be safe. This “deadline” is non-statutory. *Ahrenholz*, 219 F.3d at 675-76.

(b) *Seventh Circuit Petition*: Within **10 DAYS** after the entry of a section 1292(b) certification, the party seeking the appeal must petition the Seventh Circuit for permission to bring the appeal. 28 U.S.C. § 1292(b); *Ahrenholz*, 219 F.3d at 676.

The petition must state the controlling question of law being appealed, the facts necessary to understand the controlling question of law, the reasons why there is substantial ground for difference of opinion, and why an immediate appeal may materially advance the ultimate disposition of the case. *See Ahrenholz*, 219 F.3d 676.

Include with the petition the order complained of, as well as any related findings, conclusions, or opinion, and any order stating the district court’s permission to appeal.

The Seventh Circuit may, in its discretion, grant or deny the petition. 28 U.S.C. § 1292(b). This decision is regarded as tentative and subject to reexamination, and the panel assigned to the merits appeal may dismiss the appeal as having been improvidently granted. *Johnson v. Burken*, 930 F.2d 1202, 1205 (7th Cir. 1991).

3. FED. R. CIV. P. 23(f): The Seventh Circuit may in its discretion permit an appeal from an order granting or denying class action certification if application is made to the court within **10 DAYS** after entry of the order.

The reasons behind Rule 23(f) guide its application: (1) the denial of class status can sound the death knell of the litigation; (2) the grant of class status can put considerable pressure on defendants to settle, even when the plaintiffs' probability of success is slight; and (3) an early appeal may facilitate the development of the law. *Blair v. Equifax Check Servs.*, 181 F.3d 832, 834-35 (7th Cir. 1999).

There is no automatic stay of the district court proceedings when the court of appeals certifies the appeal. FED. R. CIV. P. 23(f).

D. Special Issues

1. Removal: 28 U.S.C. § 1447(d) provides, "An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise"

The United States Supreme Court has interpreted section 1447(d) to mean that "only remands based on grounds specified in § 1447(c) are immune from review under § 1447(d). As long as a district court's remand is based on a timely raised defect in removal procedure or on lack of subject-matter jurisdiction — the grounds for remand recognized by § 1447(c) — a court of appeals lacks jurisdiction to entertain an appeal of the remand under § 1447(d)." *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 127-28 (1995) (citation omitted). See also *Adkins v. Illinois Cent. R.R. Co.*, 326 F.3d 828, 830-34 (7th Cir. 2003) (discussing the appealability of remands from removal).

2. Cross-Appeals:

- (a) *When unnecessary*: A cross-appeal need not be filed to defend a judgment on any ground consistent with the record and not waived, even if the ground was rejected by the lower court. *Rose Acre Farms, Inc. v. Madigan*, 956 F.2d 670, 672 (7th Cir. 1992), *cert. denied*. See also *Mellon Bank, N.A. v. Dick Corp.*, 351 F.3d 290, 291 (7th Cir. 2003) ("[L]itigants may offer on appeal any

properly preserved argument that supports the judgment.”), *cert. denied*.

- (b) *When necessary*: A cross-appeal must be filed when an appellee wants to attack the judgment so as to enlarge his own rights, or to diminish an opponent’s rights. *Alejo v. Heller*, 328 F.3d 930, 937 (7th Cir. 2003), *cert. denied*.

II. PERFECTING AN APPEAL

A. Deadlines

1. Standard Deadline: A notice of appeal must be filed with the district court within **30 DAYS** of the *entry* of the judgment or order appealed. FED. R. APP. P. 4(a)(1)(A); *see also Darne v. State of Wis.*, 137 F.3d 484, 486 n. 1 (7th Cir. 1998) (entry date, not date that judgment or order is signed, issued, or filed, triggers time to file notice of appeal), *cert. denied*.
2. When Federal Government a Party: If the federal government (including officers and agencies of the United States) is a party to the case, the notice of appeal (of any party) must be filed within **60 DAYS** of the entry of judgment. FED. R. APP. P. 4(a)(1)(B).
3. Subsequent Notices of Appeal: If one party (who has a right to appeal) files a timely notice of appeal, any other party may file its notice of appeal (if it wishes to alter the judgment, *Sellers v. United States*, 902 F.2d 598, 603 (7th Cir. 1990); *Jordan v. Duff & Phelps, Inc.*, 815 F.2d 429, 439 (7th Cir. 1987), *cert. dismissed*; *see also Warner/Elektra/Atlantic Corp. v. County of DuPage*, 991 F.2d 1280, 1282-83 (7th Cir. 1993)) within **14 DAYS** from the date on which the first notice of appeal was filed even though the usual time has expired. FED. R. APP. P. 4(a)(3).

B. Effect of Certain Post-Judgment Motions

1. Motions that Toll: If any of the motions listed below is timely served and filed, the time for appeal does not begin to run until entry of the order disposing of the last such motion outstanding. FED. R. APP. P. 4(a)(4). They are:

- (a) a motion for judgment under Fed. R. Civ. P. 50(b);

- (b) a motion to amend or make findings of fact under Fed. R. Civ. P. 52(b), *see Financial Servs. Corp. v. Weindruch*, 764 F.2d 197, 199 (7th Cir. 1985);
- (c) a motion for attorney's fees under Fed. R. Civ. P. 54, provided the district court orders, before a notice of appeal is filed and becomes effective, that the final judgment is suspended to resolve the motion for fees. *See also* FED. R. CIV. P. 58.
- (d) a motion to alter or amend the judgment under Fed. R. Civ. P. 59, *see Simmons v. Ghent*, 970 F.2d 392, 393 (7th Cir. 1992);
- (e) a motion for a new trial under Fed. R. Civ. P. 59;
- (f) a motion for relief under Fed. R. Civ. P. 60, provided the motion is filed no later than 10 days after entry of judgment;

*A district court cannot extend the time for filing any of these motions. FED. R. CIV. P. 6(b).

2. Other Post-Judgment Motions that Toll: Any other motion that substantively challenges the judgment on the merits and is served and filed within **10 BUSINESS DAYS** (*see* FED. R. CIV. P. 6(a)) of the entry of judgment will be treated as based on Rule 59, "no matter what nomenclature the movant employs." *Lac du Flambeau Band of Lake Superior Chippewa Indians v. State of Wis.*, 957 F.2d 515, 517 (7th Cir. 1992); *see also Lentomyynti Oy v. Medivac, Inc.*, 997 F.2d 364, 366 (7th Cir. 1993); *Charles v. Daley*, 799 F.2d 343, 347 (7th Cir. 1986).

However, a Rule 59 motion that contains no grounds for granting the motion may be treated as a nullity and therefore will not toll the time for appeal. *Western Trans. Co. v. E.I. DuPont de Nemours & Co.*, 682 F.2d 1233, 1236 (7th Cir. 1982); *Martinez v. Trainor*, 556 F.2d 818, 820 (7th Cir. 1977).

3. Motions that do not Toll:

- (a) *Filed After 10-Day Period:* Post-judgment motions (whether the first such motion or a successive motion) not filed within 10 days of the entry of the judgment will not toll the time to appeal the underlying judgment. See *United States EEOC v. Gurnee Inns, Inc.*, 956 F.2d 146, 148-49 (7th Cir. 1992); *Charles*, 799 F.2d at 347; *Needham v. White Labs., Inc.*, 639 F.2d 394, 397 (7th Cir. 1981), *cert. denied*.
- (b) *May be Treated as Rule 60(b) Motion:* A motion to reconsider or vacate the judgment filed after 10 days will not be treated as a timely Rule 59 motion, and therefore one that tolls the time to appeal, but may be treated as having been made under Fed. R. Civ. P. 60(b). See *Browder v. Director, Dept. of Corrections*, 434 U.S. 257, 263 n. 7 (1978); *id.* at 273-74 (Blackmun, J., concurring); *Otto v. Variable Annuity Life Ins. Co.*, 814 F.2d 1127, 1139 (7th Cir. 1986), *cert. denied*; *Labuguen v. Carlin*, 792 F.2d 708, 709 (7th Cir. 1986).

Appeals from the denial of a Rule 60(b) motion that was filed after the 10-day period do not bring up the underlying judgment for review. *McKnight v. United States Steel Corp.*, 726 F.2d 333, 338 (7th Cir. 1984).

- 4. Motions to Remand: Once a notice of appeal is filed, a district court does not have authority to unilaterally grant relief from the judgment under Rule 60; at that point, the district court can only deny Rule 60 relief. If, however, a party files a Rule 60 motion and the district court “indicates” that it is inclined to grant it, Circuit Rule 57 provides a mechanism whereby the movant can notify the court of appeals of the district court’s inclination and the court of appeals can in turn remand the case. See *Chicago Downs Ass’n, Inc. v. Chase*, 944 F.2d 366, 370 (7th Cir. 1991); *Textile Banking Co. v. Rentschler*, 657 F.2d 844, 849-50 (7th Cir. 1981).

C. Contents of Notice of Appeal

- 1. Mandatory Contents: The notice must contain (a) the name of the party or parties taking the appeal, (b) the judgment or order being appealed, and (c) the name of the court to which the appeal is taken. FED. R. APP. P. 3(c)(1).

2. Identifying Parties: *Each* party taking the appeal should be identified by name, but Fed. R. App. P. 3(c)(1)(A) permits an attorney representing more than one party to indicate which parties are appealing without naming them individually (*e.g.*, “all plaintiffs”).
3. Identifying the Order: Appellants need not identify every individual order preceding final judgment that they intend to appeal (*e.g.*, order dismissing Defendant Smith for personal jurisdiction, order compelling production of documents, and summary judgment order). So long as the notice names the final judgment or the order disposing of a Rule 59 motion (or its equivalent) as the “judgment, order, or part thereof appealed from,” the notice will bring up for review all issues in the case. *Kunik v. Racine County*, 106 F.3d, 172-73 (7th Cir. 1997).

In fact, the Seventh Circuit has cautioned litigations about being *too* specific. *Librizzi v. Children’s Mem’l Med. Ctr.*, 134 F.3d 1302, 1306 (7th Cir. 1998) (“It is never necessary — and may be hazardous — to specify in the notice of appeal the date . . . of an interlocutory order or post-judgment decision . . ., unless the appellant wants to confine the appellate issues to those covered in the specific order.”).

D. Fees

An appellant must pay \$255.00, which includes a filing fee and an appellate docketing fee, to the district court clerk when filing the notice of appeal.

III. DOCKETING AN APPEAL

A. Docketing Statement

1. Purpose: The purpose of a docketing statement is to enable the court to determine as early as possible whether it has jurisdiction over the appeal.
2. When Appellant Must File: Circuit Rule 3(c) permits an appellant to either file the docketing statement (a) **when filing the notice of appeal** with the district court, **or** (b) with the Seventh Circuit within **7 DAYS** of filing the notice of appeal. The Seventh Circuit prefers option (a).

Failure to file the docketing statement within 14 days of the filing of the notice of appeal will lead to the imposition of a \$100.00 fine on counsel. CIR. R. 3(c)(2). Failure to file the docketing statement within 28 days of the filing of the notice of appeal will be treated as an abandonment of the appeal, and the appeal will be dismissed. *Id.*

3. Required Contents: Circuit Rule 3(c) and 28(a) governs the contents of the docketing statement.

(a) *District Court's Jurisdiction:*

- (1) Federal Question: If jurisdiction was based on a federal question, the provision of the constitution or federal statute involved must be identified. CIR. R. 28(a)(1).
- (2) Diversity: If jurisdiction depended on diversity of citizenship, the statement shall identify the jurisdictional amount and the **citizenship** (at the time the action was first filed) of each party. CIR. R. 28(a)(1). "Citizenship" has a very particular meaning:
 - (i) If any party is an individual, identify the individual's domicile. *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 828 (1989). *See also* 13B CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE § 3612 (2d ed. 1984), discussing the determination of a person's domicile.
 - (ii) If any party is a corporation, identify both the state of incorporation and principal place of business. CIR. R. 28(a)(1). Note that a corporation's state of incorporation and principal place of business are not necessarily the same as the state where the corporation's headquarters is located.
 - (iii) If any party is an unincorporated association or partnership, identify the citizenship of all members. CIR. R. 28(a)(1). Limited Liability Companies

("LLCs") fall into this category. *Cosgrove v. Bartolotta*, 150 F.3d 729, 731 (7th Cir. 1998).

(b) *Court of Appeals' Jurisdiction*: Identify the statutory provision believed to confer jurisdiction and the following particulars:

- (1) The date of entry of the judgment or decree sought to be received.
- (2) The filing date of any motion for a new trial or alteration of the judgment or any other motion claimed to toll the time within which to appeal.
- (3) The disposition of such a motion and the date of its entry.
- (4) If the case is a direct appeal from the decision of a magistrate, the dates on which each party consented in writing to the entry of final judgment by the magistrate judge.

CIR. R. 28(a)(2).

*There are special requirements for appeals from orders other than final judgments. See CIR. R. 28(a)(3).

(c) *Prior or Related Cases*: Prior or related appellate proceedings in the case must be identified by caption and number. CIR. R. 3(c).

(d) *Counsel of Record*: Clearly identify the lawyer who should be designated counsel of record. Otherwise, the first lawyer listed will be automatically designated as such. (There can only be one counsel of record.) CIR. R. 3(d).

4. Appellee's Obligation: The appellee must file its own complete docketing statement if the appellant's docketing statement it is not "complete and correct." An appellee's docketing statement, if necessary, must be filed with the Seventh Circuit within **14 DAYS** of the filing of the appellant's docketing statement. CIR. R. 3(c). The appellee's docketing statement must explicitly state that the appellant's

docketing statement “is not complete and correct.” CIR. R. 28(b).

B. The Process of Docketing an Appeal at the Seventh Circuit

1. Short Record Forwarded to Court of Appeals: The district court clerk sends to the clerk of the court of appeals a copy of the notice of appeal, order or judgment appealed, list of docket entries, the appellant’s docketing statement, and a Seventh Circuit Appeal Information Sheet. CIR. R. 3(a).
2. Docketing Process: The clerk of the court of appeals assigns the appeal a number and case information is entered into the court’s computer system. Docket information for appeals dating back to 1990 may be found at the Seventh Circuit’s Home Page: <http://www.ca7.uscourts.gov>.
3. Caption of Appeal: Captions at the court of appeals are the same as they were at the district court with the addition of identification of parties as appellants or appellees. CIR. R. 12(b). However, the practice of the court is to list only the first five parties per side. A separate entry listing parties not included in the caption is made.
4. Appellate Docket Number: All matters before the Seventh Circuit receive a docket number.
 - (a) Each appeal has a six-digit number. The first two digits identify the calendar year in which the appeal was docketed. The last four digits are assigned sequentially as each new appeal is received, starting with 1001. 04-1001 is the first appeal docketed in 2004.
 - (b) Petitions for permission to appeal under 28 U.S.C. § 1292(b) or Fed. R. Civ. P. 23(f) also receive a six-digit number. The only difference from the typical appeal is that the last four are assigned sequentially starting with 8001. The first appeal of this kind in 2004 is 04-8001.
5. Unusual Circumstances Noted: The court staff will note unusual circumstances on the court’s internal (but not external) docket. For example, the staff might note that an appeal is potentially successive to an earlier appeal or that one of the parties is represented by a disbarred attorney.

C. Information Packet

The court routinely sends all counsel a packet of docketing information about the appeal.

D. Screening Process Initiated

Senior staff will review the short record (usually all the documents in the court's possession at that time). Counsel to the Circuit Executive will review all appeals shortly after docketing for any potential problems related to appellate jurisdiction.

If the Circuit Executive uncovers a problem, the court issues an order identifying the problem and requesting the appellant to respond or dismiss the appeal. A motions panel of the court will generally resolve the jurisdictional problem before the appeal is allowed to proceed. *See Barrow v. Falck*, 977 F.2d 1100, 1102-03 (7th Cir. 1992), for a review of the procedure.

IV. REPRESENTATION STATEMENT

A. Deadline

The attorney for the appellant who filed the notice of appeal must file a representation statement within **10 DAYS** after filing the notice of appeal. FED. R. APP. P. 12(b).

B. Contents

A representation statement must name the parties that the attorney represents on appeal. FED. R. APP. P. 12(b).

V. DISCLOSURE STATEMENT

A. Deadline

Every attorney (both appellant's and appellee's) for a non-governmental party or amicus and any private attorney representing a governmental part must file a disclosure statement with the Seventh Circuit no later than **21 DAYS** after the docketing of the appeal, at the time of filing the principal brief, or upon filing a motion or response with the Seventh Circuit (whichever occurs first). CIR. R. 26.1(a) and (c).

B. Contents

The statement must disclose the names of all law firms whose partners or associates have appeared or are expected to appear for the party in the court of appeals or any lower court or administrative agency. All non-governmental parties must also: (1) identify any parent corporation; and (2) list any publicly held company that owns 10% or more of the party's stock. CIR. R. 26.1(b).

A form disclosure statement in html and pdf versions is available on the Seventh Circuit's website, <http://www.ca7.uscourts.gov>, under the Forms button.

C. Inclusion in Brief

A disclosure statement must be included in a party's principal brief, right after the cover page, even if a disclosure statement has been filed with the court earlier. FED. R. APP. P. 26.1; CIR. R. 26.1. It is easiest to download the form from the court's website and then transfer it into your brief.

D. Duty to Update

Parties must file an updated disclosure statement within 14 days of any subsequent change in the information during the course of appeal. CIR. R. 26.1(d).

VI. TRANSCRIPT OF PROCEEDINGS

A. Deadline

Within **10 DAYS** after the filing of the notice of appeal, or entry of the district court order disposing of the last timely motion of those listed in Fed. R. App. P. 4(a)(4)(A), whichever occurs last, appellant must order from the court reporter the parts of the transcript not already on file that will be needed on appeal. FED. R. APP. P. 10(b).

B. Form of Request

Counsel and court reporters must utilize the "Seventh Circuit Transcript Information Sheet," which may be obtained from the district court clerk or the court reporter.

C. When No Transcript Needed

Even if no transcript is needed (or available), counsel must still certify this fact on the “Seventh Circuit Transcript Information Sheet.”

VII. DESIGNATION OF RECORD

A. District Court Clerk’s Duty

The district court clerk must prepare within 14 days after the filing of the notice the original papers, transcripts filed, and exhibits received. CIR. R. 10(a).

B. Items Not Automatically Included

The following items will not be included in the record unless specifically requested by a party by item and date or unless ordered by the court: briefs and memoranda, notices of filing, subpoenas, summonses, motions to extend time, affidavits and admissions of service and mailing, notices of settings, depositions and notices, and jury lists.

C. S.D. Ind. — Deadline for Requesting Items Not Automatically Included

1. Local Rule 76.1 States:

If an appellant wishes to designate items to be included in the record on appeal pursuant to Cir. R. 10(a), it shall serve a proposed joint designation on the appellee **with the notice of appeal**. The parties shall confer and, if they agree, shall prepare a joint designation, highlighting those entries on the Court’s docket sheet, if practicable, and file it with the clerk of the district court within **TEN DAYS** of the filing of the notice of appeal. If the parties are unable to reach agreement on a joint designation, each party may submit a separate designation within ten days of the filing of the notice of appeal.

2. In Practice:

The district court automatically sends a form letter to counsel, enclosing copies of Local Rule 76.1 and Circuit Rule 10. In addition, a copy of the docket sheet is included with following direction: “You shall highlight those documents which you wish to be included in the appellate record and

attach the docket sheet as an exhibit to your DESIGNATION OF RECORD to be filed with this office.”

D. N.D. Ind. — Deadline for Requesting Items Not Automatically Included

A party who wants any of the above-listed items included in the record must file a request specifying the item requested and the date it appears on the docket within **10 DAYS** of when the notice of appeal was filed. CIR. R. 10(a).

The Northern District does not have a local rule on this topic.

VIII. MOTION TO KEEP DOCUMENTS UNDER SEAL

A. Default Procedure

Except to the extent portions of the record are required to be sealed by statute or rule of procedure, every document filed in or by the court of appeals — whether or not the document was sealed in the district court — is in the public record unless a judge of the court orders it to be sealed. 7TH CIR. OPER. P. 10.

B. Deadline

Documents sealed in the district court will be maintained under seal in the court of appeals for only 14 days. 7TH CIR. OPER. P. 10. Therefore, any party that wants a document that was sealed by the district court to remain under seal in the court of appeals for longer than 14 days must immediately make an appropriate motion in the court of appeals. See *Baxter Int’l, Inc. v. Abbott Lab.*, 297 F.3d 544 (7th Cir. 2002) and *In re Krynicki*, 983 F.2d 74 (7th Cir. 1992) (Easterbrook, J., in chambers) for a discussion of the high standard that must be met to maintain documents under seal.

IX. MOTION FOR STAY

A. No Automatic Stay

Filing a notice of appeal will not automatically stay the operation of the judgment. An application must first be filed with the district court and, then, if that is not successful, with the court of appeals. FED. R. APP. P. 8(a).

B. Factors Considered

The court will consider the following factors in determining whether to stay the judgment: (1) the showing of likelihood of success on appeal, (2) the likelihood of irreparable harm absent the court order, (3) the harm to other parties from a possible court order, and (4) the public interest. *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); *Glick v. Koenig*, 766 F.2d 265, 269 (7th Cir. 1985); see also *Bradford-Scott Data Corp. v. Physician Computer Network, Inc.*, 128 F.3d 504, 505 (7th Cir. 1997).

X. EMERGENCY MOTIONS PRACTICE

A. Defined/Examples:

Emergency motions are those requiring immediate action because of a time constraint which will affect relief requested.

Examples include motions to stay deportation of an alien and to stay an injunction pending appeal.

B. Handling by Counsel

1. Call Clerk: Call the Seventh Circuit clerk's office as soon as possible to notify the court that an emergency motion is on its way.
2. Call District Court: Call the district court clerk to make the court aware of the need to expedite its processing of the notice of appeal if the notice of appeal is being filed immediately before the emergency motion is filed with the court of appeals.
3. Attach Exhibits: Assemble all necessary papers and orders that are needed for appellate review and attach them to the motion.
4. Highlight Dates: Highlight the date(s) relevant to the emergency relief requested.
5. Disclosure Statement: File a disclosure statement along with the motion. See Section 5 "Disclosure Statement" *supra*.
6. Telephone Number: Provide a telephone number where you can be reached after hours.

B. Handling by Court

A motions staff attorney reviews motions to determine whether immediate action is required. The staff attorney then will contact the motions judge and obtain direction as to what to do.

XI. BRIEFING SCHEDULE

A. Presumptive Schedule

Except in agency cases, an appellant's brief is due **40 DAYS** after the appeal is docketed, regardless of the completeness of the record; the appellee's brief is due **30 DAYS** after the appellant serves its brief; appellant's reply is due **14 DAYS** after appellee's brief. FED. R. APP. P. 31(a); CIR. R. 31(a).

The court, with or without a motion, may suspend, contract, or extend the presumptive briefing schedule for any number of reasons.

B. Cross-Appeals

The court will designate which party will file the opening brief as the main appellant, generally, the party most aggrieved by the judgment below. *See* 7TH CIR. OPER. P. 8. The court sets a briefing schedule in all cases involving cross-appeals. There will be three briefs filed by the two parties. The parties will not be allowed to file separate briefs, in each appeal. The brief of the appellee will serve as the response brief on the appellant's appeal and as the main brief on the appellee's cross-appeal and should have a red cover. FED. R. APP. P. 28(h). Appellant's reply brief, if any, would also incorporate the response brief on appellee's cross-appeal. An appellee who has cross-appealed may file a brief in reply to the appellant's response to the issues pressed by the cross-appeal. FED. R. APP. 28(c).

C. Case Management Conferences

The court may hold a case management conference with counsel in complex civil appeals. Counsel may request such a conference by motion. Counsel to the Circuit Executive conducts these conferences. The purposes of the conference is to work out a schedule for filing the briefs and to address any other case management issues the court notes or the parties raise.

D. Motion/Affidavit for Extension of Time

1. Deadline: The motion must be filed **5 DAYS** before the brief is due — preferably much earlier — unless the facts upon which the motion is based did not exist earlier or were not, or with due diligence could not have been, known earlier to the movant’s counsel. CIR. R. 26.
2. Contents: See Cir. R. 26.
 - (a) *The Current Due Date of the Brief*
 - (b) *Grounds*: They must be specific; generalities will not suffice.

“The affidavit must disclose facts which establish to the satisfaction of the court that with due diligence, and giving priority to the preparation of the brief, it will not be possible to file the brief on time.”

Grounds that merit consideration are engagement in other litigation, complexity of the appeal, and “extreme hardship.”
 - (c) *Prior Motions*: If a prior motion for extension of time has been filed, the filing date and the court’s ruling must be stated.
3. Affidavit: A motion for extension of time must be supported by an affidavit.
4. Notice to Opposing: A copy of the motion must be given to opposing counsel *before* the motion is filed.

XII. SETTLEMENT CONFERENCE

A. Purpose of the Settlement Conference Office

The Seventh Circuit conducts conferences with counsel and clients to encourage and facilitate the settlement of civil appeals per Fed. R. App. P. 33 and Cir. R. 33.

The assistance of the Settlement Conference Office is free of charge.

B. Spontaneous Rule 33 Notices

The court spontaneously notices most eligible appeals for Rule 33 conferences. Counsel receive a Notice of Rule 33 Conference, which is an order of the Court, advising them of the date and time of the conference, whether it is to be in person or by telephone (most always by telephone for Indiana counsel), and how they and their clients are expected to prepare. Participation is not optional.

C. Requested Rule 33 Conferences

At the request of any party or parties in an eligible appeal, the Settlement Conference Office will schedule a Rule 33 conference if its calendar permits. Counsel are then advised by notice that a conference will be held. If a party prefers to keep its request confidential, the Settlement Conference Office will not disclose to the other parties or to the court that the conference was requested. Once a notice of Rule 33 conference issues, participation is not optional.

D. Postponement of Briefing

Briefing is typically postponed until after the initial conference. If further modification of the briefing schedule would be conducive to settlement, an order to that effect may later be entered. The settlement conference attorneys have broad authority to adjust the briefing schedule as they see fit.

E. General Contact Information

1. Address: United States Court of Appeals for
the Seventh Circuit
Dirksen Federal Courthouse
Settlement Conference Office
219 S. Dearborn Street
Room 1120
Chicago, IL 60604
2. Telephone: 312.435.6883
3. Fax: 312.435.6888

F. Attorneys

1. Joel N. Shapiro
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2. Rocco J. Spagna
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3. Jillisa Brittan
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XIII. RESOURCES

A. Internet Access

The Seventh Circuit provides internet access to up-to-date (practically, up-to-the minute) information on appeals that are pending before the court. Dockets, briefs in pdf, and downloadable recordings of oral arguments (which are usually posted within a few hours of the actual argument). The court's home page also provides access to court rules and forms, filing tips, the Practitioner's Handbook (second only to the law in importance), and links to other web sites. The court's internet address is <http://www.ca7.uscourts.gov>.

B. Reference Materials

The Practitioner's Handbook is still the single best source for information on handling an appeal at the Seventh Circuit. The latest edition (updated in late 2003) can be viewed on the court's web site and can be electronically transferred or printed to a local personal computer. A CD-ROM version of the handbook is available upon request.

C. Telephone Numbers

1. Clerk's Office: 312.435.5850
2. Conference Office: 312.435.6883
3. Circuit Executive: 312.435.5805

D. Hours and Location

The clerk's office is open to the public from 9:00 a.m. to 5:00 p.m. Monday through Friday and is located on the 27th floor of the Dirksen Federal Courthouse, 219 South Dearborn Street, Chicago.

XIV. SOURCES

The author of this outline relied on a number of secondary sources, including the following: *Practitioner's Handbook for Appeals*; G. Michael Halfenger & Anne Berleman Kearney, "Appeals in Federal Civil Practice," materials from seminar titled "Practicing Effectively Before the Seventh Circuit: What it Takes" held in Milwaukee, Wisconsin on March 30, 2004 ("Milwaukee Seminar Materials"); Donald J. Wall, "An Introduction to the Seventh Circuit," Milwaukee Seminar Materials; Author unknown, "Motions Practice in the Seventh Circuit," Milwaukee Seminar Materials.