PRACTITIONER'S HANDBOOK FOR APPEALS

TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

2020 EDITION

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PREFACE

This Practitioner's Handbook was inspired by a similar publication entitled "Appeals to the Second Circuit" prepared by the Committee on Federal Courts of the Association of the Bar of the City of New York (Rev. Ed. 1970), and the "Practitioner's Handbook" for the Sixth Circuit, prepared by the Committee on Federal Courts of the Cincinnati Chapter of the Federal Bar Association (1971).

Both of the above committees, and also the Record Press, Inc., 95 Morton Street, New York, New York 10014, owner of the copyright on the Second Circuit publication, consented to the incorporation of substantial portions of their work in the original Handbook for the Seventh Circuit. The Second and Sixth Circuits' handbooks, however, have been substantially revised for use in the Seventh Circuit.

The Chief Judge periodically authorizes updates to the Handbook, usually following revisions to the Federal Rules of Appellate Procedure or the Circuit Rules, case law developments or new court policies. The 2020 edition has been revised and updated through September 28, 2020, by Counsel to the Circuit Executive Donald J. Wall at the direction of Chief Judge Diane S. Sykes and former Chief Judge Diane P. Wood, and represents the collaborative efforts of court staff.

We appreciate being advised of errors or inconsistencies in the Handbook or the rules and welcome suggestions for improvement. Suggestions should be sent to Donald J. Wall, Counsel to the Circuit Executive, United States Court of Appeals for the 7th Circuit at don_wall@ca7.uscourts.gov. Requests for information may be directed to the clerk's office at 312-435-5850.

NOTE: The clerk's office has a deserved reputation for helpful assistance to the bar. Clerk's office employees, however, cannot interpret the rules or give legal advice. Attorneys practicing in this court are responsible for the timeliness and correctness of all filings. Put another way, litigants may not rely on their conversations with clerk's office employees to avoid procedural or substantive requirements. *See Sonicraft, Inc. v. N.L.R.B.*, 814 F.2d 385, 387 (7th Cir. 1987) (a litigant could not rely upon misleading advice from a court employee to excuse untimely petition for review). Accordingly, counsel should refer to the applicable federal and circuit rules, caselaw and this Handbook for guidance.

Current versions of the Federal Rules of Appellate Procedure, the Circuit Rules of the Seventh Circuit, the Seventh Circuit Operating Procedures, the Criminal Justice Act Plan, and Electronic Case Filing Procedures are always available on the Seventh Circuit Home Page, http://www.ca7.uscourts.gov.

INTRODUCTORY NOTE

Over the years the number of appeals docketed in the Seventh Circuit has grown (though filings have plateaued in recent years) and the number of filings that take place in each appeal has also increased. The judges must read the appellant's brief, the appellee's brief, the reply brief, if any, the cases cited in those briefs, and the pertinent portions of the appendix or record on appeal in each of the six appeals that are orally argued daily. Further, the average appeal has several motions on its docket both prior to and subsequent to oral argument. Responses are filed to many of these motions.

All of these documents must be read, consuming a vast amount of judicial time. *For this reason, excess verbiage is looked upon with great disfavor by the Seventh Circuit.* Briefs should be kept as short as possible. Motions and all other papers filed should be succinct. Every failure to honor this request reduces the amount of judge time that will be available for work that must be done.

Statistical information pertaining to the appeals filed with the Seventh Circuit since 2000 is accessible on the court's website by clicking the tab "Annual Report" located on the court's home page.

COURT RESPONSE TO COVID-19 PANDEMIC

The Court of Appeals for the Seventh Circuit remains open, as it has throughout the pandemic. The courtroom remains closed to the public, but the court continues to hear oral argument remotely, either by telephone or video communications. The Clerk's Office will contact counsel with remote argument instructions for their specific case.

For now, all arguments through April 30, 2021, will be conducted remotely.

Any person seeking entry into the courthouse must wear a face covering or mask, completely concealing the wearer's nose and mouth, in all public areas and courtrooms unless excused by the presiding judge.

Attorneys registered in the court's database will receive emails that contain news and announcements relating to changes in the court's practices and procedures necessitated by the COVID-19 pandemic. As always it is suggested that attorneys handling cases in the Seventh Circuit visit the court's website frequently for updated information regarding court operations.

I. MANDATORY ELECTRONIC CASE FILING; ELECTRONIC ACCESS TO CASE INFORMATION, RULES, PROCEDURES & OPINIONS

A. Mandatory Electronic Case Filing

Pursuant to Circuit Rule 25 all documents filed by represented parties in the United States Court of Appeals for the Seventh Circuit must be filed and served electronically via the court's Electronic Case Filing (ECF) system. Paper copies of documents may be filed only by unrepresented litigants who are not themselves lawyers or when required by the court. Service of electronically filed documents on unrepresented parties or unregistered users should also be by paper. Attorneys should determine the necessary method of service for each case participant via the Service List Report provided in the ECF system.

Electronic filing is accomplished via the court's website, www.ca7.uscourts.gov. All lawyers who will be involved in appeals before this court must register for the national PACER system as well as register for this court's ECF system before they will be able to file in this court. Once registered for ECF, counsel will receive service of all court-issued documents electronically via a Notice of Docket Activity (NDA). Paper copies of documents will not be served on counsel and failure to promptly register for ECF may result in counsel not receiving court documents.

Case Initiating Documents, such as Petitions for Review, Petitions for Permission to Appeal, etc., should be submitted to the Clerk of Court electronically via e-mail at USCA7_Clerk@ca7.uscourts.gov. Paper copies should **not** be submitted unless specifically requested by the court. If the submission is an emergency matter, counsel also should make the Clerk's Office aware of the situation by phone at 312-435-5850 during normal business hours.

Comprehensive Electronic Case Filing Procedures are detailed on the court's website, along with user manuals, FAQ's, registration screens, tutorials and other helpful information. Counsel are advised to carefully review and comply with these procedures.

B. Proof of Service Not Needed

Rule 25(d) of the Federal Rules of Appellate Procedure eliminated the unnecessary requirement of proof of service or acknowledgement of service of a paper when service is made through a court's electronic filing system. The notice of electronic filing generated by the court's system serves that purpose.

Several other federal appellate rules deleted reference to "proof of service" to reflect the 2019 amendment to Rule 25(d), eliminating the requirement of a proof of service when service is completed using a court's electronic filing system. *See* Rule 5(a)(1) (petition for permission to appeal); Rule 21(a)(1), (c) (writs of mandamus and prohibition and other extraordinary writs); Rule 26(c) (computing and extending time); Rule 39(d) (costs).

C. Electronic Access to Seventh Circuit Case Information, Rules, Procedures & Opinions

The Seventh Circuit Court of Appeals provides internet access to up-to-date information on cases before the court through the Seventh Circuit Home Page.

The court's Home Page also provides internet access to other important information such as:

- Access to (ECF) Electronic Case Filing
- Access to the court's dockets and documents through the PACER system
- Access to oral argument recordings
- Full text of:
  - Seventh Circuit Opinions
  - Seventh Circuit Rules and Operating Procedures
  - Federal Rules of Appellate Procedure
  - Practitioner's Handbook for Appeals
  - Procedures for Electronic Case Filing
  - Standards for Professional Conduct
  - Misconduct Complaint Rules, Forms and Decisions
- Filing tips and guides, sample briefs, tutorials, various court forms
- Handouts and information about court programs
- Proposed rule changes
- Postings of Seventh Circuit employment opportunities

- Links to:
  - Seventh Circuit Library Home Page
  - Federal Defender Home Page
  - Seventh Circuit Bar Association Home Page
  - Other federal court and legal web sites

Access to the web site is free of charge and available to anyone with Internet access. The Internet address ("URL") of the Seventh Circuit Home Page is http://www.ca7.uscourts.gov/.

All information viewed at the Seventh Circuit Home Page is fully text searchable and can be printed or electronically transferred ("downloaded") to local personal computer equipment.

II. AT A GLANCE: PROCEDURAL STEPS AND TIME LIMITS ON APPEALS FROM DISTRICT COURTS

After an appealable judgment or order has been entered in the district court, the following steps are necessary to ensure that the appeal will be considered on its merits. A fuller discussion of each step appears later in this Handbook.

A. Appellate Fees

The notice of appeal for an appeal as of right is filed with the clerk of the district court, along with the $5.00 district court filing fee and the $500.00 appellate docket fee (collected on behalf of the court of appeals). The fees must be paid upon filing the notice of appeal unless the appellant is granted leave to appeal *in forma pauperis*. Fed. R. App. P. 3(e) (the obligation to pay the appellate filing fees is incurred with the filing of the appeal). Failure to pay the appellate fees or seek leave to proceed *in forma pauperis* can result in dismissal of the appeal.

NOTE: One fee is due for each notice of appeal that a litigant files. *Ammons v. Gerlinger*, 547 F.3d 724, 726 (7th Cir. 2008) (per curiam). No additional fee is required if a party, after filing an appeal from a judgment, files a second appeal seeking review of the order disposing of any motion listed in Rule 4(a)(4). A separate, second fee, however, is due if the party appeals from an adverse decision on a Rule 60(b) motion filed more than 28 days after the judgment entry. *Ammons*, 547 F.3d at 726.

B. Time Limits for Filing Appeal

1. Time limits, per Fed. R. App. P. 4, are as follows:

   - 30 days from entry of judgment or order appealed in civil cases.
   - 60 days from entry of judgment or order appealed in civil cases if the United States or an officer or agency of the United States is a party.
   - 14 days from the date on which the first notice of appeal was filed in civil cases for any other party desiring to appeal even though the time for appeal has expired.
   - 14 days from entry of judgment for appeal by defendants in criminal cases.
   - 30 days from entry of judgment for appeal by the United States in criminal cases, when authorized by statute.

The time for appeal in a civil case runs from the denial of any motion under Fed. R. Civ. P. 50(b), 52(b), 54, 59, or 60(b), if the motion is filed no later than 28 days after entry of judgment. Any notice of appeal filed prior to disposition of such motion is ineffective until entry of the order disposing of the motion. A party wishing to challenge an alteration or amendment of the judgment must file a new notice of appeal or amend the previously filed notice. Fed. R. App. P. 4(a)(4).

Similarly, the time for appeal in a criminal case runs from the denial of a motion to reconsider that substantively challenges the order appealed so long as the motion is filed within the time to appeal — 14 days for defendants and 30 days for the United States. *But see United States v. Townsend*, 762 F.3d 641, 644 (7th Cir. 2014).

An extension of up to 30 days after the prescribed time may be granted by the district court upon a showing of good cause or excusable neglect in civil or criminal cases, or 14 days after the date when the order granting the motion is entered (in civil cases only). Fed. R. App. P. 4(a)(5); Fed. R. App. P. 4(b)(4).

The district court may reopen the time to appeal in civil, but not criminal, cases for 14 days if it finds the notice of entry of the judgment or order was not received within 21 days. Fed. R. App. P. 4(a)(6).

2. Petition for leave to appeal from a certified interlocutory order. Fed. R. App. P. 5.

10 days after entry of an interlocutory order with statement prescribed by 28 U.S.C. § 1292(b), or of amended order containing such statement. The petition is filed with the clerk of the court of appeals.

C. Docketing Statement

Counsel must also file a complete docketing statement at the time of the filing of the notice of appeal, or with the court of appeals within seven days of the filing of the notice of appeal. Cir. R. 3(c)(1). Failure to file a docketing statement can result in dismissal of the appeal.

D. Bond for Costs on Appeal

1. Civil cases.

Costs bonds are not automatically required; however, the district court may require the appellant to file a bond in any form and amount it finds necessary to ensure payment of costs. Fed. R. App. P. 7; *see In re*

Carlson, 224 F.3d 716, 719 (7th Cir. 2000) (district court has discretion to waive bond requirement).

2. Interlocutory and certain bankruptcy appeals.

If required by Fed. R. App. P. 7, appellant must file a cost bond within 14 days after entry of order granting permission to appeal by the court of appeals. Fed. R. App. P. 5(d).

E. Supersedeas Bond

The 2018 amendments to Fed. R. Civ. P. 62 eliminated the somewhat dated reference to a "supersedeas bond". Rule 62(b) carries forward in modified form the supersedeas bond provisions of former Rule 62(d), making clear that any party, not just an appellant, "may obtain a stay by providing a bond or other security" at "any time after judgment is entered".

F. Transcript of Proceedings

1. Criminal Cases.

Appointed counsel in a criminal case must request a transcript at the time guilt is determined and must renew that request, upon the filing of an appeal, if the district judge has not yet ordered the transcript to be prepared. Retained counsel must order and pay for the transcript within 14 days of filing the notice of appeal. Cir. R. 10(d)(1), (2).

2. Civil Cases.

Appellant must order all necessary parts of the transcript from the court reporter within 14 days after filing notice of appeal. Fed. R. App. P. 10(b)(1).

If the entire transcript is not included, appellant must file and serve on appellee a description of the parts of the transcript ordered and a statement of issues within 14 days after filing of notice of appeal. Fed. R. App. P. 10(b)(3).

If appellee deems other parts necessary, appellee must file a statement of parts to be included within 14 days after receipt of appellant's statement. Fed. R. App. P. 10(b)(3)(B).

G. Docketing the Appeal

The appeal will be docketed, and assigned a case number, as soon as the notice of appeal and the docket entries are electronically transmitted and received by the clerk of the court of appeals. Fed. R. App. P. 12(a).

H. Record Preparation

Within 14 days of the filing of the notice of appeal, the clerk of the district court is required to prepare for viewing the entire record; exhibits not available electronically and confidential filings are prepared and held. Cir. R. 10(a)(1), (2). And within 21 days of the appeal's filing, counsel must ensure that all electronic and non-electronic documents necessary for appellate review are on the district court docket. Cir. R. 10(a)(3). The court reporter must file later prepared transcripts with the district clerk and notify the circuit clerk of the filing. Fed. R. App. P. 11(b)(1)(C). All records transmitted electronically can be viewed through PACER (public access to court electronic records).

I. Case Management Conferences

Occasionally, after the appeal has been docketed in the court of appeals, the court may hold a case management conference to set a schedule for filing any unprepared transcripts and briefs, examine jurisdiction, simplify and define issues, and consolidate appeals and establish joint briefing schedules. Counsel may request such a conference by filing a motion with the court. These conferences are generally conducted by senior court staff, usually Counsel to the Circuit Executive. Note that case management conferences are different from "settlement conferences" or "mediations", which are conducted by the court's circuit mediators. Fed. R. App. P. 33.

J. Circuit Mediation Program

After the appeal has been docketed in the court of appeals, the court may direct counsel, and often the litigants, to meet with one of the court's circuit mediators to discuss the possibility of resolving the appeal by agreement. Fed. R. App. P. 33.

K. Counsel of Record

There can be only one counsel of record for a party. The attorney for a party whose name appears on the first document filed with the clerk of this court will be entered on the docket as counsel of record unless otherwise identified. Counsel of record may not withdraw without consent of the court unless another attorney simultaneously substitutes as counsel of record. Cir. R. 3(d).

L. Disclosure Statements

Every attorney for a non-governmental party or amicus curiae, and every private attorney representing a governmental party, must file a disclosure statement containing the information required by Cir. R. 26.1. And, if the party that the attorney represents is a corporate entity, the statement must identify all

its parent corporations and list any publicly held company that owns 10% or more of the party's stock as required by Fed. R. App. P. 26.1.

In criminal cases, the government must disclose the same information for organizational victims unless excused for good cause. And in bankruptcy cases, each debtor, including any debtors not named in the caption, must be identified; all corporate debtors must disclose the Rule 26.1(a) information.

Attorneys must provide answers to all questions required by the federal and circuit rules. Lawyers should file their disclosure statements as soon as possible. But in any event, these statements must be filed with the party's first motion, response or other request for relief, and it also must be included separately in the party's brief. Fed. R. App. P 26.1; Cir. R. 26.1.

M. Briefing Schedule

Unless a different schedule is set by order of the court, appellant's brief is due 40 days after docketing of the appeal. Appellee's brief is due 30 days after appellant's brief is filed. Any reply brief is due 21 days after appellee's brief. Fed. R. App. P. 31(a); Cir. R. 31(a).

N. Statement Concerning Oral Argument

A party may include, as part of a principal brief, a short statement explaining why oral argument is (or is not) appropriate. Fed. R. App. P. 34(a), Cir. R. 34(f).

O. Oral Argument

Time allowed for oral argument is determined by the court. Counsel must notify the clerk of the person presenting oral argument at least 5 business days in advance of the argument date. Cir. R. 34(a).

P. Petition for Rehearing

The petition must be filed within 14 days after entry of judgment unless time is shortened or extended by court order. The deadline is 45 days after entry of judgment in civil cases in which the United States, an officer or agency thereof, is a party. Fed. R. App. P. 40(a)(1); Cir. R. 40(c), (d).

Q. Mandate

The clerk automatically issues the mandate 21 days after entry of judgment or 7 days after the denial of a petition for rehearing unless time is shortened or extended by court order. The mandate is issued simultaneously with a voluntary dismissal or certain procedural dismissals. Fed. R. App. P. 41; Cir. R. 41.

R. Petition for Writ of Certiorari

The deadline for filing a petition for a writ of certiorari is 90 days from entry of judgment in all cases unless the Supreme Court allows additional time not exceeding 60 days. 28 U.S.C. § 2101(c); Sup. Ct. R. 13.1 and 13.5.

III. ORGANIZATION OF THE COURT

The Seventh Circuit encompasses the states of Illinois, Indiana, and Wisconsin. The court of appeals sits in Chicago, Illinois. The court at present is authorized eleven active judgeships. Senior circuit judges also participate in the work of the court, as do district judges from within the circuit. The office of the clerk is located in Room 2722 of the United States Courthouse, 219 South Dearborn Street, Chicago, Illinois, 60604. The Main Courtroom is located in Room 2721. Sometimes arguments will be scheduled in the Ceremonial Courtroom, Room 2525. All of the judges have chambers in the Chicago courthouse.

The clerk's office is open for filing and other services from 9:00 AM to 5:00 PM every weekday except for federal holidays. Fed. R. App. P. 45. Filings, including emergency filings, can be made electronically 24/7, but filings will not be acted on during non-business hours unless prior arrangements are made with the clerk's office during business hours. *See* Cir. R. 27.

By statute the administrative head of the court is the chief judge. A judge attains that position by seniority of service on the court. When the chief judge reaches the age of 70, or serves seven years as chief judge, he or she may continue as an active member of the court, but not as chief judge. 28 U.S.C. § 45(a).

The chief judge presides over any panel on which he or she sits. If the chief judge does not sit, the most senior Seventh Circuit active judge on the panel normally presides. The presiding judge assigns the writing of opinions at the conference immediately following the day's oral arguments.

To facilitate the disposition of cases, statutory provision is made for the assignment of additional judges. The chief judge may request the Chief Justice of the United States to appoint a "visiting" judge from another circuit, 28 U.S.C. § 291(a), or, more frequently, the chief judge may designate senior judges, 28 U.S.C. § 294(c), or district court judges from the districts within the circuit, 28 U.S.C. § 292(a), to serve on panels of the Seventh Circuit.

Upon reaching retirement age, a judge can elect to become a senior judge. 28 U.S.C. § 371(b). If a judge continues to perform substantial duties, as most do, he or she may retain chambers and is entitled to secretarial and law clerk services.

In addition to a full caseload of hearings and opinion writing, the chief judge is responsible for the administration of the court of appeals, the district courts and bankruptcy courts in the seven districts of the circuit. The chief judge also is a member of the Judicial Conference of the United States, 28 U.S.C. § 331, and is head of the judicial council for the circuit.

The judicial council consists of the active circuit judges on the court, the seven chief district judges and three additional district judges from the Northern

District of Illinois. One bankruptcy judge and one magistrate judge are elected as observers. The council is empowered to "make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit." 28 U.S.C. § 332(d). It has overall responsibility for the operation of the court of appeals, the district courts, and the bankruptcy courts within the Seventh Circuit, and appoints the circuit executive who works for the council and also is the administrator of the court of appeals. 28 U.S.C. § 332(e).

IV. PANEL COMPOSITION AND CASE ASSIGNMENT

The court, unless an en banc hearing has been ordered, *see* Fed. R. App. P. 35, and that has not happened in years, sits in panels of three judges. 28 U.S.C. § 46(c); *see generally Yovino v. Rizo*, 139 S. Ct. 706 (2019). In the Seventh Circuit the court regularly hears cases from early in September until the middle of June. This 10-month period comprises the September Term of the court. It is divided into the September, January and April Sessions. On rare occasions emergency matters and death penalty appeals are heard while the court is in recess. The court also hears arguments a few days during the summer. The court ordinarily convenes at 9:30 AM, and, after entertaining any motions for admission of attorneys to practice before the court, hears oral argument in the cases scheduled for the day, usually six cases in the morning.

Assignments of judges to panels are made about a month before the oral argument on a random basis. In death penalty appeals, panels are randomly assigned when the appeal is docketed. Cir. R. 22(a)(2). Each judge is assigned to sit approximately the same number of times per term with each of his or her colleagues.

The calendar of cases to be orally argued in a given week is prepared and circulated to the judges. The judges then advise the chief judge of any disqualifications. The disclosure statements filed pursuant to Circuit Rule 26.1 and Fed. R. App. P. 26.1 are intended to make this process more accurate and, therefore, more helpful. The judges are then randomly assigned by computer to sit in various panels. This separation of the processes of randomly assigning panels and scheduling cases avoids even the remote possibility of the deliberate assignment of an appeal to a particular panel. The identity of the three judges on any panel is not made public until the day that the cases are argued. An exception to this procedure occurs when there is a subsequent appeal in a previously decided case. The original panel may be reconstituted to hear the second appeal.

The clerk distributes the briefs and appendices to the judges well before the scheduled date of oral argument. Each judge reads the briefs and relevant portions of the appendix or record prior to oral argument. At the time a case is being argued, no member of the panel knows which judge will have the responsibility of writing the opinion or order deciding the case. The presiding judge on the panel makes writing assignments after the day's oral arguments and after the appeals have been discussed.

Some fully briefed cases are decided on the basis of the briefs and record without oral argument. Most of these appeals involve appellants who are not represented by counsel. *See* Fed. R. App. P. 34(a), (f); Cir. R. 34(f). As with cases decided with oral arguments, three judges are randomly assigned and meet as a panel to decide these appeals.

The large number of appeals to be decided requires each judge to carry a heavy workload into the summer recess. Each judge devotes most of his or her summer to writing decisions. It is the goal of each judge to complete opinions and orders assigned to him or her during the previous year before the convening of the September Term.

Motions and emergency matters are received and reviewed by staff attorneys, designated as motions attorneys, and are presented to the judge assigned as the "motions judge." Certain types of motions requiring action by three judges are assigned to panels which usually act without oral argument. This responsibility is rotated among the active (and currently all senior) judges on a weekly basis. *See* Seventh Circuit Operating Procedure 1 for a detailed description of the court's process for handling motions.

V. ADMISSION TO PRACTICE BEFORE THE COURT

An attorney who wishes to be admitted to the Bar of the Seventh Circuit should consult the court's website for application instructions. Briefly, counsel must file an application with the clerk of court on the form furnished by the clerk. Cir. R. 46(a). It is mandatory that all applications be submitted electronically via the ECF Document Filing System.

The lead attorneys for all parties represented by counsel, as well as counsel presenting oral argument, must be admitted to practice in this court no more than 30 days after the docketing of the matters in which they are involved. Cir. R. 46(a).

To qualify for admission to practice, an attorney must be a member in good standing of the bar of either the highest court of a state or of any court in the federal system. Fed. R. App. P. 46(a). There is no length of admission requirement. Attorneys representing any federal, state or local governmental unit are permitted to argue *pro hac vice* without being formally admitted. Cir. R. 46(c).

The admission fee for the Seventh Circuit is $196.00 ($181.00 per 28 U.S.C. §1913 and $15.00 per Cir. R. 46(b)). Counsel should check the "United States Court of Appeals Fee Chart" on the court's website for the current national fee. Payment is made electronically through PACER and then processed by Pay.gov after the application's submission using the Electronic Case Filing (ECF) System.

If the fee for admission is waived, choose the appropriate Fee Waiver Reason from the drop-down list. Attorneys who have been appointed to represent a party on appeal *in forma pauperis*, law clerks to judges of the Seventh Circuit or the district court, and attorneys employed by the United States or any federal agency need not pay the fee. Cir. R. 46(b).

Normally, an application is ruled on within a week or two. To check on the status of your application, you may contact the clerk's office at (312) 435-5850.

Funds derived from the Cir. R. 46(b) $15.00 admission fees are deposited in the Lawyers' Fund which is used for court purposes described in Circuit Rule 46(b). Attorneys admitted to the Seventh Circuit are entitled to use the William J. Campbell Library of the United States Courts.

VI. APPELLATE JURISDICTION

A. In General

Is there appellate jurisdiction over my case? Every appellate practitioner should ask that question. It is a matter that demands the practitioner's attention, requiring counsel to be satisfied that a legal basis exists for jurisdiction over the appeal. Failure to do so is not only disruptive to the case but perilous to the attorney. *Cleaver v. Elias*, 852 F.2d 266 (7th Cir. 1988) (counsel sanctioned for bringing a premature appeal). An attorney should never be surprised if the court questions its jurisdiction over an appeal. Questions regarding appellate jurisdiction should be thought through well ahead of the court's inquiry into the matter. *See Heinen v. Northrop Grumman Corp.*, 671 F.3d 669, 670 (7th Cir. 2012).

Appellate jurisdiction assuredly can be a complex subject. That much is plain from the amount of time this court devotes to confirming its existence for each case brought before it and the number of reported decisions in which the court addresses the nuances of appellate jurisdiction. In general, jurisdictional rules are supposed to be mechanical, *Lawuary v. United States*, 669 F.3 864, 866 (7th Cir. 2012), and clear. *Taglierre v. Harrah's Illinois Corp.*, 445 F.3d 1012, 1013 (7th Cir. 2006). One should not need to guess whether the district court intended to issue an appealable order. *See Hoskins v. Poelstra*, 320 F.3d 761, 764 (7th Cir. 2003).

This section of the Handbook is not meant to be a detailed examination of appellate jurisdiction or an exhaustive survey of this court's published opinions on the subject. Instead, the goal is to highlight for the appellate practitioner those rules and cases that the practitioner should consider in determining whether appellate review is proper.

Before moving on, one further matter needs to be highlighted. "Jurisdiction … 'is a word of many, too many meanings.'" *Ortiz-Santiago v. Barr*, 924 F.3d 956, 957 (7th Cir. 2019), quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 90 (1998). Care must be taken not to overstate a procedural defect as one rising to the level of a jurisdictional error. "In recent years the Supreme Court has pressed a stricter distinction between truly jurisdictional rules, which govern a court's adjudicatory authority, and nonjurisdictional claim-processing rules, which do not." *Ortiz-Santiago*, 924 F.3d at 962-63 (internal quotation marks and citations omitted).

1. *Responsibility of the Court of Appeals to Examine Jurisdiction.*

The Seventh Circuit is ever mindful of the limits on its adjudicatory power and vigilant of jurisdictional faults throughout the appellate process. *The Wellness Community-National v. Wellness House*, 70 F.3d 46, 50-51 (7th Cir. 1995); *see also Yang v. I.N.S.*, 109 F.3d 1185, 1192 (7th Cir. 1997) (a court always has jurisdiction to determine whether it

has jurisdiction). Litigants can expect the court to review not only its own jurisdiction but that of the district court also, and such an examination can take place at any point in the appellate proceedings. *Baer v. First Options of Chicago, Inc.*, 72 F.3d 1294, 1298 (7th Cir. 1995); *Kelly v. United States*, 29 F.3d 1107, 1113 (7th Cir. 1994); *see also Restoration Risk Retention Grp., Inc. v. Gutieriez*, 880 F.3d 339, 345 (7th Cir. 2018) ("We have an independent obligation to ensure that both the district court and this court have subject matter jurisdiction even when neither parties nor the district court raised the issue."). Note that a deficiency in appellate jurisdiction takes precedence and prevents a determination of the district court's jurisdiction. *Massey Ferguson Division of Varity Corp. v. Gurley*, 51 F.3d 102, 104 (7th Cir. 1995).

2. *Duty of Counsel to Ensure Existence of Jurisdiction.*

Similarly, every litigant has an obligation to bring both appellate and district court jurisdictional problems to the court's attention, *see Espinueva v. Garrett*, 895 F.2d 1164, 1166 (7th Cir. 1990), and should do so promptly. Even so, belated jurisdictional challenges are addressed since "'[i]t is never too late … to raise a jurisdictional challenge'." *See Webb v. Clyde L. Choate Mental Health and Development Center*, 230 F.3d 991, 994 (7th Cir. 2000) (appellee requested leave to submit a supplemental brief arguing lack of appellate jurisdiction), quoting *Karazanos v. Madison Two Assoc.*, 147 F.3d 624, 626 (7th Cir. 1998).

The rules provide ample opportunity for counsel to bring such matters to the court's attention at many stages throughout the appellate process. *See, e.g.,* Fed. R. App. P. 27; Cir. R. 3(c), 28(a) and (b). Counsel should be mindful, however, that a motion to dismiss for lack of jurisdiction does not defer the deadline for filing the brief. *Ramos v. Ashcroft*, 371 F.3d 948, 949-50 (7th Cir. 2004).

But even before alerting the appellate court, litigants should flag any problem for the district judge, so that it can be corrected and jurisdictional issues avoided. *Perlman v. Swiss Bank Comprehensive Disability Protection Plan*, 195 F.3d 975, 977-78 (7th Cir. 1999).

One further note before we continue — an observation from a recent opinion:

> "Lawyers have it drilled into them that jurisdictional deficiencies may be raised at any time. What this means, however, is any time during the litigation to which the problem applies. … But if the problem escapes notice, and the case goes

to judgment on the merits, the result is conclusive; the decision cannot be collaterally attacked. …"

United States v. Manriquez-Alvarado, 953 F.3d 511, 512 (7th Cir. 2020). Therefore, one must be vigilant when it comes to jurisdiction.

3. *Parties Cannot Consent to Jurisdiction.*

The parties may not consent to appellate jurisdiction. *Tradesman International, Inc. v. Black*, 724 F.3d 1004, 1010 (7th Cir. 2013); *United States v. Smith*, 992 F.2d 98, 99 (7th Cir. 1993); *see also United States v. Tittjung*, 235 F.3d 330, 335 (7th Cir. 2000). Similarly, the court itself may not, as a rule, choose to pass on jurisdictional issues and decide the case on the merits. *Steel Co. v. Citizens for A Better Environment*, 523 U.S. 83, 94-102 (1998).

4. *Parties Cannot Manufacture Final Judgment.*

Litigants sometimes fabricate a final judgment to circumvent the final judgment rule of 28 U.S.C. § 1291. The Supreme Court rejects such tactics, commenting that "§ 1291's firm final-judgment rule is not satisfied whenever a litigant persuades a district court to issue an order purporting to end the litigation." *Microsoft Corp. v. Baker*, 137 S. Ct. 1702, 1715 (2017).

This court, too, has consistently disapproved of attempts to engineer a final judgment by voluntarily dismissing viable claims without prejudice (so that the claims may be revived after an appeal). Such attempts to manufacture a final appealable judgment are insufficient to vest the court with jurisdiction. *See West v. Louisville Gas & Electric Co.*, 920 F.3d 499, 504-06 (7th Cir. 2019) (conditional dismissal of claims, without the binding effects of a truly final judgment, renders a judgment non-final); *West v. Macht*, 197 F.3d 1185 (7th Cir. 1999); *Union Oil Co. v. John Brown, E & C, Inc.*, 121 F.3d 305 (7th Cir. 1997); *see also ITOFCA, Inc. v. MegaTrans Logistics, Inc.*, 235 F.3d 360 (7th Cir. 2000) (no jurisdiction where dismissal of claim without prejudice permitted claim's refiling at any time). *Cf. Furnace v. Bd. of Trustees of Southern Illinois Univ.*, 218 F.3d 666, 669-70 (7th Cir. 2000) (dismissal of complaint without prejudice may constitute adequate finality for appeal if amendment cannot save action); *South Austin Coalition Community Council v. SBC Communications, Inc.*, 191 F.3d 842, 844 (7th Cir. 1999) (dismissal of suit without prejudice to permit litigation of merits in some other court or at some other time is a final appealable decision). More on this later. *See* this Handbook, "E. Appealability in Civil Cases" at Chapter VI, *infra*.

A party may eliminate the bar to appellate jurisdiction in some circumstances if the party agrees to treat the dismissal of its claims as having been with prejudice. *JTC Petroleum Co. v. Piasa Motor Fuels, Inc*, 190 F.3d 775, 776-77 (7th Cir. 1999); *see also ITOFCA, Inc. v. MegaTrans Logistics, Inc.*, 235 F.3d at 365. This can be done at oral argument, *Arrow Gear Co. v. Downers Grove Sanitary District*, 629 F.3d 633, 637 (7th Cir. 2010), and even after oral argument. *National Inspection & Repairs, Inc. v. George S. May International Co.*, 600 F.3d 878, 883-84 (7th Cir. 2010).

5. *Judges Must Give Reasons.*

Parties should keep in mind that Cir. R. 50 calls for the district judge to state reasons when the court enters dispositive orders and any orders that may be appealed. The rule urges the parties to flag the absence of reasons as quickly as possible so that the court may remand the case promptly to make repairs, rather than go through full briefing and argument in the dark. *See United States v. Mobley*, 193 F.3d 492, 494-95 (7th Cir. 1999). *Cf. Ross Brothers Construction Co., Inc. v. International Steel Services, Inc.,* 283 F.3d 867, 872 (7th Cir. 2002). Note that the rulings described in Rule 50 all refer to events leading up to the final judgment in a case, and that it may be enough to dispose of a post-judgment matters such as a Rule 60(b) motion with a very brief statement that signals no change is required. *Stoller v. Pure Fishing Inc.*, 528 F.3d 478 (7th Cir. 2008).

6. *District Court Decisions.*

The jurisdiction of the Court of Appeals for the Seventh Circuit extends to all criminal appeals and virtually all civil appeals from the seven district courts within the circuit. 28 U.S.C. §§ 1291-1292. They are: the Northern, Central and Southern Districts of Illinois; the Northern and Southern Districts of Indiana; and the Eastern and Western Districts of Wisconsin.

These statutory provisions confer jurisdiction to review decisions made by a district court in a "judicial" capacity; some decisions, however, are properly understood as "administrative" — decisions about such things as facilities, personnel, equipment, supplies, and rules of procedures — and are not subject to appellate review. *Ayestas v. Davis*, 138 S. Ct. 1080, 1089-90 (2018).

Along the same line, the court can review actions of a district court's executive committee (or a similar district court body). The executive committee may issue two types of orders addressed to litigants or

attorneys — judicial and administrative. *See In re Chapman*, 328 F.3d 903, 904 (7th Cir. 2003); *In re Palmisano*, 70 F.3d 483, 484 (7th Cir. 1995). Importantly, the court has jurisdiction over the committee's judicial actions, not its administrative actions. *See Chapman*, 328 F.3d at 904; *cf. In re Long*, 475 F.3d 880, 881 (7th Cir. 2007) (order requiring an individual to sign in and be escorted by a marshal while at the federal courthouse is administrative).

7. *Magistrate Judge Decisions.*

The Seventh Circuit's jurisdiction over appeals from district court decisions includes appeals from a magistrate judge's final decision in civil cases pursuant to 28 U.S.C. § 636(c)(3); Fed. R. App. P. 3(a)(3). The parties' consent to have a magistrate judge preside over their case under this section need not be in writing, but it must be on the record, clear and unambiguous. *Stevo v. Frasor*, 662 F.3d 880, 883-84 (7th Cir. 2011).

Typically, the parties file written consents and the case proceeds without a hitch. But note that consent may be implicit, as the Supreme Court recognized in *Roell v. Withrow*, 538 U.S. 580, 586-91 (2003). "But even implicit consent requires *some* action from the party whose consent must be found." *Coleman v. Labor & Indus. Review Comm'n*, 860 F.3d 461, 470 (7th Cir. 2017) (emphasis in original) (implicit consent not found); *cf. DaSilva v. Rymarkiewicz*, 888 F.3d 321 (7th Cir. 2018) (implicit consent found).

Unanimous consent of all parties is required. *Mark I, Inc. v. Gruber*, 38 F.3d 369, 370 (7th Cir. 1994). *Cf. Brook, Weiner, Sered, Kreger & Weinberg v. Coreq, Inc.*, 53 F.3d 851 (7th Cir. 1995) (consents of original parties are binding on parties that were substituted as legal representatives of deceased party or as legal successor of original party).

To put it another way, absent consent of all parties, a magistrate judge's ruling may not be appealed directly to the court of appeals; instead, review of the magistrate judge's ruling lies with the district court. *Egan v. Freedom Bank*, 659 F.3d 639 (7th Cir. 2011) (sanctions imposed by magistrate judge not reviewable); *see also DirectTV, Inc. v. Barczewski*, 604 F.3d 1004, 1011 (7th Cir. 2010) (magistrate judge's denial of a sanctions order never presented to or passed on by the district judge and therefore not reviewable on appeal); *Kalan v. City of St. Francis*, 274 F. 3d 1150, 1153-54 (7th Cir. 2001).

Importantly, all the parties at the time the case was filed must be accounted for. In *Coleman v. Labor & Indus. Review Comm'n*, 860 F.3d 461 (7th Cir. 2017), the court held that a magistrate judge has no authority to "resolve the case finally" at the screening stage, *see* 28 U.S.C. § 1915(e)(2), with the consent of only the plaintiff. Instead, the court concluded that the "district judge must enter any post-screening orders that dispose of the entire case." *Id.* at 475. *Cf. Brown v. Peters*, 940 F.3d 932 (7th Cir. 2019) (state defendants can consent in advance to magistrate judge's jurisdiction to conduct initial case screening).

Parties added to a case after the original parties have consented must also agree to submission of the case to the magistrate judge; if they do not, the case must be returned to a district judge. *Williams v. General Electric Capital Auto Lease, Inc.*, 159 F.3d 266, 268-69 (7th Cir.1998). The required consents can be provided after judgment is entered, *King v. Ionization Intern., Inc.*, 825 F.2d 1180, 1195 (7th Cir. 1987) (the statute does not require a specific form or time of consent), or even after oral argument on appeal. *See Drake v. Minnesota Mining & Manufacturing Co.*, 134 F.3d 878, 883 (7th Cir. 1998).

Further, a magistrate judge who enters by consent a final judgment in a civil case also has authority to dispose of post-judgment motions in the same litigation. *Jones v. Association of Flight Attendants-CWA*, 778 F. 3d 571, 573 (7th Cir. 2015). If, however, the post-judgment filing is really a new case, the magistrate judge could dispose of the matter only if the parties furnished new consents. *Id*. at 574.

8. *Tax Court; Administrative Agency Decisions.*

In addition, the court has jurisdiction to review decisions of the United States Tax Court (*see* 26 U.S.C. § 7482(a), (b)) and of various federal administrative tribunals. The court's jurisdiction in administrative agency matters depends, however, on the provisions of the various statutes relating to judicial review of agency determinations; the relevant statutory authority should be examined in each instance. *See, e.g.*, *CH2M Hill Central, Inc. v. Herman*, 131 F.3d 1244 (7th Cir. 1997).

9. *Federal Circuit; Supreme Court; State Court Decisions.*

Appeals in Tucker Act cases involving less than $10,000.00 and appeals in patent cases, among others, go to the United States Court of Appeals for the Federal Circuit. *See generally* 28 U.S.C. § 1295. Also, there are a few classes of cases appealable directly from the district court to the Supreme Court of the United States. *See*, *e.g.*, 28 U.S.C. §§ 1253, 2284 (decisions of three-judge panels). The court does not under

any circumstances have jurisdiction to hear appeals from decisions of state courts. *See Reilly v. Waukesha County*, 993 F.2d 1284, 1287 (7th Cir. 1993).

10. *Rooker-Feldman Doctrine.*

The essence of the Rooker-Feldman doctrine is that the lower federal courts do not have the authority to review judgments of the state courts even when a federal question is presented. *See Seaway Bank & Trust Co. v. J&A Series I, LLC*, 962 F.3d 926, 932 (7th Cir. 2020) (the Rooker-Feldman bar is jurisdictional and may not be waived). The only federal court possessing such authority is the Supreme Court of the United States. Litigants who believe that a state judicial proceeding has violated their constitutional rights must appeal that decision through their state courts and then to the United States Supreme Court. *Centres, Inc. v. Town of Brookfield*, 148 F.3d 699, 701-02 (7th Cir. 1998); *see also Lennon v. City of Carmel*, 865 F.3d 503, 506 (7th Cir. 2017).

11. *Necessity of Counsel.*

An individual has a statutory right to proceed personally in all federal courts without counsel. 28 U.S.C. § 1654. *Cf. Tuduj v. Newbold*, 958 F.3d 576, 578-79 (7th Cir. 2020) (prisoner represented by recruited counsel properly denied "leave to represent himself" where request for self-representation was not unequivocal). But that right is limited to self-representation. A non-lawyer may not represent an individual or sign pleadings on the individual's behalf. *See Lewis v. Lenc-Smith Mfg. Co.*, 784 F.2d 829 (7th Cir. 1986). This rule similarly applies where a parent proceeds on behalf of a child, *see Navin v. Park Ridge School Dist.*, 270 F.3d 1147, 1149 (7th Cir. 2001) (per curiam), or a spouse proceeds on behalf of his or her partner. *Cole v. C.I.R.*, 637 F.3d 767, 773 (7th Cir. 2011); *Swanson v. Citibank, N.A.*, 614 F.3d 400, 402 (7th Cir. 2010).

Artificial entities, such as corporations, partnerships, and limited liability companies (commonly referred to as LLCs), are legally incapable of appearing in federal court unless represented by counsel. *Rowland v. Calif. Men's Colony,* 506 U.S. 194, 202 (1993) (all artificial entities may appear in federal court only through licensed counsel); *United States v. Hagerman*, 545 F.3d 579, 581-82 (7th Cir. 2008); *Scandia Down Corp. v. Euroquilt, Inc.*, 772 F.2d 1423, 1427 (7th Cir. 1985); *see also Muzikowski v. Paramount Pictures Corp.*, 322 F.3d 918, 924 (7th Cir. 2003) (non-profit corporation cannot represent itself pro se); *Malone v. Nielson*, 474 F.3d 934, 937 (7th Cir. 2007) (per curiam)

(if an estate's administrator is not the sole beneficiary of the estate, then he or she cannot represent the estate in court).

The rule is not jurisdictional in the sense that harmless violations can be ignored. *In re IFC Credit Corp.*, 663 F.3d 315, 320-21 (7th Cir. 2011). At any point in which a party that is not entitled to proceed *pro se* finds itself without a lawyer though given a reasonable opportunity to obtain one, the court is empowered to and should bar the party from further participation in the litigation. *United States v. Hagerman*, 549 F.3d 536, 538 (7th Cir. 2008); *see also Mendenhall v. Goldsmith*, 59 F.3d 685, 687 n.1 (7th Cir. 1995) (appeal of corporation dismissed because it did not appear by counsel).

Prisoner cases present a unique situation. It is commonplace for a prisoner litigant to use the services of a lay advocate, sometimes referred to as a jailhouse lawyer, to prepare the prisoner litigant's appellate papers. *See Johnson v. Avery*, 393 U.S. 483, 490 & n.1 (1969); *see also Luttrel v. Nickel*, 129 F.3d 933, 936 (7th Cir. 1997) (in determining that district court did not abuse its discretion in denying appointment of counsel to a self-described "functional illiterate," court noted that litigant "had the assistance of 'jailhouse lawyers'"). Still, the prisoner litigant must sign all papers, taking sole responsibility for the papers' content.

B. Screening Procedure in the Seventh Circuit

1. *Appellate Jurisdiction.*

Every federal appellate court has a special obligation to satisfy itself of its own jurisdiction. *Steel Co. v. Citizens for A Better Environment*, 523 U.S. 83, 94-95 (1998). In an effort to uncover jurisdictional defects very early in the appellate process, the Seventh Circuit reviews each new appeal shortly after it is docketed to determine whether potential appellate jurisdiction problems exist. Generally, only the "short record" — the notice of appeal, the Cir. R. 3(c) docketing statement (if filed), the judgment(s) or order(s) appealed, and the district court docket sheet — is reviewed. These documents are sent to senior court staff for review.

If an initial review reveals that there may be a problem with appellate jurisdiction, the parties are notified and directed to submit memoranda addressing the problem. The court reviews the matter (through a motions panel) and attempts to resolve the problem. At this juncture, the appeal is either dismissed or allowed to proceed. *See generally Barrow v. Falck*, 977 F.2d 1100, 1102-03 (7th Cir. 1992).

Importantly, the court's decision at this stage of the appellate process to allow the appeal to proceed does not resolve definitively the question of appellate jurisdiction. A merits panel is free to re-examine jurisdictional issues in those cases that are permitted to proceed, uninhibited by the law of the case doctrine or by Circuit Rule 40(e). *Brown v. Fifth Third Bank*, 730 F.3d 698, 701 (7th Cir. 2013) (Posner, J., in chambers); *Whitlock v. Brueggemann*, 682 F.3d 567, 573-74 (7th Cir. 2012); *United States v. Henderson*, 536 F.3d 776, 778-79 (7th Cir. 2008); *United States v. Lilly*, 206 F.3d 756, 760 (7th Cir. 2000); *Bogard v. Wright*, 159 F.3d 1060, 1062 (7th Cir. 1998); *American Fed'n of Grain Millers, Local 24 v. Cargill, Inc.*, 15 F.3d 726, 727 (7th Cir. 1994); *see also Butera v. Apfel*, 173 F.3d 1049, 1053 (7th Cir. 1999) (merits panel not obligated to revisit jurisdictional issue resolved by a motions panel at an earlier date).

On occasion, the court explicitly may require the parties to address in the briefs a problem that the court identified during its jurisdictional screening, or may choose not to rule on an appellee's motion to dismiss, preferring to consider the matter at the merits stage. *See*, *e.g.*, *West v. Louisville Gas & Electric Co.*, 920 F.3d 499, 503 (7th Cir. 2019).

In some cases, the court may choose to remand the case to the district court to take some action. For example, the district court may take corrective action under Fed. R. App. P. 10(e) or Fed. R. Civ. P. 60(a), to clarify a jurisdictional issue that the court discovers in the screening process. *Rice v. Sunrise Express, Inc.,* 209 F.3d 1008, 1014 n.9 (7th Cir. 2000); *see also Boyko v Anderson*, 185 F.3d 672, 674 (7th Cir. 1999) (limited remands appropriate to perfect appellate jurisdiction to enable appeal to go forward). A proper *nunc pro tunc* order that memorializes past action may eliminate jurisdictional concerns. *Rice v. Sunrise Express, Inc.,* 209 F.3d at 1014-15. Other times, the court may send a case back to the district court to rule on a request to extend the appeal period which the district court did not recognize as such.

2. *District Court Jurisdiction.*

As with appellate jurisdiction, this court has an independent duty to ensure subject matter jurisdiction exists, and neither party may waive arguments that jurisdiction is lacking. *Dexia Credit Local v. Rogan*, 602 F.3d 879, 883 (7th Cir. 2010). If subject matter jurisdiction does not exist, the appellate court cannot reach the merits of the case, and instead it can only correct the district court's error in entertaining the suit. *Buchel-Ruegsegger v. Buchel*, 576 F.3d 451, 453 (7th Cir. 2009). Counsel who holds back a challenge to subject matter jurisdiction, hoping to obtain a judgment on the merits, engages in misconduct for

which he or she can be disciplined. *Enbridge Pipelines (Illinois) L.L.C. v. Moore*, 633 F.3d 602, 606 (7th Cir. 2011).

Circuit Rule 3(c)(1) requires an appellant to file a docketing statement at the beginning of the appeal. That statement must contain all the information that the rule asks for, including all the information required in Circuit Rule 28(a). Counsel later on must provide the same information in the Jurisdictional Statement section of the brief. Objections to the jurisdiction of either the district court or appellate court should be noted in the docketing statement at the outset of the appeal. *United States v. Lloyd*, 398 F.3d 978, 981 (7th Cir. 2005).

One of the purposes of the docketing statement, therefore, is to enable the court of appeals to affirmatively determine whether subject matter jurisdiction exists. If the court notes any inadequacies or deficiencies in the information provided in the statement as to either appellate or subject matter jurisdiction, the parties are ordered to file an amended statement. Failure to remedy a problem may result in the dismissal of the case or imposition of sanctions. *See Meyerson v. Harrah's East Chicago Casino*, 312 F.3d 318 (7th Cir. 2002); *Tylka v. Gerber Products Co.*, 211 F.3d 445 (7th Cir. 2000).

Appeals in cases based in whole or part on diversity jurisdiction receive an extra measure of screening. The court, ever mindful of the limitations on subject matter jurisdiction of federal courts, scrupulously reviews the parties' docketing statements to determine whether the amount in controversy is established and the citizenship of each party to the litigation is identified.

C. Mootness; Standing to Appeal

Generally, most issues concerning appellate jurisdiction focus on one of two things — timeliness or finality (or one of the exceptions to the finality requirement for taking an appeal) — or both. There is another aspect to appellate jurisdiction that the practitioner must not lose sight of.

Article III of the Constitution requires that federal courts only decide disputes that present "actual, ongoing cases or controversies." *Lewis v. Continental Bank Corp.*, 110 S. Ct. 1249, 1253 (1990); *see also Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 71-72 (2013). This constitutional requirement must persist throughout all stages of the appellate proceedings. *Arizonians for Official English v. Arizona*, 520 U.S. 43, 67 (1997). And, like any other question implicating Article III jurisdiction, the court of appeals is obligated to consider the issue of standing, whether or not the parties have raised it. *Brown v. Disciplinary Committee of the Edgerton Volunteer Fire Dept.*, 97 F.3d 969, 972 (7th Cir. 1996).

1. *Mootness.*

Under Article III of the Constitution, federal court jurisdiction is limited to "cases" or "controversies" where the litigant possesses a personal stake in the outcome of the action. *Wright v. Calumet City*, 848 F.3d 814, 816 (7th Cir. 2017), quoting *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1528 (2013). And, "that personal stake evincing an actual controversy must be present at all stages of review, not merely at the inception of the lawsuit." *Id.*

An appeal that no longer presents a live controversy is moot and will be dismissed. *Henco, Inc. v. Brown*, 904 F.2d 11, 13 (7th Cir. 1990). *See also Wirtz v. City of South Bend,* 669 F.3d 860, 862 (7th Cir. 2012); *Selcke v. New England Ins. Co.*, 2 F.3d 790, 792 (7th Cir. 1993) (burden of proof on party asserting appellate jurisdiction if challenged). "The...test for mootness on appeal is...whether it is still possible to 'fashion *some* form of meaningful relief' to the appellant in the event he prevails on the merits." *Flynn v. Sandahl*, 58 F.3d 283, 287 (7th Cir. 1995), quoting *Church of Scientology v. United States*, 113 S. Ct. 447, 450 (1992) (emphasis in original). *See also A.B. v. Housing Authority of South Bend*, 683 F.3d 844, 845 (7th Cir. 2012) (appeal moot if appellate court cannot grant "any effectual relief whatever" in favor of the appellant); *Stone v. Board of Election Commissioners for the City of Chicago*, 643 F.3d 543 (7th Cir. 2011); *In re Turner*, 156 F.3d 713, 716 (7th Cir.1998).

In some cases that are dismissed as moot, the court of appeals will need to address the issue of vacatur — whether to vacate a district court order when it becomes moot on appeal. *Orion Sales, Inc. v. Emerson Radio Corp.*, 148 F.3d 840, 843 (7th Cir. 1998). When a case becomes moot on appeal, the court of appeals generally vacates the judgment of the district court and remands with instructions to dismiss the case. *Mitchell v. Wall*, 808 F.3d 1174, 1176 (7th Cir. 2015).

However, there are exceptions. The vacate-and-dismissal order is for the benefit of the appellant, and if the appellant does not ask for it, the court of appeals can decline to order it on the ground of waiver. Also, the rule doesn't apply to interlocutory appeals involving preliminary injunctions, because they do not have preclusive affect anyway.

When mootness is due to a settlement reached during the pendency of an appeal, it is for the district court, not the appellate court, to vacate the prior judgment in light of the settlement; and the general rule is that settlements on appeal result in the dismissal of the appeal.

Ameritech Corporation v. International Brotherhood of Electrical Workers, Local 21, 543 F.3d 414, 419 (7th Cir. 2008).

For a discussion on when appeals become moot, see *Milwaukee Police Assn. v. Board of Fire & Commissioners of the City of Milwaukee*, 708 F.3d 921 (7th Cir. 2013), and *Eichwedel v. Curry*, 700 F.3d 275 (7th Cir. 2012).

2. *Standing to Appeal.*

Nonparty. The person who brings an appeal must have standing to do so. *Moy v. Cowen*, 958 F.2d 168, 170 (7th Cir. 1992). It is a well-settled rule that "only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment." *Marino v. Ortiz*, 484 U.S. 301, 304 (1988); *see also Shakman v. Clerk of the Circuit Court of Cook County*, 969 F.3d 810, 812 (7th Cir. 2020) ("Party status is a jurisdictional requirement."). In most cases, this means parties of record at the time the judgment was entered, including those who have become parties by intervention, substitution or third-party practice. *In re VMS Ltd. Partnership Sec. Litig.*, 976 F.2d 362, 366 (7th Cir. 1992). *See also Felzen v. Andreas*, 134 F.3d 873 (7th Cir. 1998); *but see Wiggins v. Martin*, 150 F.3d 671, 673 (7th Cir. 1998) (intervenor in trial court may nevertheless lack standing on appeal).

A nonparty to a proceeding generally cannot bring an appeal. *United States v. Hagerman*, 545 F.3d 579, 580 (7th Cir. 2008). There are exceptions. For instance, an individual or entity may seek to become a party to an existing case, filing a motion to intervene. The denial of such a motion on the merits is a final, appealable order. *Driftless Area Land Conservancy v. Huebsch*, 969 F.3d 742, 745 (7th Cir. 2020); *see also CE Design, Ltd. v. Cy's Crab House North, Inc.*, 731 F.3d 725 (7th Cir. 2013) (proposed intervenor needed to file a "springing" notice of appeal as to judgment to preserve its separate appeal of decision denying intervention). Nonparties in the trial court also can participate as parties to the appeal without formal intervention if the outcome of the appeal would be likely to determine (not just affect) their rights. *In re Trans Union Corporation Privacy Litigation*, 629 F.3d 741, 749 (7th Cir. 2011).

Put another way, the court has "allowed nonparties to appeal, but only when the district court has ordered them to do something (as with a contempt citation issued to nonparty witnesses) or when they are agents of parties to the suit (as with attorneys seeking fees)." *Douglas v. The Western Union Co.*, 955 F.3d 662, 665 (7th Cir. 2020).

Dictum, Comments and Statements. Judgments, not statements in opinions, are the basis for appellate review. *In re Repository Technologies, Inc.*, 601 F.3d 710, 718 (7th Cir. 2010); *Daniels v. Liberty Mutual Ins. Co.,* 484 F.3d 884, 887-88 (7th Cir. 2007). An appeal does not present a real case or controversy where the appellant complains not about a judgment but about statements or findings in the court's opinion. *Chathas v. Local 134 IBEW*, 233 F.3d 508, 512 (7th Cir. 2000); *Warner/Elektra/Atlantic Corp. v. County of DuPage*, 991 F.2d 1280, 1282-83 (7th Cir. 1993); *Pollution Control Industries of America, Inc. v. Van Gundy*, 979 F.2d 1271, 1273 (7th Cir. 1992); *Abbs v. Sullivan*, 963 F.2d 918, 924-25 (7th Cir. 1992); *see also In re Trans Union Corporation Privacy Litigation*, 629 F.3d 741, 749 (7th Cir. 2011) (claimed "unwarranted criticism" is not a basis for an appeal).

To put it another way, a victory for the wrong reason is still a victory. Litigants cannot appeal from district courts' *opinions*; only their *judgments* are the subject to appellate review. So, if a district court enters a judgment in a litigant's favor, but the litigant disagrees with the district judge's *reason* for entering a judgment in its favor, the litigant may not take an appeal, unless the litigant is aggrieved by and seeks to alter the terms of the *judgment*. *Board of Trustees of the University of Illinois v. Organon Teknika Corp. LLC*, 614 F.3d 372, 374-75 (7th Cir. 2011).

Sometimes a district court during the course of litigation makes comments that are critical of counsel. An attorney cannot base an appeal on the alleged damage to his or her professional reputation regardless of how harmful the judge's comments may have been absent the imposition of a monetary sanction. *Seymour v. Hug*, 485 F.3d 926, 929 (7th Cir. 2007); *see also Wickens v. Shell Oil Co.*, 620 F.3d 747, 759-60 (7th Cir. 2010) (court reviews judgments, not language in a district court's opinion critical of counsel). *Cf. Martinez v. City of Chicago*, 823 F.3d 1050, 1053-55 (7th Cir. 2016) (order that imposed a formal nonmonetary sanction on a lawyer, in contrast to a critical comment unjoined to a sanctions order, is appealable).

Party Not Aggrieved. A party who has received all the relief sought in the trial court generally is not aggrieved and cannot bring an appeal. *See*, *e.g.*, *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 333 (1980); *Abbs v. Sullivan*, 963 F.2d 918, 924 (7th Cir. 1992); *see also Ash v. Georgia-Pac. Corp.*, 957 F.2d 432, 437 (7th Cir. 1992) (a party may not appeal from a judgment to which it consents). *Cf. INB Banking Co. v. Iron Peddlers, Inc.*, 993 F.2d 1291, 1292 (7th Cir. 1993) (a party who consents to judgment while explicitly reserving the right to appeal preserves that right); *Council 31, Am. Fed. of State, County & Mun.*

Employees v. Ward, 978 F.2d 373, 380 (7th Cir. 1992) (conditional cross-appeals and unconditional appeals treated differently). On the other hand, the winner in the district court can appeal if that party seeks a modification of the judgment in its favor. *Wirtz v. City of South Bend*, 669 F.3d 860, 862 (7th Cir. 2012).

Put another way, "[o]nly a person injured by the terms of the judgment is entitled to appeal." *Grinnell Mutual Reinsurance Co. v. Reinke*, 43 F.3d 1152, 1154 (7th Cir. 1995). An appellate court lacks authority to consider an appeal from a party not subject to the order sought to be challenged. *Fischer v. Magyar Allamvasutak Zrt.*, 892 F.3d 915 (7th Cir. 2018). The party adversely effected from a district court order must be the one who takes the appeal. *See Chase Manhattan Mortgage Corp. v. Moore,* 446 F.3d 725 (7th Cir. 2006); *Nationwide Insurance v. Board of Trustees of the University of Illinois*, 116 F.3d 1154, 1155 (7th Cir. 1997) (victim of insured's alleged wrongdoing — a defendant in insurer's declaratory judgment action — suffered no cognizable injury from ruling that insurer had no duty to defend (the only ruling appealed); defendant-victim's appeal dismissed).

Similarly, a party cannot appeal a judgment in its favor merely because it wants some other unsuccessful party to prevail against someone else on some aspect of the case. *Mueller v. Reich*, 54 F.3d 438, 441 (7th Cir. 1995), vacated on unrelated grounds under the name *Wisconsin v. Mueller*, 519 U.S. 1144 (1997).

<u>*Improper Cross-Appeals*</u>. A winning party cannot cross-appeal because the district court rejected one (or more) of its arguments on the way to deciding in its favor. Rather, a prevailing party is entitled to advance in support of its judgment all arguments it presented to the district court. Put another way, a prevailing party seeks to enforce not a district court's reasoning, but the court's judgment. *Jennings v. Stephens*, 135 S. Ct. 793, 799 (2015). It is improper to file a cross-appeal merely to assert an alternative ground for affirmance; a party can (and should) raise alternative grounds for affirmance in its responsive brief without cross-appealing. *Weitzenkamp v. Unam Life Insurance Company of America*, 661 F.3d 323, 332 (7th Cir. 2011); *Marcatante v. City of Chicago*, 657 F.3d 433, 438 (7th Cir. 2011).

In short, a cross-appeal is necessary and proper only when a party wants the appellate court to alter the judgment (the bottom line, not the grounds or reasoning) of the district court. *See American Bottom Conservancy v. U.S. Army Corps of Engineers,* 650 F.3d 652, 660 (7th Cir. 2011); *Kamelgard v. Macura*, 585 F.3d 334, 336 (7th Cir. 2009); *Jones Motor Co., Inc. v. Holtkamp, Liese, Beckemeier & Childress, P.C.*,

197 F.3d 1190, 1191 (7th Cir. 1999); *Stone Container Corp. v. Hartford Steam Boiler Inspection & Ins. Co.,* 165 F.3d 1157, 1159 (7th Cir. 1999); *Rose Acre Farms, Inc. v. Madigan*, 956 F.2d 670, 672 (7th Cir., 1992).

As a general rule, this also means that an appellee may not attack the judgment with a view to enlarge its own rights under the judgment or to lessen the rights of the other side without a cross-appeal. *Henry v. Hulett*, 969 F.3d 769, 787 (7th Cir. 2020) (en banc) (defendants' challenge to district court's class certification decision sought to diminish plaintiffs' rights, requiring a cross-appeal); *Lewert v. P.F. Chang's China Bistro, Inc.* 819 F.3d 963, 969-70 (7th Cir. 2016) (court could not consider appellee's alternative ground for affirmance for failure to state a claim under Rule 12(b)(6) requiring a dismissal with prejudice, because district court dismissed case without prejudice for lack of subject matter jurisdiction; a cross-appeal was required); *Lee v. City of Chicago*, 330 F.3d 456, 471 (7th Cir. 2003). For instance, if the basis of a district court's dismissal was lack of standing (a jurisdictional dismissal), but appellee wants to pursue an alternative argument that the case should be dismissed on the merits because plaintiffs failed to state a claim upon which relief can be granted, a cross-appeal is required. *MAO-MSO Recovery II, LLC v. State Farm Mutual Automobile Ins. Co.*, 935 F.3d 573, 577 (7th Cir. 2019). But, if the district court was without jurisdiction to address the merits of the case, the court of appeals, too, has no jurisdiction to address the merits. *Id.* at 583 (cross-appeal arguing for dismissal on the merits dismissed).

An appellee whose argument involves an attack on the lower court's reasoning or an insistence upon a matter overlooked or ignored by the lower court need not take a cross-appeal. The dispositive question is whether the relief sought in the cross-appeal is different from the relief already obtained by the cross-appealing party in the district court's final judgment; if it is not different, then the cross-appeal must be dismissed. *Bernstein v. Bankert*, 733 F.3d 190, 224 (7th Cir. 2013). Taken a step further, the court also has said that the cross-appeal rule is not so vital that it justifies haggling over borderline cases; doubts should be resolved against finding that the appellee's failure to file a cross-appeal forfeited its right to argue an alternative ground. *WellPoint, Inc. v. Commissioner of Internal Revenue*, 599 F.3d 641, 650 (7th Cir. 2010).

See also this Handbook, *infra* at 111.

Appellate Court has Jurisdiction to Determine Jurisdiction. As a final matter, be mindful that the court has jurisdiction to determine whether the plaintiffs lacked standing to sue or the district court otherwise lacked jurisdiction to act. *See*, *e.g.*, *United States v. One 1987 Mercedes Benz Roadster 560 SEC*, 2 F.3d 241, 242 n.1 (7th Cir. 1993); *Tisza v. Communications Workers of America*, 953 F.2d 298, 300 (7th Cir. 1992).

D. Appealability in Criminal Cases

1. *Finality*.

Defendant Appeals. Ordinarily, a defendant in a criminal case may not take an appeal until a judgment of conviction and sentence has been entered. *Flanagan v. United States*, 465 U.S. 259, 263 (1984); *Pollard v. United States*, 352 U.S. 354, 358 (1957); *United States v. Kaufmann*, 951 F.2d 793 (7th Cir. 1992). Rule 32(k)(1) of the Federal Rules of Criminal Procedure sets out what a judgment of conviction must include. The defendant may appeal the conviction, his sentence, or both. Fed. R. Crim. P. 32(j)(1)(A), (B). And, if a defendant requests the district court clerk to file an appeal, the clerk must do so on the defendant's behalf. Fed. R. Crim. P. 32(j)(2).

And, of course, this court generally has no jurisdiction to review a post-judgment order that was issued after defendant filed a notice of appeal from the judgment; defendant must file a second notice of appeal that includes the new ruling, or alternatively amend the original notice of appeal to include the post-judgment order. *United States v. Bonk*, 967 F.3d 643, 649-50 (7th Cir. 2020).

Government Appeals. The government is permitted to appeal some sentences. *See* 18 U.S.C. § 3742(b); *see also United States v. Byerley*, 46 F.3d 694, 698 (7th Cir. 1995) (the United States has no right of appeal in a criminal case absent explicit statutory authority). The government may also appeal the dismissal of an indictment or information. 18 U.S.C. § 3731.

Restitution Orders. A district court has jurisdiction to award restitution even if a defendant files a notice of appeal following sentencing. A judgment sentencing a defendant to imprisonment and an order of restitution involve two separate appealable judgments. *Manrique v. United States*, 137 S. Ct. 1266, 1271-73 (2017). Unless the defendant files a second notice of appeal from the judgment imposing restitution, the Supreme Court concluded that the defendant cannot challenge it, at least if the government asserts the rule. *Id.*

Finality Tolled. A motion for reconsideration (filed within the time to appeal) makes a district court's decision non-final if it presents a substantive challenge to the decision (as opposed to a motion seeking to correct a typographical or other formal error). *United States v. Rollins*, 607 F.3d 500, 501-02 (7th Cir. 2010); *cf. United States v. Townsend*, 762 F.3d 641, 644 (7th Cir. 2014).

Magistrate Judge Judgments. The criminal code provides that a defendant may not file an appeal directly to this court from a misdemeanor conviction and sentence entered by a magistrate judge. 18 U.S.C. § 3402. The appeal must go first to the district court. Rule 58(g)(2) of the Federal Rules of Criminal Procedure similarly speaks only in terms of an appeal from the magistrate judge to the district court. Of course, the court of appeals has jurisdiction to entertain an appeal once the district court has reviewed the judgment. *United States v. Smith*, 992 F.2d 98 (7th Cir. 1993).

2. *Interlocutory Orders.*

There are some exceptions to the rule that the parties in a criminal case must wait until imposition of sentence to appeal.

Pretrial Detention Order. Pretrial detention and release orders are appealable. 18 U.S.C. § 3145(c). Because these matters must be decided quickly, 18 U.S.C. § 3145(c), the appellant should file an appropriate motion, along with a memorandum of law, within the appeal rather than having the case proceed to full briefing. *United States v. Daniels*, 772 F.2d 382, 383-84 (7th Cir. 1985); *United States v. Bilanzich*, 771 F.2d 292, 300 (7th Cir. 1985); Cir. R. 9(a), (d).

Government Appeals. The government is statutorily authorized to appeal certain interlocutory orders. *See* 18 U.S.C. § 3731. For instance, the government may take an appeal from an order suppressing or excluding evidence or requiring the return of seized property, or the dismissal of a portion of an indictment or information.

Collateral Order Doctrine. In addition, a limited exception to the final judgment rule has been recognized in criminal cases for interlocutory orders within the scope of the collateral order doctrine. But the collateral order exception is interpreted with the utmost strictness in criminal cases. *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 799 (1989); *United States v. Schock*, 891 F.3d 334, 339 (7th Cir. 2018); *United States v. Henderson*, 915 F.3d 1127, 1131 (7th Cir. 2019); *United States v. J.J.K.*, 76 F.3d 870 (7th Cir. 1996) (collateral order doctrine is to be interpreted narrowly in criminal cases).

The Supreme Court has identified only four topics to come within the scope of the collateral order doctrine in criminal cases: release on bail before trial; the Speech or Debate Clause; the Double Jeopardy Clause; and involuntary medication. *See Stack v. Boyle*, 342 U.S. 1 (1951) (bail); *Abney v. United States*, 431 U.S. 651 (1977) (double jeopardy); *Helstoski v. Meanor*, 442 U.S. 500 (1979) (speech or debate); and *Sell v. United States*, 539 U.S. 166 (2003) (involuntary medication). *But see United States v. Ganos*, 961 F.2d 1284 (7th Cir. 1992) (a double jeopardy claim that is frivolous or not colorable defeats jurisdiction). *Compare United States v. Davis*, 1 F.3d 606, 607-08 (7th Cir. 1993) (order denying motion in limine to bar disclosure of information based on attorney-client privilege appealable under *Perlman* exception to finality rule); *United States v. Corbitt*, 879 F.2d 224, 227 n.1 (7th Cir. 1989) (order releasing presentence report to media under collateral order doctrine); *United States v. Dorfman*, 690 F.2d 1230, 1231-32 (7th Cir. 1982) (pretrial order authorizing publication of wiretap transcripts under collateral order doctrine).

Orders denying or granting a motion to disqualify counsel are not within this exception. *See Flanagan v. United States*, 465 U.S. 259 (1984); *United States v. White*, 743 F.2d 488 (7th Cir. 1984); *In re Schmidt*, 775 F.2d 822 (7th Cir. 1985) (order disqualifying counsel for grand jury witness); *but see In re Grand Jury Subpoena of Rochon*, 873 F.2d 170, 173 (7th Cir. 1989) (order disqualifying government counsel).

Litigants seeking to invoke the collateral order doctrine in a criminal case are advised to review the court's decisions in *United States v. Schock*, 891 F.3d 334 (7th Cir. 2018) — which distinguished rights that entail the dismissal of charges (which must await the trial decision) from the concept of the right not to be tried (which supports an interlocutory appeal) — and *United States v. Henderson*, 915 F.3d 1127 (7th Cir. 2019) (shackling order not reviewable).

<u>*Pendent Appellate Jurisdiction*</u>. The Supreme Court in *Abney v. United States*, 431 U.S. 651, 662-63 (1977), effectively foreclosed the use of the doctrine of pendent appellate jurisdiction in criminal cases. *United States v. Schock*, 891 F.3d at 339-40. *See also United States v. Eberhardt*, 388 F.3d 1043, 1051-52 (7th Cir. 2004) (collecting some of the cases discussing pendent appellate jurisdiction in criminal cases).

3. *Fugitive Disentitlement Doctrine*.

The fugitive disentitlement doctrine is a discretionary device by which courts may dismiss criminal appeals (or civil actions) by or against individuals who are fugitives from justice. *United States v. Jacob*, 714 F.3d 1032 (7th Cir. 2013) (per curiam); *Gutierrez-Almazan v. Gonzales*, 453 F.3d 956, 957 (7th Cir. 2006) (per curiam); see also *Sarlund v. Anderson*, 205 F.3d 973 (7th Cir. 2000). Courts are cautioned against frequent use of the doctrine. *Gutierrez-Almazan v. Gonzales*, 453 F.3d at 957.

E. Appealability in Civil Cases

1. *Final Judgment.*

A cornerstone of our judicial system is that the entire case and every matter in controversy in it should be decided in a single appeal. This is the final judgment rule, codified in 28 U.S.C. § 1291. *Microsoft Corp. v. Baker*, 137 S. Ct. 1702, 1712 (2017). Generally, an appeal therefore may not be taken in a civil case until a final judgment disposing of all claims against all parties has been entered on the district court's civil docket pursuant to Fed. R. Civ. P. 58. *See Alonzi v. Budget Construction Co.*, 55 F.3d 331, 333 (7th Cir. 1995); *Cleaver v. Elias*, 852 F.2d 266 (7th Cir. 1988); *see also Birchmeier v. Caribbean Cruise Line, Inc.*, 896 F.3d 792, 795 (7th Cir. 2018) (a decision on the merits is final only if it resolves all claims of all parties); *Chessie Logistics Co. v. Krinos Holdings, Inc.*, 867 F.3d 852, 856 (7th Cir. 2017).

If, however, a complaint names one or more defendants but the plaintiff does not assert any claims against them or seek any relief from them, the failure to mention them in the final judgment is not an impediment to appellate jurisdiction. *Alonso v. Weiss*, 932 F.3d 995, 1001 (7th Cir. 2019) (the summary judgment order, by its terms, expressly resolved all claims in the district court).

But when a district court's resolution of a case looks both ways — giving inconsistent signals as to the finality of its decision — the only safe route is to treat it as final. *Hoskins v. Poelstra*, 320 F.3d 761, 763-64 (7th Cir. 2003) (order dismissed "complaint" without prejudice which is not final, but judgment entered that dismissed "case"). On occasion, the court has suspended consideration of an appeal (even after oral argument) until the district court enters a proper judgment that makes clear that it resolved all claims asserted by all parties. Once the district court has done so, the court will resume consideration of the appeal, sometimes without the necessity of a fresh notice of

appeal under Fed. R. App. P. 4(a)(2) — prompting the original notice to come into force once a proper judgment has been entered. *See Global Material Technologies, Inc. v. Dahzeng Metal Fibre Co., Ltd.*, Appeal No. 18-3117 (7th Cir. May 23, 2019) (unpublished).

The court's review of whether there has been a final order is *de novo*. *Star Insurance Co. v. Risk Marketing Group Inc.*, 561 F.3d 656, 659 (7th Cir 2009).

Separate Document Rule. A Rule 58 judgment is a separate document that is required in every civil case, apart from the district court's memorandum opinion or order that disposes of the case. *Perry v. Sheet Metal Workers' Local No. 73 Pension Fund*, 585 F.3d 358, 361-62 (7th Cir. 2009). The document benefits both the parties (for purposes of enforcement and clarity of legal obligations) and the judicial system (for providing a clear time period for taking an appeal). *Kunz v. DeFelice*, 538 F.3d 667, 673 (7th Cir. 2008).

The court repeatedly has emphasized the importance of compliance with Rule 58's separate document requirement and the preferred use of the established forms to prevent confusion. *Brown v. Fifth Third Bank*, 730 F.3d 698 (7th Cir. 2013). For one thing, a Rule 58 judgment eliminates all doubt about the disposition of a case. *Gleason v. Jansen*, 888 F.3d 847, 852 (7th Cir. 2018).

The rule makes prompt entry of judgment the norm. Fed. R. Civ. P. 58(b), (e). Nevertheless, district judges have ample discretion to manage their cases and to delay entry of judgment if there are sound reasons to do so. *See Passananti v. Cook County*, 689 F.3d 655, 661 (7th Cir. 2012) (no abuse of discretion in district court's decision to postpone entry of judgment for four months while it considered and eventually granted defendants' Rule 50 motion; outer boundaries of this discretion not addressed). *But see Walker v. Weatherspoon*, 900 F.3d 354 (7th Cir. 2018), where the court criticized the practice of announcing a final decision but postponing the issuance of the opinion that provided the explanation of the decision.

Rule 58(a) provides that "every judgment" must be set out in a separate document but enumerates five kinds of decisions that do not count as a "judgment" for this purpose. A separate document is not required for an order disposing of a motion:

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

(b) to amend or make additional findings under Rule 52(b);

(c) for attorney's fees under Rule 54;

(d) for a new trial, or to alter or amend the judgment, under Rule 59; or

(e) for relief under Rule 60.

Rule 58 requires a district judge to personally review and approve any judgment other than one implementing a general jury verdict, awarding only costs or a sum certain, or denying all relief. *Johnson v. Acevedo*, 572 F.3d 398, 400 (7th Cir. 2009); *see also Greenhill v. Vartanian*, 917 F.3d 984, 987 (7th Cir. 2019). Inspection by a district judge should ensure the entry of proper judgments, especially when the dispositions are complicated. And, lawyers should alert the district judge to problems with judgments. *Philadelphia Indemnity Ins. Co. v. The Chicago Trust Co.*, 930 F.3d 910, 912 (7th Cir. 2019).

If the district court has not entered a Rule 58 judgment though required, *see* Fed. R. Civ. P. 58(a), the rule provides that a party may request the court do so. Fed. R. Civ. P. 58(d). In fact, if the district court does not enter a proper Rule 58 judgment in a separate document, and one is required, the parties should ask the court to do so. *Perry v. Sheet Metal Workers' Local No. 73 Pension Fund*, 585 F.3d 358, 362 (7th Cir. 2009).

A typical Rule 58 judgment identifies all the parties in the case and records the disposition of every claim made by every party, and nothing more. To put it another way, the judgment must provide the relief to which the winner is entitled — the consequence of the judicial ruling — unless the plaintiff loses outright. *Exelon Generation Company, LLC v. Local 15, International Brotherhood of Electrical Workers, AFL-CIO*, 540 F.3d 640, 643-44 (7th Cir. 2008); *Rush University Medical Center v. Leavitt*, 535 F.3d 735, 737 (7th Cir. 2008); *see also Casanova v. American Airlines, Inc.*, 616 F.3d 695, 696 (7th Cir. 2010) (judgment must state the relief to which the prevailing party is entitled).

The Rule 58 judgment should omit reasons and collateral matters and not delve into the rationale and legal conclusions behind the final decision. *TDK Electronics Corp. v. Draiman*, 321 F.3d 677, 679 (7th Cir. 2003); *see also Hyland v. Liberty Mutual Fire Ins. Co.*, 885 F.3d 482, 483 (7th Cir. 2018) (judgments must not recite the pleadings and other papers that led to the decision); *Bell v. Kay*, 847 F.3d 866, 868 (7th Cir. 2017) (per curiam) (dismissal order not the "separate document" required under Rule 58 because it "states rather than omits

the reason for dismissal"). A recitation that a motion was granted or denied likewise is not appropriate for inclusion in the Rule 58 judgment. *Cooke v. Jackson National Life Ins. Co.*, 882 F.3d 630, 631 (7th Cir. 2018).

No special wording is required to comply with Rule 58. The judgment merely must be self-contained and set forth the relief to which the parties are entitled in resolving all claims of all parties. *Johnson v. Acevedo*, 572 F.3d 398, 400 (7th Cir. 2009) (every judgment must be self-contained and specify the relief being awarded); *Massey Ferguson Division of Varity Corp. v. Gurley*, 51 F.3d 102, 104-05 (7th Cir. 1995); *Paganis v. Blonstein*, 3 F.3d 1067, 1071-72 (7th Cir. 1993).

A judgment, however, that simply announces the prevailing party without "award[ing] the relief to which the prevailing party is entitled," *see*, *e.g.*, *American Inter-Fidelity Exchange v. American Re-Insurance Co.*, 17 F.3d 1018, 1020 (7th Cir. 1994), or merely repeats that a motion was granted, *see*, *e.g.*, *Talley v. United States Dept. of Agriculture*, 595 F.3d 754, 757 (7th Cir. 2010); *Camp v. Gregory*, 67 F.3d 1286, 1290 (7th Cir. 1995); *Massey Ferguson Division of Varity Corp. v. Gurley*, 51 F.3d at 104, is defective. *See also Greenhill v. Vartanian*, 917 F.3d 984, 987 (7th Cir. 2019) (a judgment that shows the district court is done with the case permits an appeal, but does not resolve the parties' dispute, does not satisfy Rule 58). Unless some other document clearly reveals the terms on which the litigation has been resolved or the parties otherwise agree on the terms of the resolution of the case to remove any ambiguity in the district court's judgment, it is not appealable. *See*, *e.g.*, *Hyland v. Liberty Mutual Fire Ins. Co.*, 885 F.3d 482, 484 (7th Cir. 2018); *Health Cost Controls of Illinois v. Washington*, 187 F.3d 703, 708 (7th Cir. 1999); *Buck v. U.S. Digital Communications*, 141 F.3d 710 (7th Cir. 1998); *Buchanan v. United States*, 82 F.3d 706 (7th Cir. 1996) (per curiam); *Burgess v. Ryan*, 996 F.2d 180 (7th Cir. 1993).

The absence of a separate Rule 58 judgment can be particularly troublesome for cases that involve injunctive or declaratory relief. *See Calumet River Fleeting, Inc. v. International Union of Operating Engineers, Local 150, AFL-CIO*, 824 F3d 645, 650-51 (7th Cir. 2016).

On occasion the court has recognized that some minute entries might satisfy the separate document requirement of Rule 58. *Perry v. Sheet Metal Workers' Local No. 73 Pension Fund*, 585 F.3d 358, 361-62 (7th Cir. 2009). *But see Vergara v. City of Chicago*, 939 F.3d 882 (7th Cir. 2019) (minute order dismissing case, stating an opinion explaining reasons would be filed later, not treated as Rule 58 judgment). In *Hope*

v. United States, 43 F.3d 1140, 1142 (7th Cir. 1994), the court determined that a completed minute order form commonly used in the district court for Northern District of Illinois constituted a Rule 58 judgment although the court preferred that the clerks of the district court use Form AO 450 to comply with Rule 58. *See also Nocula v. UGS Corp.*, 520 F.3d 719, 724 (7th Cir. 2008).

More than fifty years ago, the court felt "obliged to comment on the unsatisfactory form of the judgment entered in the district court," suggesting that "greater care ought to have been exercised in forming the document." *Home Federal Sav. & L. Ass'n of Chicago v. Republic Ins. Co.*, 405 F.2d 18, 25 (7th Cir. 1968). Eight years later the court noted that the comment in *Home Federal* "by no means achieved a solution to the problem," requiring the court "to reaffirm the importance of entry of a proper final judgment." *Rappaport v. United States*, 557 F.2d 605, 606 (7th Cir. 1977) (per curiam). Fast-forward more than forty years later — the court to this day is plagued with cases that do not contain a proper Rule 58 judgment. *See*, *e.g.*, *Hyland v. Liberty Mutual Fire Ins. Co.*, 885 F.3d 482, 484 (7th Cir. 2018) ("[O]nce again we urge district courts to comply with [Rules 54(a) and 58]."); *Cooke v. Jackson National Life Ins. Co.*, 882 F.3d 630 (7th Cir. 2018); *see also INTL FCStone Financial Inc. v. Jacobson*, 950 F.3d 491, 501-02 (7th Cir. 2020).

The absence (or inadequacy) of a Rule 58 judgment requires appellate court staff to carefully read district court orders and search through the record and docket entries to make certain that the district court disposed of all claims against all parties. *Calumet River Fleeting, Inc. v. International Union of Operating Engineers, Local 150, AFL-CIO*, 824 F.3d 645, 650 (7th Cir. 2016) (appellate jurisdiction exists, in absence of Rule 58 judgment, if it is "know[n] from other sources" that the district court is finished with the case). Litigants and their attorneys should bring such matters promptly to the district judge's attention so that the district judge can take appropriate action to correct any deficiencies in the judgment. *See Hollingsworth v. Perry*, 558 U.S. 183, 184 (2010) ("Courts enforce the requirement of procedural regularity on others, and must follow those requirements themselves."). Failure to act will cause unnecessary additional work for the court and counsel in untangling jurisdictional snarls.

<u>*Waiver of Separate Document Rule*</u>. The norm is for a district court to enter a separate final judgment in compliance with Rule 58 of the Federal Rules of Civil Procedure when it is done with a case.

A district court's failure to comply with the formal requirement of Rule 58 — a separate document that recites the disposition of all claims — is not fatal to appellate jurisdiction if it is clear that the district court clearly signaled that it finished its work on the case. *Wisconsin Central Ltd. v. TiEnergy, LLC*, 894 F.3d 851, 854 (7th Cir. 2018); *Luevano v. Wal-Mart Stores, Inc.*, 722 F.3d 1014, 1020 (7th Cir. 2013). Put another way, a separate document under Rule 58 is not required to give the court of appeals jurisdiction. *Eberhardt v. O'Malley*, 17 F.3d 1023, 1024 (7th Cir. 1994).

The appellant can waive the separate document requirement of Rule 58 if the only obstacle to appellate review is the district court's failure to enter judgment on a separate document, *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 386 (1978); Fed. R. App. P. 4(a)(7)(B), and if the district court makes clear that the case is over. *Smith-Bey v. Hospital Administrator*, 841 F.2d 751, 755-56 (7th Cir. 1988); *Foremost Sales Promotions, Inc. v. Director, Bureau of Alcohol, Tobacco & Firearms*, 812 F.2d 1044, 1046 (7th Cir. 1987). *Cf. West Lafayette Cor. v. Taft Contracting Co., Inc.,* 178 F.3d 840, 842-43 (7th Cir. 1999) (agreement to release claim is good reason to enter judgment but not a substitute for action by the district court); *Spitz v. Tepfer*, 171 F.3d 443, 447-48 (7th Cir. 1999) (district court's technical error in failing to address an issue, if issue abandoned and court plainly intended to rule on all issues in case, is no impediment to appellate jurisdiction). This means that it is possible to appeal in advance of a proper Rule 58 judgment, but it is never necessary to do so. *United States v. Indrelunas*, 411 U.S. 216 (1973). Therefore, it is incorrect to assume that the maximum number of opportunities to appeal is one. *Otis v. City of Chicago*, 29 F.3d 1159, 1166-67 (7th Cir. 1994) (en banc).

On occasion, a district court will conditionally dismiss a case, but give the plaintiff time to fix the problem that led to dismissal. Such an order becomes an appealable "final decision" once the time for correction has expired and no corrective action is taken, whether or not the court enters a final judgment. *Davis v. Advocate Health Center Patient Care Express*, 523 F.3d 681, 683 (7th Cir. 2008); *see also Otis v. City of Chicago*, 29 F.3d 1159, 1165-66 (7th Cir. 1994) (en banc). Further, a notice of appeal filed before the expiration of the deadline to fix the problem is effective if there has been no activity in the district court following the notice's filing. *See Shott v. Katz*, 829 F.3d 494, 496 (7th Cir. 2016).

Relief Not Determined. It remains essential to know who won what. *Buck v. U.S. Digital Communications, Inc.*, 141 F.3d 710, 711 (7th Cir. 1998). A lack of quantified damages prevents an appeal. *Kerr-McGee*

Chem. Corp. v. Lefton Iron & Metal Co., 570 F.3d 856, 857-58 (7th Cir. 2009) (per curiam), citing *Liberty Mutual Ins. Co. v. Wetzel*, 424 U.S. 737 (1976). Judgments under Rule 58, therefore, must provide the relief to which the prevailing party is entitled. *Hyland v. Liberty Mutual Fire Ins. Co.*, 885 F.3d 482, 483 (7th Cir. 2018). *Cf. Buchanan v. United States*, 82 F.3d 706 (7th Cir. 1996) (per curiam) (judgment in a suit for monetary relief not appealable if it fails to specify either the amount due plaintiff or a formula by which that amount of money could be computed in mechanical fashion). Even so, an appeal will not be dismissed if the judgment fails to resolve purely ministerial matters, involving no discretion. *See Richardson v. Gramley*, 998 F.2d 463, 465 (7th Cir. 1993); *Production and Maintenance Employees' Local 504 v. Roadmaster Corp.*, 954 F.2d 1397, 1401-02 (7th Cir. 1992) (an appeal is permitted if the determination of damages is mechanical and uncontroversial). *Cf. Health Cost Controls of Illinois v. Washington*, 187 F.3d 703, 707-08 (7th Cir. 1999) (failure of district court to specify amount of damages does not bar jurisdiction if parties agree to amount of damages during course of appeal).

Still, the parties should ensure that the district court has issued a separate judgment. *See Armstrong v. Ahitow*, 36 F.3d 574 (7th Cir. 1994); *Chambers v. American Trans Air, Inc.*, 990 F.2d 317, 318 (7th Cir. 1993); *Tobey v. Extel/JWP, Inc.*, 985 F.2d 330, 331 (7th Cir. 1993). The court on a number of occasions has stressed the importance of a clear, definite and specific judgment and reminded counsel of their duty to take steps to see to the entry of a proper judgment. *Continental Casualty Co. v. Anderson Excavating & Wrecking Co.*, 189 F.3d 512, 515-16 (7th Cir. 1999); *Health Cost Controls of Illinois v. Washington*, 187 F.3d 703, 708 (7th Cir. 1999).

Declaratory Judgment. In declaratory judgment actions, district courts must declare *specifically* and *separately* the respective rights of the parties, not simply state in a memorandum opinion, minute order, or a form prescribed for judgments in a civil case that a motion has been granted or denied. *Calumet River v. Int'l Union Operating Engineers*, 824 F.3d 645, 651 (7th Cir. 2016). Such shortcomings may lead the court to remand the case to the district court with instructions to enter a proper declaratory judgment. *See Philadelphia Indemnity Ins. Co. v. The Chicago Trust Co.*, 930 F.3d 910, 912 (7th Cir. 2019) (court remanded case with instructions "to enter a new judgment that implements the district judge's opinion, abides by Rule 58, and resolves the whole case"); *see also Greenhill v. Vartanian*, 917 F.3d 984, 987 (7th Cir. 2019) (Rule 58(b)(2) provides that the judge, not a clerk, review and approve the form of a declaratory judgment). *Cf. Windridge of Naperville Condominium Ass'n v. Philadelphia Indemnity Ins. Co.*,

932 F.3d 1035, 1038 n.2 (7th Cir. 2019) (district court docket entry served as a final judgment declaring parties' rights and saying case was closed).

Failure to Quantify the Prejudgment Interest. A commonly seen omission in a judgment is the failure to specify the amount of prejudgment interest owed a party. The award of prejudgment interest makes up part of a plaintiff's damages. *Dual-Temp of Illinois, Inc. v. Hench Central, Inc.,* 777 F.3d 429 (7th Cir. 2015) (per curiam). If the amount is not calculated, the judgment is not final. *See Osterneck v. Ernst & Whinney*, 489 U.S. 169, 175-76 (1989); *Dynegy Marketing & Trade v. Multiut Corp.*, 648 F.3d 506, 513 (7th Cir. 2011).

Failure to Explicitly Resolve a Claim. A final judgment must resolve all claims against all parties. *See Cleaver v. Elias*, 852 F.2d 266 (7th Cir. 1988). An outstanding claim left unresolved usually will scuttle appellate jurisdiction, unless the court necessarily adjudicated the claim because of other rulings it made. *Bielskis v. Louisville Ladder, Inc.*, 663 F.3d 887, 893 (7th Cir. 2011); *BKCAP, LLC v. CAPTEC Franchise Trust 2000-1*, 572 F.3d 353, 357-58 (7th Cir. 2009). C*f. Minnesota Life Ins. Co. v. Kagan*, 724 F.3d 843, 848 (7th Cir. 2013) (party's repudiation of a potentially remaining claim — here, an unresolved issue concerning the amount of interest to be paid on insurance proceeds — sufficient to convert a non-final order into one that is final and appealable).

Dismissals Without Prejudice. A dismissal without prejudice normally does not qualify as an appealable final judgment because the plaintiff is free to re-file the case. *Larkin v. Galloway*, 266 F.3d 718, 721 (7th Cir. 2001). But if circumstances preclude re-filing, such as the claim is time-barred, *Lee v. Cook County*, 635 F.3d 969, 972 (7th Cir. 2011), the dismissal is for lack of federal jurisdiction, *Bovee v. Broom*, 732 F.3d 743 (7th Cir. 2013), or the dismissal is based on *forum non conveniens*, *Hunt v. Moore Brothers, Inc.*, 861 F.3d 655, 657 (7th Cir. 2017) (dismissal final in the sense that the plaintiffs are finished before the federal courts), it is treated as final and appealable. *See also Effex Capital, LLC v. National Futures Ass'n*, 933 F.3d 882, 885 n.3 (7th Cir. 2019) (multiple indicia suggested district court finished with the case and that plaintiff could not refile suit with district court after seeking administrative remedies); *Thomas v. Butts*, 745 F.3d 309, 311 (7th Cir. 2014) (dismissal without prejudice appealable if it is "conclusive in practical effect").

A less strict proposition, and one apparently in harmony with the court's opinions on the subject, is that a dismissal without prejudice is

appealable unless the reason for the dismissal is an easily fixable problem. *Anderson v. Catholic Bishop of Chicago*, 759 F.3d 645, 649 (7th Cir. 2014). *Cf. Kowalski v. Boliker*, 893 F.3d 987, 994 (7th Cir. 2018) (appellate review not precluded if invitation to refile is illusory).

In short, only if the defect that required dismissal is immediately curable is the dismissal without prejudice nonappealable. *Schering-Plough Healthcare Products, Inc. v. Schwarz Pharma, Inc.*, 586 F.3d 500, 506-07 (7th Cir. 2009); *see also Taylor-Holmes v. Office of the Cook County Public Guardian*, 503 F.3d 607, 610 (7th Cir. 2007) (a dismissal without prejudice is not appealable if it amounts to merely telling the plaintiff "to patch up the complaint, or take some other easily accomplished step").

Another complementary way to determine whether a dismissal without prejudice is appealable is to look for indicia that the district court is finished with the case. *Hernandez v. Dart*, 814 F.3d 836, 841 (7th Cir. 2016); *see also Effex Capital, LLC v. National Futures Ass'n*, 933 F.3d 882, 885 n.3 (7th Cir. 2019). The label "without prejudice", therefore, does not always prevent a disposition from being a *de facto* final judgment. *Gleason v. Jansen*, 888 F.3d 847, 852 (7th Cir. 2018). So, for example, if a district judge misdescribes as "without prejudice" a disposition that is conclusive in practical effect, the court of appeals possesses jurisdiction. *American States Ins. Co. v. Capital Assoc. of Jackson County, Inc.*, 392 F.3d 939, 941 (7th Cir. 2004). But remember that attempts to engineer a provisional dismissal of claims without prejudice so as to bring the proceedings in the district court to a close are disapproved. *West v. Louisville Gas & Electric Co.*, 920 F.3d 499, 504-05 (7th Cir. 2019).

On occasion, a district court may dismiss a complaint without prejudice, but permit the plaintiff to file an amended complaint to fix the problem that led to dismissal. In such a case, the order becomes an appealable "final decision" once the time for correction has expired, whether or not the court enters a final judgment, and there has been no activity in the district court beyond the filing of a notice of appeal. *Shott v. Katz*, 829 F.3d 494, 496 (7th Cir. 2016); *Davis v. Ruby Foods, Inc.*, 269 F3d 818, 819 (7th Cir. 2001) (order dismissing case without prejudice to filing a complaint by a specified date became a final appealable judgment when the date passed without plaintiff filing anything); *see also Mapes v. State of Indiana*, 932 F.3d 968, 971 (7th Cir. 2019) (per curiam).

Such "springing" judgments — judgments that become final automatically upon the occurrence (or nonoccurrence) of some

condition specified in an earlier order — should be avoided; they are a potent source of confusion concerning the timeliness of appeals. *Shah v. Inter-Continental Hotel Chicago Operating Corp.*, 314 F.3d 278, 281 (7th Cir. 2002). Remember, any party may (and, as a matter of course, should) request the district court to enter a proper Rule 58 judgment if one has not been entered. Fed. R. Civ. P. 58(d).

Importantly, where dismissed but revivable claims remain, the court will permit the party controlling those claims to unequivocally dismiss them with prejudice and thereby eliminate the jurisdictional defect. *Palka v. City of Chicago*, 662 F.3d 428, 433 (7th Cir. 2011); *Helcher v. Dearborn County*, 595 F.3d 710, 716-17 (7th Cir. 2010).

A party's representation that it is willing to dismiss revivable claims with prejudice can be made at oral argument, *see Doermer v. Oxford Financial Group, Ltd.*, 884 F.3d 643, 647-48 (7th Cir. 2018); *Chessie Logistics Co. v. Krinos Holdings, Inc.*, 867 F.3d 852, 856 (7th Cir. 2017); *Specht v. Google, Inc.*, 747 F.3d 929, 933 (7th Cir. 2014); *Arrow Gear Co. v. Downers Grove Sanitary District*, 629 F.3d 633, 637 (7th Cir. 2010), and even after oral argument. *National Inspection & Repairs, Inc. v. George S. May International Co.*, 600 F.3d 878, 883-84 (7th Cir. 2010). The failure to do so will result in the dismissal of the appeal. *See West v. Louisville Gas & Electric Co.*, 920 F.3d 499, 506 (7th Cir. 2019).

On the other hand, a party could ask the district court for entry of a partial judgment under Rule 54(b), permitting an appeal in a case that has a revivable claim or party. *Emergency Services Billing Corp., Inc. v. Allstate Ins. Co.*, 668 F.3d 459, 463 (7th Cir. 2012); *see also On Command Video Corp. v. Roti*, 705 F.3d 267, 270 (7th Cir. 2013).

Failure to Enter Separate Document Under Rule 58 Judgment. When Rule 58 requires a judgment or order to be set forth on a separate document, but it never is, it is treated as entered 150 days after entry of the district court's judgment or order. Fed. R. App. P. 4(a)(7)(A); Fed. R. Civ. P. 58(c)(2)(B). *See Bell v. Kay*, 847 F.3d 866, 868 (7th Cir. 2017) (per curiam); *Calumet River Fleeting, Inc. v. International Union of Operating Engineers, Local 150, AFL-CIO*, 824 F.3d 645, 650 (7th Cir. 2016).

The 150-day judgment deeming rule, however, is not a jurisdictional rule and can be waived or forfeited. *Walker v. Weatherspoon*, 900 F.3d 354, 356-57 (7th Cir. 2018). But like other mandatory claims-processing rules, the rule must be "properly invoked" if a party wants the court to enforce the time limit. *Id.* (appellees forfeited benefit of Rule 4(a)(7)(A)(ii) by belated invocation of the rule). *See also Vergara*

v. City of Chicago, 939 F.3d 882, 885 (7th Cir. 2019) (noting the rule is not jurisdictional, but it is a mandatory claim-processing rule which must be enforced if properly invoked).

Interlocutory Rulings. Interlocutory orders may be stored up and appealed at the end of a case — when the district court enters a separate document under Fed. R. Civ. P. 58. *Luevano v. Wal-Mart Stores, Inc.*, 722 F.3d 1014, 1019-20 (7th Cir. 2013). An appeal from a final judgment, therefore, does not mean that the appellant is limited to making arguments about the ultimate merits of the case. *Calma v. Holder*, 663 F.3d 868, 873 (7th Cir. 2011).

After a final judgment has been entered, a party has a right to appeal any earlier interlocutory order entered during the proceedings in the district court that adversely affects the party (provided that it has not been mooted by subsequent proceedings) as well as the final decision itself. *In re Trans Union Corp. Privacy Litigation*, 741 F.3d 811, 817 (7th Cir. 2014); *Habitat Education Center v. United States Forest Service*, 607 F.3d 453, 456 (7th Cir. 2010); *American National Bank & Trust Company of Chicago v. Equitable Life Assurance Society of the United States*, 406 F.3d 867, 876-77 (7th Cir. 2005); s*ee also Glass v. Dachel*, 2 F.3d 733, 738 (7th Cir. 1993) (reference in the notice of appeal to the final order presents the whole case to us on appeal); *Hendrich v. Pegram*, 154 F.3d 362, 368 (7th Cir. 1998); *Matter of Grabill Corp.*, 983 F.2d 773, 775 (7th Cir. 1993); *House v. Belford*, 956 F.2d 711, 716 (7th Cir. 1992). *Cf. Ackerman v. Northwestern Mutual Life Ins. Co.*, 172 F.3d 467, 468-69 (7th Cir. 1999) (notice of appeal cannot bring up for review an order entered after the notice's filing).

Relatedly, litigants should be mindful that a district court may reconsider interlocutory orders at any time before final judgment. *Terry v. Spencer*, 888 F.3d 890, 893 (7th Cir. 2018); *Mintz v. Caterpillar Inc.*, 788 F.3d 673, 679 (7th Cir. 2015).

Orders Remanding a Removed Case Back to State Court. Not all final judgments are reviewable. This court has consistently reminded litigants that an order remanding a case to state court based on a lack of subject matter jurisdiction or a defect in the removal procedure is *not* reviewable on appeal, whether or not the decision is correct. *See, e.g., Jackson County Bank v. DuSablon*, 915 F.3d 422, 424 (7th Cir. 2019); *The Northern League, Inc. v. Gidney*, 558 F.3d 614 (7th Cir. 2009) (per curiam); *In the Matter of Mutual Fund Market-Timing Litigation,* 495 F.3d 366 (7th Cir. 2007); *Rubel v. Pfizer, Inc.* 361 F.3d 1016 (7th Cir. 2004); *Phoenix Container, L.P. v. Sokoloff*, 235 F.3d 352, 354-55 (7th Cir. 2000). The court cannot look past the ultimate ground

for sending the case back to state court (*e.g.*, lack of subject matter jurisdiction) to the reasoning behind it; again, this is because appellate courts review judgments, not opinions. *Rubel v. Pfizer, Inc.*, 361 F.3d at 1019-20.

A remand order based on lack of subject matter jurisdiction may be made at any time, *The Northern League, Inc. v. Gidney*, *supra*, including lack of Article III standing. *Collier v. SP Plus Corp.*, 889 F.3d 894, 896-97 (7th Cir. 2018). But one based on a defect in the removal procedures must be initiated by a motion filed within 30 days of the removal, *In the Matter of Mutual Fund Market-Timing Litigation,* 495 F.3d at 368, otherwise, the matter is reviewable on appeal. *Pettitt v. The Boeing Co.,* 606 F.3d 340, 342-43 (7th Cir. 2010).

Although 28 U.S.C. § 1447(d) generally precludes appellate review of a district court's remand order, it permits appellate review of cases removed under § 1442 (the federal officer removal statute) and § 1443 (certain civil rights cases). An exception also exists for class actions or mass action as defined in the Class Action Fairness Act. 28 U.S.C. § 1453(c); *see generally LG Display Co., Ltd. v. Madigan*, 665 F.3d 768 (7th Cir. 2011); *Anderson v. Bayer Corporation*, 610 F.3d 390 (7th Cir. 2010); *In re Safeco Insurance Company of America*, 585 F.3d 326 (7th Cir. 2009).

Also, an award of attorney's fees occasioned by a wrongful removal (or denial of a motion for such an award) is an independently appealable order not subject to the prohibition against reviewing a remand order. *Micrometl Corp. v. Tranzact Technologies, Inc.*, 656 F.3d. 467, 469-70 (7th Cir. 2011); *Hart v. Wal-Mart Stores, Inc. Associates' Health and Welfare Plan*, 360 F.3d 674, 677 (7th Cir. 2004). And, that order is reviewed for an abuse of discretion. *Jackson County Bank v. DuSablon*, 915 F.3d at 424. Additionally, litigants who receive an award of fees in the district court under § 1447(c) automatically receive reimbursement for the expense of defending that award on appeal. *Id.* at 425.

<u>*Motions to Intervene*</u>. The denial of a motion to intervene essentially ends the litigation for the movant. Such orders are immediately appealable under 28 U.S.C. § 1291 even if the rest of the case remains pending and unfinished in the district court, and such an appeal has no bearing on whether the notice was timely vis-a-vis the judgment. *CE Design, Ltd. v. Cy's Crab House North, Inc.*, 731 F3d 725, 730 (7th Cir. 2013); *see also State of Illinois v. City of Chicago*, 912 F.3d 979, 984 (7th Cir. 2019). Accordingly, if the motion to intervene has not been acted on within the time to appeal the merits judgment in the case, the proposed intervenor should file a "contingent" notice of

appeal; otherwise, the reversal of the district court's intervention decision can secure no meaningful relief. *Id.*

Consolidated Cases. In appropriate circumstances the district court may consolidate two or more cases separately filed there "for all purposes". The constituent cases, however, retain their separate identities to the extent that a final decision in one is immediately appealable by the losing party, regardless of whether any of the other consolidated cases remain pending. *Hall v. Hall*, 138 S. Ct. 1118, 1131 (2018).

2. *Post-Judgment Orders.*

Post-judgment proceedings are treated for purposes of appeal as a separate, free-standing lawsuit, and an appeal cannot be taken until the district court completely disposes of that post-judgment proceeding. *JP Morgan Chase Bank, N.A. v. Asia Pulp & Paper Co., Ltd.*, 707 F.3d 853, 867-68 (7th Cir. 2013); *Solis v. Consulting Fiduciaries, Inc.*, 557 F.3d 772, 775-76 (7th Cir. 2009); *JMS Development Co. v. Bulk Petroleum Corp.*, 337 F.3d 822, 825 (7th Cir. 2003); *Trustees of Funds of IBEW Local 701 v. Pyramid Electric,* 223 F.3d 459, 463-64 (7th Cir. 2000).

What post-judgment orders constitute final decisions can be tricky. A good place to start is an inquiry into the impetus of the post-judgment proceedings — an order that addresses all the issues raised in the motion that sparked the post-judgment proceedings is treated as final for purposes of 28 U.S.C. § 1291. *Solis v. Consulting Fiduciaries, Inc.*, 577 F.3d at 775-76; *see also Autotech Technologies LP v. Integral Research & Development Corp.*, 499 F.3d 737, 745 (7th Cir. 2007).

3. *Costs, Attorney Fees and Sanctions.*

Costs. Costs are normally awarded (or not) after entry of judgment on the merits and is a matter separate from the merits judgment. *See Peck v. IMC Credit Services*, 960 F.3d 972, 974 (7th Cir. 2020) (per curiam) (final decision on costs is appealable separately from the merits). A notice of appeal that predates the district court's order regarding costs is not effective as to that order. *Halsa v. ITT Educational Services, Inc.*, 690 F.3d 844, 849 (7th Cir. 2012).

Attorney Fees. When a district court has entered a final judgment on the merits of a case, the entry of a subsequent order granting or denying an award of attorney fees for the case at hand — whether based on a statute, a contract, or both — is a separate proceeding having no effect on the finality of the merits judgment, and a separate

notice of appeal is required, *Ray Haluch Gravel Co. v. Central Pension Fund of the International Union of Operating Engineers*, 134 S. Ct. 773 (2014); *see also Budinich v. Becton Dickinson & Co.*, 486 U.S. 196 (1988); *Midlock v. Apple Vacations West. Inc.,* 406 F.3d 453, 456 (7th Cir. 2005); *Dunn v. Truck World, Inc.*, 929 F.2d 311 (7th Cir. 1991), 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); *Robinson v. City of Harvey*, 489 F.3d 864, 868-69 (7th Cir. 2007).

An order determining that a party is entitled to fees but leaving the amount of the award undetermined may be not be appealed. *Cooke v. Jackson National Life Ins. Co.*, 882 F.3d 630, 632 (7th Cir. 2018); *McCarter v. Retirement Plan for Dist. Managers of American Family Ins. Group*, 540 F.3d 649 (7th Cir. 2008); *see also Midlock v. Apple Vacations West, Inc*, 406 F.3d 453, 456 (7th Cir. 2005). *But see Birchmeier v. Caribbean Cruise Line, Inc.*, 896 F.3d 792, 795-96 (7th Cir. 2018) (an award that leaves "some math but nothing for the district court to decide" is appealable).

An award of attorney fees, no matter the source, is not a type of judgment for which a separate judgment document under Rule 58 is required. *Feldman v. Olin Corp.*, 673 F.3d 515 (7th Cir. 2012). And, if the order awarding fees is directed against an attorney, the attorney must appeal in his or her own name. *Feldman v. Olin Corp.*, 692 F.3d 748, 759 (7th Cir. 2012).

Most attorney fee awards are rendered post-judgment though some are not. Interim fee awards generally are interlocutory and not appealable until the conclusion of the underlying suit on the merits. *Birchmeier v. Caribbean Cruise Line, Inc.*, 896 F.3d 792, 796 (7th Cir. 2018) (prejudgment awards can be challenged by timely appealing the judgment); *Estate of Drayton v. Nelson*, 53 F.3d 165, 166-67 (7th Cir. 1994). An interim award, however, may be appealed under the collateral order doctrine when the payor may have difficulty getting the money back. *Dupuy v. Samuels*, 423 F.3d 714, 717-18 (7th Cir. 2005); *People Who Care v. Rockford Bd. of Educ. Dist. No. 205*, 921 F.2d 132 (7th Cir. 1991); *Palmer v. City of Chicago*, 806 F.2d 1316, 1318-20 (7th Cir. 1986).

A notice of appeal from an order awarding or denying fees does not bring up the judgment on the merits for appellate review. *Exchange Nat'l Bank v. Daniels*, 763 F.2d 286, 289-94 (7th Cir. 1985).

<u>*Sanctions*</u>. Like an attorney fee award, a party (or attorney) must wait to appeal a sanctions order until the district court has entered

judgment on the merits of the underlying case. *See Cunningham v. Hamilton County,* 119 S. Ct. 1915 (1999); *see also Cleveland Hair Clinic, Inc. v. Puig,* 104 F.3d 123, 126 (7th Cir. 1997); *Mulay Plastics, Inc., v. Grand Trunk Western R.R. Co.*, 742 F.2d 369 (7th Cir. 1984).

And, even though subject matter jurisdiction may be lacking, the court still has the authority to review an order regarding sanctions. *American National Bank & Trust Company of Chicago v. Equitable Life Assurance Society of the United States*, 406 F.3d 867, 874 (7th Cir. 2005).

Importantly, if the district court orders the party's attorney (and not the party) to pay the sanctions, the attorney must file a notice of appeal in his or her own name. *Halim v. Great Gatsby's Auction Gallery, Inc.*, 516 F.3d 557, 564 (7th Cir. 2008); *Reed v. Great Lakes Companies, Inc.*, 330 F.3d 931, 933 (7th Cir. 2003); *see also Feldman v. Olin Corporation*, 673 F.3d 515, 516 (7th Cir. 2012).

Further, the sanctions order need not be monetary to be appealed. A district court order that imposed a formal, nonmonetary sanction on a lawyer, in contrast to a critical comment unjoined to a sanctions order, is appealable. *Martinez v. City of Chicago*, 823 F.3d 1050, 1053-55 (7th Cir. 2016).

4. *Bankruptcy Appeals.*

Bankruptcy cases present unique issues concerning finality. A considerably more flexible approach to finality applies in a bankruptcy appeal taken under 28 U.S.C. § 158(d) — the source of the court of appeals' jurisdiction — than in an ordinary civil appeal under 28 U.S.C. § 1291. *In re Gould*, 977 F.2d 1038, 1040-41 (7th Cir. 1992); *In re James Wilson Assoc.*, 965 F.2d 160, 166 (7th Cir. 1992); *see also In re McKinney*, 610 F.3d 399 (7th Cir. 2010) (court discusses test to determine finality of bankruptcy court orders); *In re Smith*, 582 F.3d 767, 776-77 (7th Cir. 2009); *In re Comdisco, Inc.*, 538 F.3d 647 (7th Cir. 2008).

Generally, an order finally resolving a separable controversy (for example, between one creditor and the debtor) is appealable even though the bankruptcy proceeding is not over. *See In re Rimstat, Ltd.,* 212 F.3d 1039, 1044 (7th Cir. 2000); *In re Official Committee of Unsecured Creditors of White Farm Equipment Co.*, 943 F.2d 752 (7th Cir. 1991). To put it another way, a bankruptcy court's ruling is final if it resolves a discrete dispute that would have been a stand-alone

dispute were it not for the bankruptcy proceedings. *Bank of America, N.A. v. Moblia*, 330 F.3d 942, 944 (7th Cir. 2003).

The Supreme Court recently examined why the ordinary understanding of "final decision" is not attuned to the distinctive character of bankruptcy litigation. *See Ritzen Group, Inc. v. Jackson Masonry, LLC*, 140 S. Ct. 582 (2020). The case is illustrative of the need to correctly delineate the dimensions of a bankruptcy proceeding. "An erroneous identification of an interlocutory order as a final decision may yield an appeal over which the appellate forum lacks jurisdiction. Conversely, an erroneous identification of a final order as interlocutory may cause a party to miss the appellate deadline." *Id.* at 587.

Similarly, a district court's decision (on appellate review) is final if it too resolves a discrete dispute within the bankruptcy case. If, however, the district court only resolves a discrete "issue" embedded within the dispute, and remands to the bankruptcy court, the court of appeals does not have jurisdiction. *Hazelton v. Board of Regents for the Univ. of Wis. System*, 952 F.3d 914 (7th Cir. 2020).

One way of assessing whether this standard is met is to identify whether the order at issue brought to an end a single "proceeding" that exists within the larger bankruptcy case. *Germeraad v. Powers*, 826 F.3d 962, 965 (7th Cir. 2016). *See also Bullard v. Blue Hills Bank*, 135 S. Ct. 1686, 1692 (2015) (discussing the importance of defining the relevant "proceeding" in determining whether a bankruptcy order is final). *Cf. In re Ferguson*, 834 F.3d 795, 799-800 (7th Cir. 2016) (discussing notion of finality by contrasting "disputes" with "issues").

A number of Seventh Circuit decisions stated that the decisions of both the district and bankruptcy courts must be final in order to obtain review in the court of appeals. *In re Ferguson*, 834 F.3d 795, 798-799 (7th Cir. 2016); *In re Salem*, 465 F.3d 767, 771 (7th Cir. 2006); *In re Devlieg, Inc.*, 56 F.3d 32, 33 (7th Cir. 1995) (per curiam); *In re Klein*, 940 F.2d 1075, 1077 (7th Cir. 1991); *In re Behrens*, 900 F.2d 97, 99 (7th Cir. 1990). But a district court's decision on a bankruptcy court's interlocutory order may leave nothing for the bankruptcy court to do, and thus transform the bankruptcy court's interlocutory order into a final, appealable order. *Smith v. Capital One Bank (USA), N.A.*, 845 F.3d 256 (7th Cir. 2016).

The court recently and explicitly disapproved the language that "both decisions must be final," noting that this language matters only when one court has rendered a final decision and the other has not, *In re*

Anderson, 917 F.3d 566, 571 (7th Cir. 2019), and provided a table to help visualize the four possibilities:

	Bankruptcy court decision final	Bankruptcy court decision interlocutory
District court decision final	Appealable (e.g., *Rimsat*)	Appealable (e.g., *Anderson*)
District court decision interlocutory	Not appealable (e.g., *Rockfort Products*)	Not appealable (e.g., *Schaumburg Bank*)

A district court order remanding a case to the bankruptcy court is not final if further significant proceedings are contemplated. *In re Stoecker*, 5 F.3d 1022, 1027 (7th Cir. 1993); *In re Lytton's*, 832 F.2d 395, 400 (7th Cir. 1987); *In re Fox*, 762 F.2d 54, 55 (7th Cir. 1985); *see also In re Excello Press, Inc.*, 967 F.2d 1109, 1111 (7th Cir. 1992). But a remand order that requires nothing of the bankruptcy judge, *Liebowitz v. Great American Group, Inc.*, 559 F.3d 644, 647-48 (7th Cir. 2009), or the performance of a ministerial task, *In re Holland*, 539 F.3d 563, 565 (7th Cir. 2008), is final. Whether what needs to be done is "ministerial" means, as a practical matter, a ruling unlikely to give rise to a controversy that would trigger a further appeal. *In re Rockford Products Corp.*, 741 F.3d 730, 733 (7th Cir. 2013); *In re XMH Corp.*, 647 F.3d 690, 693-94 (7th Cir. 2011); *cf. In re A.G. Financial Service Center, Inc.*, 395 F.3d 410, 412-13 (7th Cir. 2005).

Interlocutory orders of district courts sitting as appellate courts in bankruptcy are appealable if they meet the standards of 28 U.S.C. § 1292. *Connecticut National Bank v. Germain*, 503 U.S. 249 (1992). The case law should be carefully reviewed to determine appealability.

The court of appeals generally does not have jurisdiction to consider direct appeals from the bankruptcy court. *In re Andy Frain Services, Inc.*, 798 F.2d 1113, 1124 (7th Cir. 1986). A direct appeal from the bankruptcy court to the court of appeals is permitted, however, if both courts agree pursuant to 28 U.S.C. § 158(d)(2)(A). *See, e.g.*, *In re Wright*, 492 F.3d 829, 832 (7th Cir. 2007).

An interlocutory appeal from a bankruptcy judge's decision to the court of appeals requires three steps: first, a certification by the bankruptcy judge, district judge, or the parties acting jointly; second, a petition to the court of appeals under Fed. R. App. P. 5; and finally, a discretionary decision by the court of appeals. *See Peterson v. Somers Dublin Ltd.*, 729 F.3d 741, 745 (7th Cir. 2013).

Importantly, the court of appeals is not permitted to consider a direct appeal unless a petition for permission to appeal is filed with the circuit clerk within 30 days after the bankruptcy court's certification under Bankruptcy Rule 8006(g). The rule's time limitation is a mandatory claim-processing rule, which must be enforced if properly invoked. *In re Wade*, 926 F.3d 447 (7th Cir. 2019) (neither bankruptcy court's certification order nor notice of appeal treated as a functional equivalent of a petition for permission to appeal). Failure to comply with the rule requires the parties to pursue an appeal through the ordinary process, which starts with the district court. *Cf. In re Sobczak-Slomczewski*, 826 F.3d 429 (7th Cir. 2016) (per curiam) (14-day deadline specified in bankruptcy rule for filing notice of appeal from bankruptcy court to district court is jurisdictional because it is rooted in a statute, 28 U.S.C. § 158).

5. *Administrative Agencies.*

Some federal administrative agency decisions are reviewable in the district court and others are reviewable directly in the court of appeals. The authority of courts of appeals to review the administrative order is statutory. *Alabama Tissue Center of the Univ. of Alabama Health Serv. Foundation, P.C. v. Sullivan*, 975 F.2d 373, 376 (7th Cir. 1992); *see*, *e.g.*, 28 U.S.C. § 2342. The statutes and regulations governing the various federal agencies must be consulted to determine if the administrative order is one that can be directly appealed to the court of appeals.

In determining the finality of an administrative order, the relevant considerations include whether the administrative decision-making has reached a stage where judicial review will not disrupt the orderly process of adjudication and whether rights or obligations have been determined or legal consequences will flow from the agency action. *Environmental Law and Policy Center v. U.S. Nuclear Regulatory Commission*, 470 F.3d 676, 681 (7th Cir. 2006).

A non-final administrative agency decision may be reviewable if the order meets the criteria of the collateral order doctrine. *Vulcan Construction Materials, L.P. v. Federal Mine Safety and Health Review Commission*, 700 F.3d 297, 300 (7th Cir. 2012).

A district court order remanding a case to an agency for further consideration generally is not appealable unless the task on remand will be ministerial or (equivalently) involve just mechanical computations, *Crowder v. Sullivan*, 897 F.2d 252 (7th Cir. 1990) (per

curiam), or otherwise may escape appellate review. *Edgewater Foundation v. Thompson,* 350 F.3d 694, 696 (7th Cir. 2003).

If a district court order will not be effectively reviewable by a petition to review the agency's final decision, it is appealable immediately. *Daviess County Hospital v. Bowen*, 811 F.2d 338, 341-42 (7th Cir. 1987); *see also Rush University Medical Center v. Leavitt*, 535 F.3d 735, 738 (7th Cir. 2008). Similarly, an agency appeals panel order remanding the case to an administrative law judge for further proceedings generally is not immediately reviewable under the relevant judicial review statute. *CH2M Hill Central, Inc. v. Herman*, 131 F.3d 1244 (7th Cir. 1997).

6. *Interlocutory Appeals.*

Interlocutory appeals are frowned on in the federal court system. They interrupt litigation and therefore delay the resolution of a case. *Sterk v. Redbox Automated Retail, LLC*, 672 F.3d 535, 536 (7th Cir. 2012). That said, some interlocutory appeals are permitted.

Where no final judgment has been entered, an appeal may be taken only if the order sought to be appealed falls within one of the statutory or judicial exceptions to the final judgment rule. Counsel must be mindful that if the deadline for the time to appeal is missed, review must then wait until another appealable order (normally, the final judgment) is entered. *Rubin v. The Islamic Republic of Iran*, 637 F.3d 783, 790-91 (7th Cir. 2011).

Even when there is a right of interlocutory appeal, a party can wait till the case is over and then appeal, bringing before the court all non-moot interlocutory rulings adverse to the party. *Pearson v. Ramos*, 237 F.3d 881, 883 (7th Cir. 2001). Litigants bypass opportunities for interlocutory review all the time, and their failure to take an immediate appeal does not forfeit any opportunity to later appeal. *In re UAL Corporation (Pilots' Pension Plan Termination)*, 468 F.3d 444, 453 (7th Cir. 2006).

Rule 54(b). Rule 54(b) of the Federal Rules of Civil Procedure allows (but does not require) a district judge to certify for immediate appeal an order that disposes of one or more but fewer than all of the claims or parties in a multiple claim or multiple party case.

The rule requires that the district judge expressly direct the entry of judgment and make an express determination that there is no just reason to delay the entry of judgment.

The express findings required by the rule are indispensable to appealability. *Willhelm v. Eastern Airlines, Inc.*, 927 F.2d 971, 973 (7th Cir. 1991); *Foremost Sales Promotions, Inc. v. Director, Bureau of Alcohol, Tobacco & Firearms*, 812 F.2d 1044, 1046 (7th Cir. 1987); *Glidden v. Chromalloy American Corp.*, 808 F.2d 621, 623 (7th Cir. 1986); *see also Granack v. Continental Casualty Co.*, 977 F.2d 1143, 1145 (7th Cir. 1992) ("[A]n express determination cannot be made implicitly."). Although the precise language stated in the rule is not required, *Alexander v. Chicago Park District*, 773 F.2d 850, 855 (7th Cir. 1985), an appeal will be dismissed if the district court fails to indicate that there is no just reason for delay. *Johnson v. Levy Organization Dev. Co., Inc.*, 789 F.2d 601, 607 (7th Cir. 1986). There is no requirement that the findings required by the rule be entered on a separate document. *Real Estate Data, Inc. v. Sidwell Co.*, 809 F.2d 366, 370 n.4 (7th Cir. 1987).

There are limits on the district court's discretion to grant a partial judgment under Rule 54(b). The rule requires a final disposition as to either a separate claim for relief, or a dispute between separate parties. *Buckley v. Fitzsimmons*, 919 F.2d 1230, 1237 (7th Cir. 1990), *vacated on other grounds*, 502 U.S. 801 (1991). An order will be appealable under the rule only if the claims designated in the order lack a substantial factual overlap with those remaining in the district court, so there will be no need for multiple appellate consideration of the same issue. *Horn v. Transcon Lines, Inc.*, 898 F.2d 589, 592 (7th Cir. 1990); *Indiana Harbor Belt R.R. v. American Cyanamid Co.*, 860 F.2d 1441 (7th Cir. 1988).

Relatedly, the court strongly prefers the district court to explain its decision to enter a partial judgment under Rule 54(b). *Doe v. Vigo County*, 905 F.3d 1038, 1042 (7th Cir. 2018).

The rule is not intended to provide an option to the district court to certify *issues* for interlocutory review. *Lottie v. West American Insurance Co.,* 408 F.3d 935, 939 (7th Cir. 2005); *see also Kerr-McGee Chemical Corp. v. Lefton Iron & Metal Co.*, 570 F.3d 856, 857 (7th Cir. 2009) (Rule 54(b) does not permit a district court to send issues of liability to court of appeals while the amount of damages remains unresolved).

The court has stated the test for separate claims under Rule 54(b) in these terms: "whether the claim that is contended to be separate so overlaps the claim or claims that have been retained for trial that if the latter were to give rise to a separate appeal at the end of the case the court would have to go over the same ground that it had covered in

the first appeal." *Lawyers Title Insurance Corp. v. Dearborn Title Corp.*, 118 F.3d 1157, 1162 (7th Cir. 1997). *See also NAACP v. American Family Mutual Insurance Co.*, 978 F.2d 287, 292 (7th Cir. 1992); *Olympia Hotels Corp. v. Johnson Wax Development Corp.*, 908 F.2d 1363, 1367-68 (7th Cir. 1990).

The court in *Lawyers Title* went on to note that the district court also has the power to enter an appealable judgment under Rule 54(b) as "to separate parties whether or not their claims are separate." *Lawyers Title Insurance Corp. v. Dearborn Title Corp.*, 118 F.3d at 1162; *see also Newman v. State of Indiana*, 129 F.3d 937, 940 (7th Cir. 1997). For example, Rule 54(b) can be used to separate a defendant who filed for bankruptcy during the course of the litigation — the claims against whom remained unresolved — from all other like-positioned defendants who successfully were granted summary judgment, insuring appellate jurisdiction. *Tradesman Intern'l, Inc. v. Black*, 724 F.3d 1004, 1006-07 (7th Cir. 2013).

If a judgment has been properly entered under Rule 54(b), it is a final judgment and must be appealed, if at all, within the usual time for appeals in civil cases; the judgment will not be reviewable during a subsequent appeal from a judgment disposing of the remainder of the case. *Construction Industry Retirement Fund v. Kasper Trucking, Inc.*, 10 F.3d 465, 467-68 (7th Cir. 1993); *Glidden v. Chromalloyn American Corp.*, 808 F.2d 621, 623 (7th Cir. 1986).

Recently, the court called into question whether tardy requests for entry of a partial judgment under Rule 54(b) are permissible. In *King v. Newbold*, 845 F.3d 866, 868 (7th Cir. 2017), the court noted that a timeliness requirement was added to the rule long ago "as a hedge against dilatory Rule 54(b) motions," citing *Schaefer v. First National Bank of Lincolnwood*, 465 F.2d 234, 236 (7th Cir. 1972). As a general rule, the court went on, it is an abuse of discretion for a district judge to grant a partial judgment under Rule 54(b) if the motion is filed more than 30 days after the order to which it relates, excepting cases where "hardship" is shown. *Id. Cf. Brown v. Columbia Sussex Corp.,* 664 F.3d 182,186-90 (7th Cir. 2011); *LacCourte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin*, 760 F.2d 177, 180-81 (7th Cir. 1985); *Sutter v. Groen*, 687 F.2d 197, 199 (7th Cir. 1982); *Local P-171, Amalgamated Meat Cutters & Butcher Workmen v. Thompson Farms Co.*, 642 F.2d 1065, 1073-75 (7th Cir. 1981).

Once an appeal is taken, the court of appeals on its own initiative considers whether the criteria of Rule 54(b) are met and whether it has jurisdiction. *Marseilles Hydro Power, LLC v. Marseilles Land and*

Water Co., 518 F.3d 459, 464 (7th Cir. 2008); *Jack Walter & Sons Corp. v. Morton Bldg., Inc.*, 737 F.2d 698 (7th Cir. 1984); *A/S Apothekernes Laboratorium for Specialpraeparater v. IMC Chemical Group, Inc.*, 725 F.2d 1140 (7th Cir. 1984). As the court recently put it, "[i]t is not enough to resolve something that is designated as a separate claim, if other aspects of the case involve the same underlying subject matter. The claim resolved must dispose of a distinct issue; only then will there be 'no just reason for delay' in the appellate process." *Domanus v. Locke Lord LLP*, 847 F.3d 469, 477 (7th Cir. 2017).

The goal of the court's analysis is to prevent "piece-meal appeals" involving the same facts. *Peerless Network, Inc. v. MCI Communications Services, Inc.*, 917 F.3d 538, 543 (7th Cir. 2019). An appeal from an inappropriately entered partial judgment under Rule 54(b) will not be reviewed, and the appeal will be dismissed for lack of jurisdiction. *See, e.g., General Insurance Co. of America v. Clark Mall Corp.*, 644 F.3d 375 (7th Cir. 2011); *Cadleway Properties, Inc. v. Ossian State Bank*, 478 F.3d 767 (7th Cir. 2007).

The court conducts a two-step analysis of a Rule 54(b) partial final judgment — first, making sure that the order was truly a final judgment and second, determining that there are no just reasons to delay an appeal of the matter. *Peerless Network, Inc. v. MCI Communications Services, Inc.*, 917 F.3d at 543. A district court's determination that the claim appealed is truly "final" receives *de novo* review, while its determination that there is no just reason to delay the appeal is reviewed under an abuse of discretion standard. *General Ins. Company of America v. Clark Mall Corp.*, 644 F.3d 375, 379 (7th Cir. 2011).

Section 1292(a)(1). Under 28 U.S.C. § 1292(a)(1), the court of appeals has jurisdiction to review interlocutory orders "granting, continuing, modifying, refusing or dissolving injunctions." Under this provision, interlocutory orders granting or denying a request for a preliminary injunction and interlocutory orders granting a permanent injunction are automatically appealable; an interlocutory order denying (or having the effect of denying) a request for a permanent injunction may be appealable. *See Carson v. American Brands, Inc.*, 450 U.S. 79, 83-84 (1981); *Switzerland Cheese Ass'n, Inc. v. E. Horne's Market, Inc.*, 385 U.S. 23, 25 (1966); *In re City of Springfield*, 818 F.2d 565 (7th Cir. 1987); *Elliott v. Hinds*, 786 F.2d 298, 300 (7th Cir. 1986); *Samayoa v. Chicago Board of Education*, 783 F.2d 102, 104 (7th Cir. 1986); *Parks v. Pavkovic*, 753 F.2d 1397, 1402-03 (7th Cir. 1985); *Donovan v. Robbins*, 752 F.2d 1170, 1172-74 (7th Cir. 1985); *Winterland Concessions Co. v. Trela*, 735 F.2d 257, 260-61 (7th Cir. 1984).

(a) *Grants*. Rule 65(d)(1) of the Federal Rules of Civil Procedure requires that every injunction must "state the reasons why it issued," "state its terms specifically," and "describe in reasonable detail — and not by referring to the complaint or other document — the act or acts restrained or required." "This requirement of specificity spares court and litigants from struggling over an injunction's scope and meaning by informing those who are enjoined of the specific conduct regulated by the injunction and subject to contempt." *Patriot Home Inc. v. River Forest Hous., Inc.*, 512 F.3d 412, 415 (7th Cir. 2008) (quotation marks omitted).

Failure to comply with the requirements of Rule 65(d) in granting an injunction does not necessarily scuttle appellate jurisdiction. *Schmidt v. Lessard*, 414 U.S. 473 (1974); *Dupuy v. Samuels,* 465 F.3d 757, 759 (7th Cir. 2006); *Metzl v. Leininger*, 57 F.3d 618, 619 (7th Cir. 1995); *Burgess v. Ryan*, 996 F.2d 180, 184 (7th Cir. 1993); *see also Chathas v. Local 134 IBEW*, 233 F.3d 508, 512-13 (7th Cir. 2000).

Nevertheless, inadequate specificity in an injunction may compel the dismissal of the appeal. *Reich v. ABC/York-Estes Corp.*, 64 F.3d 316, 319-20 (7th Cir. 1995); *Original Great American Chocolate Chip Cookie Co., Inc. v. River Valley Cookies, Ltd.*, 970 F.2d 273, 275-76 (7th Cir. 1992) (unenforceable "injunction" creates no case or controversy under Article III of the Constitution); *Chicago & North Western Transportation Co. v. Railway Labor Executives' Ass'n.*, 908 F.2d 144, 149-50 (7th Cir. 1990), *cert. denied*, 498 U.S. 1120 (1991); *Bates v. Johnson*, 901 F.2d 1424, 1427-28 (7th Cir. 1990).

On the other hand, sometimes it is clear that the district judge set out to issue an enforceable injunction but erred in the implementation because, for example, the written order does not describe the required or forbidden acts in "reasonable detail" or because the order purports to incorporate some other document. In such cases, an appeal is permissible under §1292(a)(1) and leads to a remand so that the district court can fix the problem. *See*, *e.g.*, *Dupuy v. Samuels*, 465 F.3d 757 (7th Cir. 2006).

But if the district court did not even try to enter a written injunction or the district judge's language is ambiguous, reflecting a judge's desires or expectations rather than as a coercive order, it tells us that no injunction has been entered.

See, e.g., *In re Rockford Products Corp.*, F.3d 741, 730, 733-34 (7th Cir. 2013).

Last, it should be pointed out that procedural developments may moot an appeal from a preliminary injunction. An example is when the district court makes a final decision on the merits while the interlocutory appeal is pending. *See Auto Driveaway Franchise Systems, LLC v. Auto Driveaway Richmond, LLC*, 928 F.3d 670, 674-75 (7th Cir. 2019).

In summary, "mandatory interlocutory orders are considered injunctions reviewable under § 1292(a)(1) only if they effectively grant or withhold the relief sought on the merits and affect one party's ability to obtain such relief in a way that cannot be rectified by a later appeal (that is, 'irreparably'). Stated differently, [a]n order...is properly characterized as an injunction when it substantially and obviously alters the parties' pre-existing legal relationship." *Jamie S. v. Milwaukee Public Schools*, 668 F.3d 481, 490 (7th Cir. 2012) (internal quotations marks and citations omitted).

(b) *Separate Document*. The court has repeatedly explained that "[a] judicial opinion is not itself an order to act or desist; it is a statement of reasons supporting the judgment." *Bethure Plaza, Inc. v. Lumpkin*, 863 F.2d 525, 527 (7th Cir. 1988). In a recent opinion the court opined that a separate document is required under Rule 65(d)(1)(C) because the "[l]anguage in an opinion does not comply with Rule 65(d)." *BankDirect Capital Fin., LLC v. Capital Premium Fin., Inc.*, 912 F.3d 1054, 1057 (7th Cir. 2019); *see also Auto Driveaway Franchise Systems, LLC v. Auto Driveaway Richmond, LLC*, 928 F.3d 670, 675-79 (7th Cir. 2019).

A district court's failure to enter a standalone document containing the injunction by itself, however, is not a jurisdictional flaw. *C.Y. Wholesale, Inc. v. Holcomb*, 965 F.3d 541, 545 (7th Cir. 2020). To put it another way, compliance with Rule 65 and appellate jurisdiction are two different things. *Auto Driveaway Franchise Systems, LLC v. Auto Driveaway Richmond, LLC*, 928 F.3d 670, 677 (7th Cir. 2019). What matters for purposes of jurisdiction is whether the order contains enough information to render the scope of the injunctive sufficiently clear to permit effective enforcement; however, an order that fails the specificity test is not an injunction and does not provide a basis for appellate jurisdiction.

Id.; *see MillerCoors LLC v. Anheuser-Busch Companies, LLC*, 940 F.3d 922, 923 (7th Cir. 2019) (per curiam) ("the district court's intent to afford enforceable equitable relief is sufficiently clear to provide appellate jurisdiction despite the noncompliance with Rule 65(d)").

Still, Rule 65(d)'s separate document command is not a technical nit that should be ignored. Without a separate document, the court is required to infer the scope of the injunction from the district court's opinion. The discipline of providing a separate order under Rule 65(d) averts this unnecessary step for the court and should not be overlooked. *C.Y. Wholesale, Inc. v. Holcomb*, 965 F.3d 541, 545 (7th Cir. 2020).

It is suggested, therefore, that litigants who want to appeal an order granting an injunction seek and obtain a compliant injunction order from the district court. Indeed, the court has determined that enforcing the rule is sufficiently important that the court on occasion will order a limited remand with instructions to enter the injunction on a document separate from the opinion. *Quincy Bioscience, LLC v. Ellishbrooks*, 957 F.3d 725, 728 n.17 (7th Cir. 2020); *MillerCoors LLC v. Anheuser-Busch Companies, LLC*, 940 F.3d 922 (7th Cir. 2019).

(c) *Denials*. While 28 U.S.C. § 1292(a)(1) permits an interlocutory appeal of an order refusing an injunction, importantly, at least as to denials, the court construes § 1292(a)(1) "narrowly, as a limited exception" to the final judgment rule. *Chicago Joe's Tea Room, LLC v. Village of Bridgeview*, 894 F.3d 807, 812 (7th Cir. 2018), citing *Albert v. Trans Union Corp.*, 346 F.3d 734 (7th Cir. 2003). In *Albert*, the court viewed cases interpreting § 1292(a)(1) as "represent[ing] a continuum" — at one end is an order that completely denies all injunctive relief in the case, while at the other end is an order that does not deny any injunctive relief, and in the middle is the difficult order which denies some but not all of the injunctive relief in the case. *Id.* at 739. Counsel is advised to review the *Albert* decision to determine where on the continuum his or her case lies and therefore whether appellate jurisdiction exists under § 1292(a)(1).

(d) *Time to Appeal*. Importantly, a party seeking review of an interlocutory order under § 1292(a)(1) cannot enlarge the time for filing a notice of appeal by filing a successive motion and appealing the denial of the latter motion. *Teledyne Technologies, Inc. v. Shekar*, 831 F.3d 936, 939 (7th Cir. 2016).

(e) *Postponement of Ruling*. A postponement of a ruling regarding injunctive relief is not appealable unless it is so protracted that it has the practical effect of a denial; in that event the motion is deemed constructively denied and an immediate appeal is allowed. *United States v. Board of School Commissioners*, 128 F.3d 507, 509 (7th Cir. 1997). *Cf. Simon Property Group, L.P. v. mySimon, Inc.*, 282 F.3d 986 (7th Cir. 2002) (decision to postpone injunctive relief not appealable unless decision was definitive disposition of request for relief and irreparable harm will result from delay). By contrast, discovery orders that require a party to do or not to do something are not deemed to be injunctions within the meaning of § 1292(a)(1). *Allendale Mutual Insurance Co. v. Bull Data Systems, Inc.*, 32 F.3d 1175, 1177 (7th Cir. 1994).

(f) *Review of Other Nonfinal Rulings*. In addition, other non-appealable orders may be reviewed along with the order granting or denying an injunction if they are closely related and considering them together is more economical than postponing consideration to a later appeal, or if the appealable order turns on the validity of the other non-final orders. *Resolution Trust Corp. v. Ruggiero*, 994 F.2d 1221, 1225 (7th Cir. 1993); *Artist M. v. Johnson*, 917 F.2d 980, 986 (7th Cir. 1990), *rev'd on other grounds sub nom.*, *Suter v. Artist M.*, 503 U.S. 347 (1992); *Elliott v. Hinds*, 786 F.2d 298, 301 (7th Cir. 1986); *Parks v. Pavkovic*, 753 F.2d 1397, 1402 (7th Cir. 1985). *See also* this Handbook, *infra* at 66-68.

The Supreme Court, however, has questioned the expansion of the scope of an interlocutory appeal to include other orders not independently appealable. *See Swint v. Chambers County Commission*, 314 U.S. 35, 49-50 (1995). Nevertheless, the court reiterated that it will continue to exercise jurisdiction over other rulings so long as those rulings are "inextricably bound" to the injunction, and will be reviewed as well as the injunction but only "to the extent necessary". *Tradesman International, Inc. v. Black*, 724 F.3d 1004, 1010-14 (7th Cir. 2013); *Jaime S. v. Milwaukee Public Schools*, 668 F.3d 481, 492-93 (7th Cir. 2012). *Cf. Stone v. Signode Industrial Group, LLC*, 943 F.3d 381, 384 n.2 (7th Cir. 2019) ("we have jurisdiction under 28 U.S.C. § 1292(a) to review the relevant legal reasoning of the grant of summary judgment insofar as it is necessary to review the permanent injunction even though we do not have the jurisdiction over the grant of summary judgment itself").

(g) *Interpretation or Clarification of Injunction*. An order interpreting or clarifying an injunction is not appealable. On the other hand, a "misinterpretation" would be a modification of an injunction because it would change, rather than clarify, the meaning of the original injunction. *Association of Community Organizations for Reform Now (ACORN) v. Illinois State Board of Elections*, 75 F.3d 304, 306 (7th Cir. 1996); *Motorola, Inc. v. Computer Displays International, Inc.*, 739 F.2d 1149, 1155 (7th Cir. 1984); *see also Ford v. Neese*, 119 F.3d 560, 562 (7th Cir. 1997) (an order that expands (or refuses to expand) an injunction is a modification, not interpretation, of the injunction and is appealable).

(h) *Case Management Orders*. Judges routinely direct parties to do things — provide discovery, make witnesses available for medical examinations, pay arbitrators, draw up plans for compliance with some legal obligation — without thereby entering injunctions that may be immediately appealable. Case management orders — orders "to do" issued in the course of litigation — are not injunctions that permit an appeal; an injunction, in contrast, "is an order of specific performance on the merits, a remedy for a legal wrong." *Moglia v. Pacific Employers Ins. Co.*, 547 F.3d 835, 838 (7th Cir. 2008). District courts must be given discretion to manage their cases, and therefore housekeeping orders that give rise to a delay incident to an orderly process generally are not immediately appealable. *Jangia v. Questar Capital Corp.*, 615 F.3d 735, 740 (7th Cir. 2010); *see also Wingerter v. Chester Quarry Co.*, 185 F.3d 657, 662 (7th Cir. 1999) (per curiam) (managerial orders are not immediately appealable).

(i) *Stays and Abstentions*. Similarly, a district court's stay of court proceedings is an interlocutory order and therefore normally not appealable. But there are exceptions, such as the district court's abstention under *Colorado River*, an abdication of federal jurisdiction in favor of a state court in which a parallel suit is pending. *R. C. Wegman Construction Co. v. Admiral Ins. Co.*, 687 F.3d 362, 364 (7th Cir. 2012). Along the same line, "[t]emporary deferrals of adjudication, and other housekeeping matters, are not appealable unless they effectively conclude the litigation and are irreparable on appeal from the final judgment." *Tenneco Inc. v. Saxony Bar & Tube, Inc.*, 776 F.2d 1375, 1378 (7th Cir. 1985).

(j) *Temporary Restraining Order*. A temporary restraining order (TRO) is an injunction that is limited in time. An order granting a TRO is limited to no more than 14 days, but it may be extended once for a like period. Fed. R. Civ. P. 65(b)(2). The essence of a TRO is its brevity, its ex parte character, and its informality. *Geneva Assurance Syndicate, Inc. v. Medical Emergency Services Associates (MESA) S.C.*, 964 F.2d 599, 600 (7th Cir. 1992) (per curiam).

The grant or denial of a TRO is not appealable. *Geneva Assurance Syndicate, Inc.*, 964 F.2d at 600; *Doe v. Village of Crestwood*, 917 F.2d 1476, 1477 (7th Cir. 1990); *Manbourne, Inc. v. Conrad*, 796 F.2d 884, 887 n.3 (7th Cir. 1986); *Weintraub v. Hanrahan*, 435 F.2d 461, 462-63 (7th Cir. 1970).

A TRO, however, is appealable if 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); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Salvano*, 999 F.2d 211, 213 n.2 (7th Cir. 1993).

Similarly, a TRO that remains in force longer than 28 days (the maximum period permitted under Rule 65(b)(2)) must be treated as a preliminary injunction, which allows an appeal. *See Commodity Futures Trading Commission v. Lake Shore Asset Management, Ltd.*, 496 F.3d 769, 771 (7th Cir. 2007); *Chicago United Industries, Ltd. v. City of Chicago,* 445 F.3d 940, 943 (7th Cir. 2006). The name which a judge gives the order — whether labeled a TRO or preliminary injunction — will not determine whether the ruling is appealable. *Geneva Assurance Syndicate, Inc. v. Medical Emergency Services Associates (MESA) S.C.*, 964 F.2d at 600.

Section 1292(b). An appeal under 28 U.S.C. § 1292(b) is a two-step process. First, the litigant must obtain the district court's certification in writing of "a controlling question of law." Second, the litigant must persuade the court of appeals to accept the appeal. *Hewitt v. Joyce Beverages of Wisconsin, Inc.*, 721 F.2d 625, 626 (7th Cir. 1983). If the first step is not satisfied, the court of appeals will not consider an appeal under § 1292(b).

Under 28 U.S.C. § 1292(b), a district court has discretion to certify for immediate appeal an interlocutory order not otherwise appealable if in its opinion the "order involves a controlling question of law as to which there is substantial ground for difference of opinion" and an immediate

appeal "may materially advance the ultimate termination of the litigation." *People Who Care v. Rockford Bd. of Education District No. 205*, 921 F.2d 132 (7th Cir. 1991); *see also Sterk v. Redbox Automated Retail,* LLC, 672 F.3d 535, 536 (7th Cir. 2012).

The district court may amend an order to add a § 1292(b) certification at any time although the procedure should be used sparingly. *Buckley v. Fitzsimmons*, 919 F.2d 1230, 1239 (7th Cir. 1990), *vacated on other grounds*, 502 U.S. 801 (1991).

The statute applies to all civil cases, including bankruptcy cases, *In re Jartran, Inc.*, 886 F.2d 859, 865 (7th Cir. 1989); *In re Moens*, 800 F.2d 173, 177 (7th Cir. 1986), but does not apply to criminal cases. *United States v. White*, 743 F.2d 488 (7th Cir. 1984).

Within 10 days after the entry of a § 1292(b) certification, the party seeking to appeal must petition the court of appeals for permission to bring the appeal. Fed. R. App. P. 5(a). The 10-day deadline is jurisdictional, as the time limit appears in a statute, and courts have no authority to extend it. *Groves v. United States*, 941 F.3d 315 (7th Cir. 2019) (the statute does not contemplate that the order's appealability can be revived by a new certification).

The court of appeals may, in its discretion, grant or deny the petition. *See generally Ahrenholz v. Board of* Trustees, 219 F.3d 674, 675 (7th Cir. 2000) (court summarizes standards to be applied when determining whether to allow an interlocutory appeal under section 1292(b)); Hewitt *v. Joyce Beverages of Wisconsin Inc.*, 721 F.2d 625, 626-27 (7th Cir. 1983). The district court cannot limit the issues that the court of appeals may address on appeal; the statute refers to certifying orders, not particular questions. *Edwardsville Nat'l Bank and Trust Co. v. Marion Laboratories, Inc.*, 808 F.2d 648, 650-51 (7th Cir. 1987).

Importantly, a district court may withdraw its certification before the court of appeals rules on a party's petition for interlocutory appeal, destroying the jurisdiction of the court of appeals to consider the petition under § 1292(b). *Kenosha Unified School District v. Whitaker*, 841 F.3d 730 (7th Cir. 2016) (per curiam) (court of appeals cannot grant permission to appeal without certification by the district court).

The court's initial decision to grant review under § 1292(b) notably is subject to reexamination, and the panel assigned to decide the merits of the appeal may dismiss the appeal as having been improvidently granted. *Johnson v. Burken*, 930 F.2d 1202 (7th Cir. 1991). But

generally, the merits panel will defer to the court's original decision on the petition for permission to appeal absent intervening circumstances or other defects in the motions panel's ability to make a fully informed decision. *In re Healthcare Compare Corp. Securities Litigation*, 75 F.3d 276, 279-80 (7th Cir. 1996); *see also Sokaogon Gaming Enterprise Corp. v. Tushie-Montgomery Associates, Inc.*, 86 F.3d 656, 658 (7th Cir. 1996). Occasionally, the court will decide the merits of the appeal in the same order granting permission to appeal. *See, e.g.*, *Motorola Mobility LLC v. AU Optronics Corp.*, 746 F.3d 842, 843 (7th Cir. 2014).

Arbitration Orders. Like 28 U.S.C. § 1291, the Federal Arbitration Act authorizes appellate jurisdiction over "a final decision with respect to an arbitration." 9 U.S.C. § 16(a)(3). And, just as 28 U.S.C. § 1292(a)(1) permits interlocutory appeals of orders granting injunctions, the Act contains a statutory exception to the final decision rule for "an interlocutory order granting … an injunction against an arbitration." 9 U.S.C. § 16(a)(2). *See INTL FCStone Financial Inc. v. Jacobson*, 950 F.3d 491 (7th Cir. 2020) (for a discussion on appellate jurisdiction of arbitration orders).

But "[a] pro-arbitration decision, coupled with a stay (rather than a dismissal) of the suit, is not appealable. … Indeed, 9 U.S.C. § 16(b) positively *forbids* appeal." *Moglia v. Pacific Employers Ins. Co. of North America*, 547 F.3d 835, 837 (7th Cir. 2008) (emphasis in original). The only exception to § 16(b)'s prohibition is an appeal by permission under 28 U.S.C. § 1292(b). *Id.* at 838; *see also INTL FCStone Financial Inc. v. Jacobson*, 950 F.3d at 500-01.

Rule 23(f). An order certifying a class (whether conditional or not) is not appealable as a matter of right. *Microsoft Corp. v. Baker*, 137 S. Ct. 1702, 1709 (2017). Under Rule 23(f) of the Federal Rules of Civil Procedure, the court of appeals may, in its discretion, permit an appeal from a district court order granting or denying class certification. An order that materially alters a previous order granting or denying class certification also is within the scope of Rule 23(f) even if it doesn't alter the previous order to the extent of changing a grant into a denial or a denial into a grant. *Matz v. Household International Tax Reduction Investment Plan*, 687 F.3d 824 (7th Cir. 2012).

The application for leave to appeal (not simply a notice of appeal) must be made within 14 days after entry of the order. *See Gary v. Sheahan*, 188 F.3d 891 (7th Cir. 1999). The deadline is not jurisdictional and therefore can be waived or forfeited. *See*, *e.g.*, *Beaton v. Speedy PCSoftware*, 907 F.3d 1018, 1022-23 (7th Cir. 2018). Still, the time limit is mandatory — which means that it must be enforced if the

litigant that receives its benefit so insists. *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482, 485-87 (7th Cir. 2012). And because the time limit is mandatory, it is not susceptible to equitable tolling. *Nutraceutical Corp. v. Lambert*, 139 S. Ct. 710 (2019).

In *Blair v. Equifax Check Services, Inc.*, 181 F.3d 832, 834-35 (7th Cir. 1999), the court identified several types of cases that may be appropriate for interlocutory review under Rule 23(f).

Importantly, Rule 23(f) does not forbid repeated motions seeking permission to appeal if, as is not uncommon, the district judge alters the class definition from time to time and therefore issues a new certification order each time. But to justify a second or successive appeal from an order granting or denying class certification, the order appealed from must have materially altered a previous certification order; a slight change will not do. *Driver v. AppleIllinois, LLC*, 739 F.3d 1073 (7th Cir. 2014).

7. *Petitions to Obtain Discovery for Use in a Foreign Proceeding.*

Section 1782 of Title 28, United States Code, allows a party to file a stand-alone petition in a federal court to obtain discovery for use in a proceeding in a foreign or international tribunal. *See Servotronics, Inc. v. Rolls-Royce PLC*, _____ F.3d _____ 2020 WL 5640466 (7th Cir. 2020) (meaning of statutory phrase "foreign or international tribunal" discussed; private foreign arbitration not within statute's meaning). Discovery orders do not end the litigation on the merits, and therefore they are usually not final and not immediately appealable. *See generally United States v. Davis*, 766 F.3d 722, 729 (7th Cir. 2014). But in § 1782 actions the litigation on the merits occurs in a foreign tribunal, so the only matter in a § 1782 proceeding is discovery. Discovery orders in § 1782 proceedings, therefore, are immediately appealable. *Heraeus Kulzer GmbH v. Biomet, Inc.*, 881 F.3d 550, 560 (7th Cir. 2018). Indeed, a discovery order in a § 1782 action may be appealable even if the action is ongoing, such as when the order contemplates future proceedings to manage the discovery. *Id.* at 561-62.

8. *Collateral Order Doctrine.*

The collateral order doctrine is a narrow, practical construction to the final judgment rule. *Ott v. City of Milwaukee*, 682 F.3d 552, 554 (7th Cir. 2012). It permits an immediate appeal under 28 U.S.C. § 1291 of an interlocutory decision if the decision conclusively determines an important issue, collateral to the merits of the action, which would be effectively unreviewable if immediate appeal were not available and

which threatens the appellant with irreparable harm if no appeal is permitted. *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 799 (1989); *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978); *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949); *United States v. Michelle's Lounge*, 39 F.3d 684, 692-93 (7th Cir. 1994).

In *McCarthy v. Fuller*, 714 F.3d 971, 974-75 (7th Cir. 2013), the court determined whether the collateral order doctrine permitted the immediate appeal of an interlocutory order this way: "The doctrine allows an interlocutory appeal that challenges a lower-court ruling (final in that court — rather than a tentative order that the district judge might decide to revisit in the course of the litigation) that will harm the appellant irreparably if the challenge is postponed to an appeal from the final judgment, and that can be adjudged correct or incorrect without a further evidentiary hearing."

The doctrine's application depends, among other things, on characterizing the decision under review as "final". However, when a district judge postpones resolution until it has received additional submissions from the litigants, it has not made a decision that is "final". *Mercado v. Dart*, 604 F.3d 360, 362-63 (7th Cir. 2010) (oral denial of a mid-trial Rule 50 motion is not final for purposes of application of collateral order doctrine).

An order *denying* an injunction bond, a supersedeas bond (as security for a stay of execution of judgment), or any other request for security to protect a litigant is a classic "collateral order" and may be immediately appealed. *Habitat Education Center v. United States Forest Service*, 607 F.3d 453, 455 (7th Cir. 2010).

Another common order that is appealed under the collateral order doctrine is one that finally denies a public official's assertion of a "right not to be tried" — an immunity from suit. *Mitchell v. Forsyth,* 472 U.S. 511 (1985); *Jones v. Clark*, 630 F.3d 677 (7th Cir. 2011); *Mercado v. Dart*, 604 F.3d 360 (7th Cir. 2010); *see also Hanson v. LeVau*, 967 F.3d 584 (7th Cir. 2020) (discussion addressing qualified immunity at the 12(b)(6) stage); *Campbell v. Kallas*, 936 F.3d 536 (7th Cir. 2019) (a pending request for an injunction, which will proceed to trial, does not defeat jurisdiction of interlocutory appeals based on qualified immunity). But the appeal will be dismissed if the argument for qualified immunity is dependent on disputed facts. *See, e.g.*, *Jones v. Clark*, 630 F.3d 677, 680 (7th Cir. 2011); *compare Gutierrez v. Kermon*, 722 F.3d 1003 (7th Cir. 2013) (case presents the hazy line between appealable and non-appealable orders denying qualified immunity).

NOTE: More recently, the court repeated the Supreme Court's admonition in *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100, 107 (2009), that a determination whether to apply the doctrine is not based on an individualized jurisdictional inquiry; instead the focus is on the entire category of orders to which a claim belongs. *United States v. Sealed Defendant Juvenile Male (4)*, 855 F.3d 769, 772 (7th Cir. 2017); *Herx v. Diocese of Fort Wayne-South Bend, Inc.*, 772 F.3d 1085, 1089 (7th Cir. 2014). *Cf. United States ex rel. CIMZNHCA, LLC v. UCB, Inc.*, 970 F.3d 835, 842 (7th Cir. 2020) (categorical analysis difficult when type of order appealed is "very rare"). Counsel, therefore, should be mindful that the category of interlocutory orders appealable under the doctrine is small, and arguments to extend collateral-order review beyond the few, well-established categories usually fail. *Herx v. Diocese of Fort Wayne-South Bend, Inc.*, 772 F.3d at 1088-90. As the Supreme Court bluntly put it, "we have meant what we have said; although the court has been asked many times to expand the 'small class' of collaterally appealable orders, we have instead kept it narrow and selective in its membership." *Will v. Hallock*, 546 U.S. 345, 350 (2006).

Mere cost and inconvenience to the parties is not a reason to permit an appeal under this doctrine. *Reise v. Board of Regents of the University of Wisconsin System*, 957 F.2d 293 (7th Cir. 1992). For example, pretrial discovery orders and case management orders — though burdensome and perhaps costly — are not immediately appealable. Rather, the collateral order doctrine comes into play "only when [the order sought to be reviewed] involves 'an asserted right the legal and practical value of which would be destroyed if it were not vindicated before trial.'" *United States v. Sealed Defendant Juvenile Male (4)*, 855 F.3d at 772, quoting *United States v. McDonald*, 435 U.S. 850, 860 (1978).

If a party fails to take an immediate interlocutory appeal of an order permitted under the doctrine, it may later seek review by filing an appeal after the final judgment in the case (assuming the issue has not been mooted). *Otis v. City of Chicago*, 29 F.3d 1159, 1167 (7th Cir. 1994) (en banc); *Exchange Nat'l Bank v. Daniels*, 763 F.2d 286, 290 (7th Cir. 1985). *Cf. Behrens v. Pelletier*, 516 U.S. 299 (1996) (court rejects one-interlocutory-appeal rule pertaining to qualified immunity rulings).

9. *Practical Finality Doctrine.*

Closely related to the collateral order exception is the doctrine of practical finality. If an order fails to meet the requirements of *Cohen v. Beneficial Industrial Loan Corp.*, *supra*, the considerations behind the

finality requirement may still favor finding a district court's order appealable under 28 U.S.C. § 1291. This doctrine requires that the order be effectively unreviewable upon a resolution of the merits of the litigation. *Travis v. Sullivan*, 985 F.2d 919, 922-23 (7th Cir. 1993); *see also Richardson v. Penfold*, 900 F.2d 116, 118 (7th Cir. 1990) (a "practical reason" existed for allowing review of a nonfinal order awarding attorneys' fees to a lawyer who has withdrawn from the case; it was difficult to envisage the procedure by which the order could be reviewed at the end of the litigation); *Crowder v. Sullivan*, 897 F.2d 252 (7th Cir. 1990) (per curiam) (reason permitting appellate review of a nonfinal order remanding a case to an administrative agency was "intensely practical" due to the difficulty of envisaging a procedure by which an order sought to be reviewed could be reviewed).

10. *Concept of "Pragmatic Finality".*

The doctrine of pragmatic finality is an extremely narrow exception to the final judgment rule. Interlocutory orders involving issues fundamental to the further conduct of the case may be appealable in rare instances, depending on the inconvenience and costs of piecemeal review and the danger that delay will create an injustice. *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152-54 (1964). The doctrine is analogous to certification under 28 U.S.C. § 1292(b) and its use is very limited; in fact, it may be limited to the unique circumstances of the *Gillespie* case. *See Coopers & Lybrand v. Livesay*, 437 U.S. 463, 477 n.30 (1978); *Flynn v. Merrick*, 776 F.2d 184 (7th Cir. 1985); *Rohrer, Hibler & Replogle, Inc. v. Perkins*, 728 F.2d 860, 864 (7th Cir. 1984).

This court has questioned the doctrine's usefulness, describing it as "formless" and commenting that there are "clearer ways to address the concern that lie behind it." *Bogard v. Wright*, 159 F.3d 1060 (7th Cir. 1998).

11. *Pendent Appellate Jurisdiction.*

Unlike the principle governing appeals from final decisions, a nonfinal order that is appealable generally does not permit review of other nonfinal orders unless the rulings come within the scope of pendant appellate jurisdiction.

The doctrine permits the court of appeals to review an otherwise non-final order when it is "inextricably intertwined" with an appealable order, such as a preliminary injunction order. *Kenosha Unified School District No. 1 Board of Education v. Whitaker*, 841 F.3d 730, 732 (7th Cir. 2016) (per curiam). The application of the doctrine, therefore,

requires, as a prerequisite, an appeal that has a proper jurisdictional basis, such as 28 U.S.C. § 1292(a)(1).

It is a discretionary doctrine, *Moglia v. Pacific Employers Insurance Co.*, 547 F.3d 835, 838 (7th Cir. 2008), its scope is narrowly construed, *Qad. Inc. v. ALN Associates, Inc.*, 974 F.2d 834, 837 (7th Cir. 1992), and the threshold to establish its application is high. *Whitaker v. Kenosha Unified School District No. 1*, 858 F.3d 1034, 1043-44 (7th Cir. 2017). The decision to exercise pendent appellate jurisdiction is inherently case specific. "We can review an unappealable order only if it is so entwined with an appealable one that separate consideration would involve sheer duplication of effort by the parties and this court. Any laxer approach would allow the doctrine of pendant appellate jurisdiction to swallow up the final-judgment rule." *Patterson v. Portch*, 853 F.2d 1399, 1403 (7th Cir. 1988) (citation omitted); *see also Asset Allocation & Management Co. v. Western Employers Insurance Co.*, 892 F.2d 566, 569 (7th Cir. 1989).

But do not think that a "close link" between the two orders and "judicial economy" is sufficient justification for invoking the doctrine and disregarding the final judgment rule. Rather, the court must be satisfied, based on the specific facts of the case, that it is "practically indispensable" to address the merits of the unappealable order in order to resolve the properly taken appeal. *Whitaker v. Kenosha Unified School District No. 1*, 858 F.3d at 1043.

The Supreme Court in *Swint v. Chambers County Commission*, 514 U.S. 35, 43-51 (1995), questioned the doctrine's application in civil cases, making clear that only the most extraordinary circumstances could justify the use of whatever power the appellate courts possess under the doctrine, and further commenting that even when circumstances are exceptional the availability of pendent appellate jurisdiction is doubtful. *See also McCarter v. Retirement Plan for American Family Insurance Group*, 540 F.3d 649, 653 (7th Cir. 2008).

This court once described pendent appellate jurisdiction as a "controversial and embattled doctrine," *United States v. Board of School Comm'rs,* 128 F.3d 507, 510 (7th Cir. 1997), but continues to invoke it since *Swint* was decided. *See, e.g., Tradesman International, Inc. v. Black*, 724 F.3d 1004 (7th Cir. 2013) (decision on attorneys' fees reviewed along with denial of permanent injunction); *Northeastern Rural Electric Membership Corp. v. Wabash Valley Power Ass'n., Inc.*, 707 F.3d 883, 886 (7th Cir. 2013) (denial of remand order inextricably intertwined to grant of injunction); *Levin v. Madigan*, 692 F.3d 608, 611 (7th Cir. 2012) (district court determination that ADEA did not

preclude a § 1983 equal protective claim directly implicated by ruling denying qualified immunity); *Jamie S. v. Milwaukee Public Schools*, 668 F.3d 481, 492 (7th Cir. 2012) (review of appealable order cannot be conducted in isolation; it is "practically indispensable" that the court also review class-certification and liability orders); *Research Automation, Inc. v. Schrader-Bridgeport International, Inc.*, 626 F3d 973, 976-77 (7th Cir. 2010) (transfer order inextricably intertwined with denial of injunction); *Goldhamer v. Nagode*, 621 F.3d 581, 584 (7th Cir. 2010) (grant of partial summary judgment inextricably bound to grant of injunction); *Montano v. City of Chicago*, 375 F.3d 593, 599 (7th Cir. 2004); *Greenwell v. Aztor Indiana Gaming Corp.*, 268 F.3d 486, 491 (7th Cir. 2001). *See also McKinney v. Duplain,* 463 F.3d 679, 692 (7th Cir. 2006); *Jones v. Infocure Corp.*, 310 F.3d 529 (7th Cir. 2002); *United States v. Bloom*, 149 F.3d 649, 657 (7th Cir. 1998) (listing cases).

The court nonetheless took a circumscribed approach to the doctrine's use in a trio of opinions (issued on the same day) involving cases brought by Holocaust survivors and their heirs against a privately-owned Austrian bank, two privately owned Hungarian banks, the Hungarian national bank, and the Hungarian national railway. The court noted that the doctrine of pendent appellate jurisdiction is narrow in scope and should not be stretched to appeal normally unappealable interlocutory orders that happen to be related, even closely related, to the appealable order. At best, pendent appellate jurisdiction may be invoked only if there are "compelling reasons" for not deferring the appeal of the otherwise unappealable interlocutory order to the end of the lawsuit. In all three cases, the court did not exercise pendent appellate jurisdiction. *Abelesz v. OTP Bank*, 692 F.3d 638, 646-48 (7th Cir. 2012); *Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661, 669 (7th Cir. 2012); *Abelesz v. Erste Group Bank AG*, 695 F.3d 655, 660-61 (7th Cir. 2012). *See also Breuder v. Bd. of Trustees of Community College Dist. No. 502*, 888 F.3d 266, 271 (7th Cir. 2018) (pendent appellate jurisdiction "must be strictly limited").

12. *Contempt Orders.*

Generally, a party found in civil contempt may not appeal until after a final judgment is entered. *Resolution Trust Corp. v. Ruggiero*, 987 F.2d 420, 421 (7th Cir. 1993) (per curiam); *see also S.E.C. v. McNamee*, 481 F.3d 451, 454 (7th Cir. 2007) ("An order holding a litigant in contempt of court is not appealable while the litigation continues").

As with many rules, there is an exception to the general rule. A contempt order is appealable, even when it is interlocutory, but only if

the underlying order that is defied is appealable. *Central States, Southeast and Southwest Areas Health and Welfare Fund v. Lewis*, 745 F.3d 283, 285 (7th Cir. 2014). Otherwise, a litigant could obtain appellate review of any interlocutory order, at will, by simply defying it. *Id.*; *see also Cleveland Hair Clinic, Inc. v. Puig*, 106 F.3d 165, 167 (7th Cir. 1997). But importantly, the order must include both a declaration of contempt and the imposition of a sanction; an order that leaves undetermined the sanction (or otherwise reserves the question for a later date) is not final. *See United Airlines, Inc. v. U.S. Bank N.A.*, 406 F.3d 918, 923 (7th Cir. 2005); *see also Autotech Technologies LP v. Integral Research & Development Corp.*, 499 F.3d 737, 745-46 (7th Cir. 2007).

This exception to the general rule requires that a notice of appeal be timely filed from the appealable interlocutory order that is defied — if a party can no longer appeal the interlocutory order, the party cannot appeal the contempt order while the underlying litigation remains pending in the district court. *Teledyne Technologies, Inc. v. Shekar*, 831 F.3d 936 (7th Cir. 2016).

On the other hand, a person found in criminal contempt may immediately appeal, whether or not the underlying order was appealable. *See Powers v. Chicago Transit Authority*, 846 F.2d 1139, 1141 (7th Cir. 1988). See generally *International Union, United Mine Workers of America v. Bagwell*, 512 U.S. 821 (1994), and *F.T.C. v. Trudeau*, 579 F.3d 754, 769 (7th Cir. 2009), for the distinction between civil and criminal contempt.

F. Appeal's Effect on District Court's Jurisdiction

Filing a notice of appeal divests the district court of jurisdiction over those aspects of the case involved in the appeal. *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982); *United States v. Ali*, 619 F.3d 713, 722 (7th Cir. 2010); *Kusay v. United States*, 62 F.3d 192, 193-94 (7th Cir. 1995); *Ced's Inc. v. EPA* 745 F.2d 1092, 1095-96 (7th Cir. 1984). To put it another way, only one court at a time has jurisdiction over a subject, and therefore a district court may not amend a decision that is under review in the court of appeals. *United States v. Brown*, 732 F.3d 781, 787 (7th Cir. 2013); *United States v. McHugh*, 528 F.3d 538, 540 (7th Cir. 2008).

The general rule that a district court cannot take any further action in the case once an appeal is filed has a number of exceptions. Perhaps the most notable is that an appeal from an interlocutory decision does not prevent the district court from finishing its work and rendering a final decision. *Wisconsin Mutual Insurance Co. v. United States*, 441 F.3d 502, 504 (7th Cir. 2006). Other instances where a

district court is permitted to act in spite of a pending appeal on the merits include acting on a motion for stay pending appeal or deciding a motion to proceed on appeal *in forma pauperis*, to award costs or fees, to deny relief under Rule 60(b), or in aid of execution of a judgment that has not been stayed or superseded. *United States v. Brown*, 732 F.3d 781, 787 (7th Cir. 2013); *Blue Cross and Blue Shield Association v. American Express Co.*, 467 F.3d 641, 638 (7th Cir. 2006); *Lorenz v. Valley Forge Insurance Co.*, 23 F.3d 1259, 1260 (7th Cir. 1994); *Chicago Downs Ass'n. v. Chase*, 944 F.2d 366, 370 (7th Cir. 1991); *Trustees of the Chicago Truck Drivers, etc. v. Central Transport, Inc.*, 935 F.2d 114, 119-20 (7th Cir. 1991); *Henry v. Farmer City State Bank*, 808 F.2d 1228, 1240 (7th Cir. 1986); *Patzer v. Board of Regents of the University of Wisconsin*, 763 F.2d 851, 859 (7th Cir. 1985); Cir. R. 57; *see also United States V. Ienco*, 126 F.3d 1016 (7th Cir. 1997). For a list of examples, *see Kusay v. United States*, 62 F.3d 192, 194 (7th Cir. 1995); *see also United States v. Ramer*, 787 F.3d 837, 838 (7th Cir. 2015) (per curiam).

A district court may again act in a case returned to it after the court of appeals issues its mandate; actions taken before then are a nullity. *Kusay v. United States*, 62 F.3d 192, 194 (7th Cir. 1995).

If the appeal is interlocutory, the district court retains the power to proceed with matters not involved in the appeal or to dismiss the case as settled, thereby mooting the appeal. *Shevlin v. Schewe*, 809 F.2d 447, 450-51 (7th Cir. 1987). But when a preliminary injunction has been appealed and a new motion for preliminary injunction is filed, there is no jurisdictional bar to the district court resolving that motion; however, the district court's ruling may, as a practical matter, moot an earlier ruling on, and also the appeal of, a preliminary injunction. *Adams v. City of Chicago*, 135 F.3d 1150, 1154 (7th Cir. 1998).

Importantly, the district court does not lose jurisdiction when there is a purported appeal from a non-final, non-appealable order. *United States v. Bastanipour*, 697 F.2d 170, 173 (7th Cir. 1982), *cert. denied*, 460 U.S. 1091 (1983); *see also INTL FCStone Financial Inc. v. Jacobson*, 950 F.3d 491, 502-03 (7th Cir. 2020) (the rule in *Griggs* does not operate when there is a purported appeal from a non-appealable order).

G. Revision of Judgment During Pendency of Appeal

A party may file a motion under Rule 60(b) of the Federal Rules of Civil Procedure directly in the district court at any time during the pendency of an appeal without seeking prior leave of the appellate court, and the district court has jurisdiction to *consider* the motion. *Craig v. Ontario Corp.*, 543 F.3d 872, 875 (7th Cir. 2008); *Chicago Downs Ass'n v. Chase*, 944 F.2d 366, 370 (7th Cir. 1991); *Graefenhain v. Pabst Brewing Co.*, 870 F.2d 1198, 1211 (7th Cir. 1989). "In such circumstances we have directed district courts to review such motions promptly, and either deny them or, if the court is inclined to grant relief, to so indicate so that

we may order a speedy remand." *Brown v. United States*, 976 F.2d 1104, 1110-11 (7th Cir. 1992); *see also United States v. Bingham*, 10 F.3d 404 (7th Cir. 1993) (a party seeking relief under Fed. R. Crim. P. 35(b) during pendency of appeal must request the district court to make a preliminary ruling on whether it is inclined to grant the motion; if so inclined the matter will be remanded for that purpose); *United States v. Blankenship*, 970 F.2d 283, 285 (7th Cir. 1992) (although the district court may not grant a new trial in a criminal case while an appeal is pending, it may entertain the motion and either deny it or, if inclined to grant a new trial, so certify to the appellate court).

In general, if a Rule 60(b) motion, filed during the pendency of an appeal, lacks merit, the district court should rule promptly and deny it. *Craig v. Ontario Corp.*, 543 F.3d 872, 875 (7th Cir. 2008).

Federal Rule of Appellate Procedure 12.1 and Circuit Rule 57 set out what steps must be taken if a party, during the pendency of an appeal, files a motion under any rule that permits the modification of a final judgment. The party is directed to request the district court to make a preliminary ruling on whether it is inclined to grant the motion. If the district court is so inclined, that court or the party must provide a copy of the district court's certification of intent to the court of appeals. The matter then will be remanded for the purpose of modifying the judgment. Absent such a remand the district court lacks jurisdiction to modify its judgment. *See, e.g., Ameritech Corp. v. International Brotherhood of Electrical Workers, Local 21*, 543 F.3d 414, 418-19 (7th Cir. 2008). Circuit Rule 57 reminds litigants that any party dissatisfied with the modified judgment must file a new notice of appeal, an earlier filed appeal will not do. *Cf.* Fed. R. App. P. 12.1(b) (court of appeals retains jurisdiction unless it expressly dismisses the appeal). Put another way, to challenge an amended judgment, appellant must file a new notice of appeal. *Fogel v. Gordon & Glickson, P.C.*, 393 F.3d 727, 733 (7th Cir. 2004).

The court in *Boyko v. Anderson*, 185 F.3d 672 (7th Cir. 1999), explained that sometimes it may be necessary to order a "limited" remand to enable the district judge to conduct an evidentiary hearing to make a definitive decision whether to grant a Rule 60(b) motion. In this situation, the appeal from the original judgment remains pending while the district court conducts the hearing on the motion. A limited remand is unnecessary if the district judge merely wants to hear oral argument on the Rule 60(b) motion.

It is worth pointing out here the distinction between Rules 60(a) and 60(b). Rule 60(a) allows a court to correct records to show what was done, rather than change them to reflect what should have been done; in other words, Rule 60(a) cannot be used to rewrite the past. *Blue Cross and Blue Shield v. American Express Co.*, 467 F.3d 634, 637 (7th Cir. 2006). Leave of the appellate court is required to make a correction under Rule 60(a) once an appeal has been docketed and is pending.

See also this Handbook, "A. Remands for Revision of Judgment" at Chapter XXIX, *infra* at 204.

H. The Time for Filing an Appeal

A notice of appeal must be filed with the district court. Rule 4(d) of the Federal Rules of Appellate Procedure addresses the common mistake of filing the notice in the court of appeals rather than the district court. The rule provides it is treated as filed in the district court on the date it is received in the appellate court.

In recent years, the Supreme Court made a concerted effort to clarify the meaning of "jurisdictional." Simply put, an appellate deadline prescribed by statute will be regarded as jurisdictional. But a time limit prescribed only in a court-made rule is not jurisdictional; rather, it is mandatory claim-processing rule subject to waiver or forfeiture. And, if properly invoked, mandatory claim-processing rules must be enforced. *See*, *e.g.*, *Hamer v. Neighborhood Housing Services of Chicago*, 138 S. Ct. 13, 16-18 (2017). *Cf. Nutraceutical Corp. v. Lambert*, 139 S. Ct. 710, 714 (2019) (stating whether a claim-processing rule is mandatory turns "on whether the text of the rule leaves room for … flexibility").

More specifically, statutory time limits for an appeal found in 28 U.S.C. § 2107 are jurisdictional, but time limits found solely in the Rules of Appellate Procedure are not. *Peterson v. Somers Dublin Ltd.*, 729 F.3d 741, 746 (7th Cir. 2013); *Carter v. Hodge*, 726 F.3d 917 (7th Cir. 2013); *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 61 (1982); *Browder v. Director, Dept. of Corrections of Illinois*, 434 U.S. 257, 264 (1978). In criminal cases the time limits are not set by statute and are not jurisdictional; rather the time limits are claim-processing rules that can be waived or forfeited. *United States v. Neff*, 598 F.3d 320 (7th Cir. 2010). *But see* 18 U.S.C. § 3731 (30-day time limit for certain appeals by the United States).

A district judge cannot affect the timeliness of an appeal by backdating an order. *Chambers v. American Trans Air, Inc.*, 990 F.2d 317, 318 (7th Cir. 1993). And importantly, the court of appeals cannot extend or enlarge the time for appeal. Fed. R. App. P. 26(b). Failure to file within the time prescribed therefore will result in dismissal of the appeal or petition in civil matters and may as well in criminal cases.

1. *Criminal Cases.*

   <u>*Time Prescribed*</u>. A notice of appeal by a defendant must be filed within 14 days after the entry either of the judgment or order appealed or of a notice of appeal by the government. Fed. R. App. P. 4(b)(1)(A). An appeal by the government, where appeal is authorized by statute (*see* 18 U.S.C. §§ 3731 and 3742(b)), must be filed within 30 days of the entry of the judgment or order appealed or the filing of a notice of

appeal by any defendant. Fed. R. App. P. 4(b)(1)(B); *United States v. Lee*, 937 F.3d 797, 815-17 (7th Cir. 2019). *See also* Fed. R. App. P. 4(c)(3).

Although the time limits in most criminal cases are not jurisdictional, *United States v. Neff,* 598, F.3d 320 (7th Cir. 2010*),* the limits are mandatory, and the court of appeals will enforce them when the appellee (usually the government) requests adherence to them. *United States v. Rollins*, 607 F.3d 500, 501 (7th Cir. 2010).

There is an exception for appeals taken by the government under 18 U.S.C. § 3731. That provision involves a government appeal from a dismissal of an indictment, a new trial order, or any of the other issues listed in § 3731. Importantly, § 3731 contains a 30-day deadline for filing a notice of appeal that 18 U.S.C. § 3742(b) — government appeal of a sentence — lacks. *See United States v. Lee*, 937 F.3d 797, 814-15 (7th Cir. 2019).

Except as noted below, the time for appeal begins to run when the judgment of conviction is entered on the district court's criminal docket. Fed. R. App. P. 4(b); *see also United States v. Cantero*, 995 F.2d 1407, 1408 n.1 (7th Cir. 1993).

At times, appellate jurisdiction hangs on whether the appeal is properly labeled "criminal" (14-day appeal limit) or "civil" (60-day appeal limit). *See generally United Sates v. Lee*, 659 F.3d 619, 620 (7th Cir. 2011). To determine whether an appeal involving criminal matters is treated as civil or criminal for purposes of Rule 4's filing requirements, the court looks to the "substance and context" of the underlying proceeding. *United States v. Lilly*, 206 F.3d 756, 761 (7th Cir. 2000) (appeal from order ruling on defendant's "Petition for Clarification" in which defendant sought to have district court declare that he had satisfied restitution obligation subject to the criminal filing requirement); *see also United States v. Simon*, 952 F.3d 848, 852-53 (7th Cir. 2020) (restitution obligations are part of the original sentence subject to the criminal rule); *United States v. Apampa*, 179 F.3d 555, 556-57 (7th Cir. 1999) (per curiam) (appeal from forfeiture order that constitutes part of punishment in criminal prosecution subject to the criminal rule).

Put another way, the court applies a "pragmatic approach" in determining whether the longer appeal deadlines for civil cases apply, focusing on the real substance of the relief sought, which is consistent with decisions from other circuits. *United States v. Segal*, 938 F.3d 898, 902-03 (7th Cir. 2019) (collecting cases). Even so, a litigant's choice to

file a notice of appeal after the 14-day criminal deadline for appeals is a high-risk litigation strategy. Litigants bringing quasi-civil appeals under the umbrella of a criminal case might consider a more conservative approach to the appeal deadlines. *Id.* at 904, n.2.

Filing Notice of Appeal Too Early. An appeal ought to be filed only after the district court has decided the relevant issue. Nothing in Federal Rule of Appellate Procedure 4(b)(2) is to the contrary — it permits a notice of appeal that is filed too early to be effective only if the issue sought to be appealed has already been resolved. *See United States v. Collins*, 949 F.3d 1049, 1055 (7th Cir. 2020) (deferred restitution cases involve two appealable judgments, not one).

Notice of Appeal Mistakenly Filed in Court of Appeals. A notice of appeal in a criminal case that is mistakenly filed in the court of appeals is considered filed in the district court on the date that it is received by the court of appeals. Fed. R. App. P. 4(d).

Effect of Certain Post-Trial Motions. If a defendant timely makes any of the motions here listed, the time for appeal runs from the date on which the order disposing of the last such outstanding motion is entered on the district court's criminal docket, unless the entry of judgment is later:

(a) a motion for judgment of acquittal under Fed. R. Crim. P. 29;

(b) a motion for a new trial under Fed. R. Crim. P. 33, but if based on newly discovered evidence, only if the motion is made within 14 days of the entry of judgment; or

(c) a motion for arrest of judgment under Fed. R. Crim. P. 34.

Fed. R. App. P. 4(b)(3)(A). Further, a motion to reconsider (filed within the time to appeal) that presents a substantive challenge to the order an appellant wants reviewed makes the district court's order nonfinal and postpones the time to appeal. The time to appeal restarts on entry of the order disposing of the motion. *United States v. Rollins*, 607 F.3d 500, 501-04 (7th Cir. 2010); *cf. United States v. Ogoke*, 860 F.3d 924, 929 (7th Cir. 2017); *United States v. Redd*, 630 F.3d 649 (7th Cir. 2011). *See also United States v. Henderson*, 536 F.3d 776, 778-79 (7th Cir. 2008) (government's motion to reconsider filed within the 30-day appeal period tolled the time for it to appeal).

But recently, the court called into question the use of the common-law practice of accepting reconsideration motions in the sentencing context, noting that most cases allowing common-law reconsideration motions

address issues related to convictions. *United States v. Townsend*, 762 F.3d 641, 644 (7th Cir. 2014) (defendant's motion for reconsideration of sentence did not toll or suspend the 14-day time period for filing a notice of appeal).

Rule 4(b)(3) makes clear that a notice of appeal need not be filed before entry of judgment since it is common for the district court to dispose of post-judgment motions before sentencing. The rule also provides that a notice of appeal filed after the court announces a decision, sentence or order, but before disposition of the post-judgment tolling motions, becomes effective upon disposition of the motions.

The rule further provides that a notice of appeal is unaffected by the filing of a motion for the correction of a sentence under Fed. R. Crim. P. 35(a), and the time to appeal continues to run, even if a motion to correct sentence is filed. Fed. R. App. P. 4(b)(5).

Appeals from Interlocutory Orders. Where an appeal may be taken from an interlocutory order under the collateral order doctrine, the time for appeal begins to run when the order is entered on the district court's criminal docket.

Prison Mailbox Rule. Rule 4(c) of the Federal Rules of Appellate Procedure applies to criminal, as well as civil, appeals. *See* this Handbook, *infra* at 87-88. Importantly, a criminal defendant may take advantage of the rule whether he or she is represented by counsel or not, so long as the defendant meets the description of "an inmate confined in an institution" and is the individual that mailed the notice of appeal. *United States v. Craig*, 368 F.3d 738, 740 (7th Cir. 2004).

Extension of Time. The court of appeals cannot extend or enlarge the time for appeal. Fed. R. App. P. 26(b). The district court may, in certain circumstances, extend the time for appeal for up to 30 days. *United States v. Mosley*, 967 F.2d 242, 243 (7th Cir. 1992); *United States v. Dumont*, 936 F.2d 292, 295 (7th Cir. 1991); Fed. R. App. P. 4(b). Unlike civil appeals, a motion for extension of time in a criminal case can be filed at any time. *United States v. Dominguez*, 810 F.2d 128, 129 (7th Cir. 1987). Appellate review of the district court's ruling on a motion to extend the time to appeal is only for abuse of discretion. *United States v. Alvarez-Martinez*, 286 F.3d 470, 472 (7th Cir. 2002).

It would be a mistake, however, to rely on the district court to revive an untimely appeal. A defendant who files an untimely appeal essentially throws himself on the mercy of the district judge who must decide as a matter of discretion whether to forgive the defendant's

neglect; in close cases the court of appeals may not reverse a district judge's refusal to exercise lenity. *See United States v. Brown*, 133 F.3d 993, 997 (7th Cir. 1998). Further, some reasons for the failure to file a timely appeal will not be excused no matter the countervailing circumstances.

Rule 4(b) requires that the neglect resulting in the failure to comply with the 14-day deadline be "excusable." The court of appeals has made clear that not every instance of neglect to file on time is excusable. *See United States v. Guy*, 140 F.3d 735 (7th Cir. 1998). If contested, the court will review a district court's determination to allow an untimely appeal to proceed, and will dismiss the appeal if that review fails to disclose a reason to believe that the neglect was excusable. *United States v. Marbley*, 81 F.3d 51 (7th Cir. 1996); *see also Prizevoits v. Indiana Bell Telephone Co.*, 76 F.3d 132 (7th Cir. 1996).

Rule 4(b) permits the district court to extend the time to appeal for good cause as well as for excusable neglect, as Rule 4(a)(5) permits. Fed. R. App. P. 4(b)(4). The Advisory Committee Notes point out that the rule "does not limit extensions for good cause to instances in which the motion for extension of time is filed before the original time has expired." The rule further requires only a "finding", rather than a "showing", of excusable neglect or good cause because the district court is authorized to extend the time for appeal without a motion.

2. *Civil Cases — Appeals from the District Court.*

Time Prescribed. Rule 4(a)(1)(A) requires that the notice of appeal be filed within 30 days of the entry of the judgment or order appealed. *See Darne v. State of Wisconsin*, 137 F.3d 484, 486 n.1 (7th Cir. 1998) (entry date – not date judgment or order is signed, issued or filed – triggers the time for filing a notice of appeal); *see also SEC v. Waeyenberghe*, 284 F.3d 812, 815 (7th Cir. 2002) (per curiam).

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). *See Helm v. Resolution Trust Corp.*, 18 F.3d 446 (7th Cir. 1994) (per curiam) (court uses definitional provision of 28 U.S.C. § 451 to determine whether party is an "agency" of the United States for purposes of Rule 4(a)(1)).

If one party files a timely notice of appeal, any other party may file a notice of appeal within 14 days from the date on which the first notice of appeal was filed even though the usual time for appeal has expired.

Fed. R. App. P. 4(a)(3). But if the first party did not have a right to appeal, the second party must file its notice of appeal within the normal time limit. *Abbs v. Sullivan*, 963 F.2d 918, 925 (7th Cir. 1992); *First Nat'l Bank of Chicago v. Comptroller of the Currency*, 956 F.2d 1360, 1363-64 (7th Cir. 1992).

Notice of Appeal Mistakenly Filed in Court of Appeals. Just as in criminal cases, if an appeal in a civil case is filed mistakenly in the court of appeals, it is considered filed in the district court on the date it is received by the court of appeals. Fed. R. App. P. 4(d).

Failure to Receive Notice of Judgment or Order. Failure to receive notice of entry of judgment does not toll the time for filing an appeal. *Spika v. Village of Lombard*, 763 F.2d 282 (7th Cir. 1985). Parties that either do not receive notice of entry of judgment or receive the notice so late as to impair the opportunity to file a timely appeal, however, are not without a remedy. The district court may reopen briefly the appeal period if it finds that a party did not receive notice of entry of a judgment or order from the district court or another party within 21 days of its entry and that no party would be prejudiced. Fed. R. App. P. 4(a)(6). The rule establishes an outer limit of 180 days (counting from the entry of the judgment or order appealed), requiring the party to file a motion within that time or within 14 days of the receipt of notice of entry, whichever is earlier.

If the motion is granted, the district court may reopen the appeal period only for 14 days from its order. Fed. R. App. P. 4(a)(6). It is important to note that the district court's exercise of discretion under Rule 4(a)(6) requires that it establish as a matter of fact that the conditions prescribed by the rule have been satisfied. *In re Marchiando*, 13 F.3d 1111, 1114-15 (7th Cir. 1994).

Filing Notice of Appeal Too Early. Ordinarily, the consequence of filing a notice of appeal too early is dismissal of the appeal. Rule 4(a)(2) of the Federal Rules of Appellate Procedure, however, allows certain premature appeals to relate forward to the date of the entry of judgment. "[A] notice of appeal from a nonfinal decision . . . operate[s] as a notice of appeal from the final judgment only when a district court announces a decision that *would be* appealable if immediately followed by the entry of judgment." *FirsTier Mortgage Co. v. Investors Mortgage Insurance Co.*, 498 U.S. 269, 276 (1991) (emphasis in original). For example, a notice of appeal that is filed after a plaintiff settles a case with a defendant, but before the district court issues its order dismissing the case, springs into effect once the order issues. *Runyan v. Applied Extrusion Technologies, Inc.*, 619 F.3d 735, 739 (7th Cir.

2010). *Cf. Albiero v. City of Kankakee*, 122 F.3d 417 (7th Cir. 1997) (plaintiff may appeal immediately from order dismissing a suit but allowing plaintiff the option of reinstating the case within a certain period of time; no judgment entered following expiration of time).

However, some notices of appeal filed before a decision on the merits are so premature that they cannot be saved by Rule 4(a)(2). As the Supreme Court explained in construing Rule 4(a)(2), the Rule "was intended to protect the unskilled litigant who files a notice of appeal from a decision that he reasonably but mistakenly believes to be a final judgment, while failing to file a notice of appeal from the actual final judgment." *FirsTier Mortgage Co. v. Investors Mortgage Ins. Co.*, 498 U.S. 269, 276 (1991). *Cf. Roe v. Elyes*, 631 F.3d 843, 855 (7th Cir. 2011) (Rule 4(a)(2) saved notice of appeal filed after district court gave plaintiff a choice between a remitted award and a new trial but before choice made because the order also said failure to timely choose deemed an acceptance of the remitted award).

Patently interlocutory decisions, such as discovery rulings or sanctions orders, do not merit application of the savings provision of Rule 4(a)(2) because a belief that such a decision is a final judgment would not be reasonable, while dispositive rulings such as orders granting default judgments do. *Feldman v. Olin Corp.*, 692 F.3d 748, 758 (7th Cir. 2012). The central question as to the applicability of the rule is whether the district court announced a decision purporting to end the case. *Strasburg v. State Bar of Wisconsin*, 1 F.3d 468 (7th Cir. 1993). But appellants that choose to file an appeal from a final decision, rather than wait for entry of the Rule 58 judgment, must comply with the appropriate appeal deadline. If an appellant misses the deadline by one day, he will have to wait and appeal from the Rule 58 judgment — and could do so consistent with the "safe haven" function of that rule. *Dzikunoo v. McGaw YMCA*, 39 F.3d 166, 167 (7th Cir. 1994) (per curiam) (Rule 4(a)(2) not discussed).

<u>*When Time Begins to Run*</u>. Except as provided below, the time for appeal begins to run the day after a final judgment disposing of the entire case has been entered on the district court's civil docket pursuant to Fed. R. Civ. P. 58. *United States v. Indrelunas*, 411 U.S. 216 (1973); *In re Kilgus*, 811 F.2d 1112, 1117 (7th Cir. 1987). The date the judge signed the order is irrelevant. *Williams v. Burlington Northern, Inc.*, 832 F.2d 100, 102 (7th Cir. 1987); *Stelpflug v. Federal Land Bank*, 790 F.2d 47, 50-51 (7th Cir. 1986); *Bailey v. Sharp*, 782 F.2d 1366, 1369 (7th Cir. 1986) (Easterbrook, J., concurring); *Loy v. Clamme*, 804 F.2d 405, 407 (7th Cir. 1986).

Importantly, a trivial or clerical correction to a judgment does not restart the time for appeal. *American Federation of Grain Millers, Local 24 v. Cargill Inc.*, 15 F.3d 726, 728 (7th Cir. 1994); *Exchange Nat'l Bank v. Daniels*, 763 F.2d 286, 289 (7th Cir. 1985).

Effect of Certain Post-Judgment Motions. If any of the motions listed in Fed. R. App. P. 4(a)(4) is timely filed, the time for appeal does not begin to run until entry of the order disposing of the last such motion outstanding. *See United States EEOC v. Gurnee Inns, Inc.*, 956 F.2d 146, 149 (7th Cir. 1992) (order disposing of the motion must be explicit). If, however, the district court grants a motion under Rule 59, requiring an amended judgment, the time to appeal begins once the amended judgment is entered rather than the disposition of motion. *Employers Insurance of Wausau v. Titan International, Inc.*, 400 F.3d 486, 488-89 (7th Cir. 2005); *see also Fogel v. Gordon & Glickson, P.C.*, 393 F.3d 727, 733 (7th Cir. 2004) (to challenge an amended judgment, appellant must file a new notice of appeal).

The following motions render an otherwise final decision of a district court not final for purposes of an appeal:

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

(b) a motion to amend or make additional findings of fact under Fed. R. Civ. P. 52(b), whether or not granting the motion would alter the judgment;

(c) a motion for attorney's fees under Fed. R. Civ. P. 54 if the district court extends the time to appeal under Rule 58;

(d) a motion to alter or amend the judgment under Fed. R. Civ. P. 59;

(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 28 days after entry of judgment.

It is a mistake to say that the filing of such a motion tolls the time to appeal. Rather, it renders an otherwise final decision of a district court not final for purposes of appeal. *See Nutraceutical Corp. v. Lambert*, 139 S. Ct. 710, 717 (2019), citing *United States v. Ibarra*, 502 U.S. 1 (1991) (per curiam).

The rule provides that the existence of the motion, and not the motion's merits, is what suspends the time to appeal; no other

approach is feasible since jurisdictional time limits must be ascertained mechanically. *Shales v. General Chauffeurs, Sales Drivers and Helpers Local Union No. 330*, 557 F.3d 746, 748 (7th Cir. 2009).

Additionally, any other motion that substantively challenges the judgment and is filed within 28 days of the entry of judgment will be treated as based on Rule 59, no matter what nomenclature the movant employs. *Obriecht v. Raemisch*, 517 F.3d 489, 493-94 (7th Cir. 2008); *Borrero v. City of Chicago*, 456 F.3d 698, 699 (7th Cir. 2006); *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin*, 957 F.2d 515, 517 (7th Cir. 1992); *Lentomyynti Oy v. Medivac, Inc.*, 997 F.2d 364, 366 (7th Cir 1993); *Charles v. Daley*, 799 F.2d 343, 347 (7th Cir. 1986). An appeal from the order disposing of any such post-judgment motion brings up for appellate review all orders (except those that have become moot) that the trial court previously rendered in the litigation. *In re Grabill Corp.*, 983 F.2d 773, 775-76 (7th Cir. 1993).

Notably, the filing of a post-judgment motion for leave to file an amended complaint under Fed. R. Civ. P. 15 does not suspend the time to file an appeal. *Shields v. Ill. Dep't of Corrs.*, 746 F.3d 782, 799 (7th Cir. 2014); *see also O'Neal v. Reilly*, 961 F.3d 973 (7th Cir. 2020) (procedurally improper to file a motion to amend complaint in a terminated case).

Rule 4(a)(4) further provides that an appeal filed before the disposition of any listed motion is suspended and springs into force when the district judge acts on the motion. Fed. R. App. P. 4(a)(4)(B)(i). The original notice of appeal is sufficient to bring up for review the underlying case, as well as any orders specified in the notice. But if the party additionally wants to appeal the disposition of the post-judgment motion or any alteration or amendment to the judgment, the party must file a new appeal or amend the original notice of appeal to so indicate, but no additional filing fees are required. Fed. R. App. P. 4(a)(4)(B)(ii), (iii).

The 28-day deadline is absolute. The district court cannot extend the time for filing any of the listed motions. Fed. R. Civ. P. 6(b); *Blue v. International Brotherhood of Electrical Workers Local Union 159*, 676 F.3d 579, 582 (7th Cir. 2012); *Robinson v. City of Harvey*, 489 F.3d 864, 869-70 (7th Cir. 2007); *Prizevoits Indiana Bell Telephone Co.*, 76 F.3d 132, 133 (7th Cir. 1996); *Marane, Inc. v. McDonald's Corp.*, 755 F.2d 106, 111 (7th Cir. 1985). If such a motion is not timely filed, it will not suspend the time for appealing the original judgment, *Banks v. Chicago Board of Education*, 750 F.3d 663, 665 (7th Cir. 2014), and will not affect a notice of appeal that has been filed already. *See*, *e.g.*,

Simmons v. Ghent, 970 F.2d 392 (7th Cir. 1992); *Wort v. Vierling*, 778 F.2d 1233 (7th Cir. 1985). Counsel should further note that Rule 6(d) of the Federal Rules of Civil Procedure does not extend the deadline for filing any of the listed motions. *See Williams v. State of Illinois*, 737 F.3d 473, 475-76 (7th Cir. 2013) (per curiam).

With the advent of e-filing, prudent counsel will allow time for difficulties on the filer's end. Even one minute's delay may mean that a motion ends up filed on the 29th, rather than the 28th, day. *See Justice v. Town of Cicero*, 682 F.3d 662, 665 (7th Cir. 2012).

Further, the filing of a second or subsequent Rule 59 motion does not suspend the time to appeal. *Martinez v. City of Chicago*, 499 F.3d 721, 725 (7th Cir. 2007); *Borrero v. City of Chicago*, 456 F.3d 698, 700-01 (7th Cir. 2006). But when a court alters its judgment — enters a new judgment — the time for filing a new Rule 59 motion starts anew. *Charles v. Daley*, 799 F.2d at 348. Also remember that Fed. R. App. P. 4(a)(4) pertains to sequential *post-judgment* motions. That another motion listed under Rule 4(a)(4) "had been filed and denied before the entry of judgment does not affect the calculation of time under Rule 4(a)(4), which deals with post-judgment motions." *Adams v. Bd. of Educ. of Harvey School Dist. 152*, 968 F.3d 713, 715 (7th Cir. 2020).

If a Rule 59(e) motion is granted, in whole or in part, and results in the alteration of the judgment, the amended judgment must be set forth on a separate document. The time to appeal, therefore, begins once the amended judgment is entered (or deemed to have been entered), not on the date of the motion's disposition. *Employers Insurance of Wausau v. Titan International, Inc.*, 400 F.3d 486, 489 (7th Cir. 2005); *see also Kunz v. DeFelice*, 538 F. 3d 667, 672-74 (7th Cir. 2008); *cf. Feldman v. Olin Corporation*, 673 F.3d 515, 516-18 (7th Cir. 2012) (no separate document required for an order disposing of a motion for attorney fees).

<u>*Rule 60(b) Motion*</u>. A motion to reconsider or vacate the judgment filed after 28 days will not be treated as a timely Rule 59 motion but will be treated as having been made under Fed. R. Civ. P. 60(b) (motion for relief from judgment). *Banks v. Chicago Board of Education*, 750 F.3d 663, 665 (7th Cir. 2014); *Williams v. State of Illinois*, 737 F.3d. 473, 475-76 (7th Cir. 2013) (per curiam). *See also Browder v. Director, Dept. of Corrections*, 434 U.S. 257, 263 (1978); *id.* at 273-74 (Blackmun, J., concurring); *Blue v. International Brotherhood of Electrical Workers Local Union 159*, 676 F.3d 579, 583-84 (7th Cir. 2012); *Otto v. Variable Annuity Life Ins. Co.*, 814 F.2d 1127, 1139 (7th Cir. 1987); *Labuguen v. Carlin*, 792 F.2d 708, 709 (7th Cir. 1986). *But see O'Neal v. Reilly*, 961

F.3d 973, 974-75 (7th Cir. 2020) (there is no rule that "post-judgment motions — no matter what arguments they make — must be treated on their merits as motions under Rule 60 if they arrive outside the time to file a notice of appeal").

However, a Rule 60(b) motion (other than one filed within 28 days of judgment, Fed. R. App. P. 4(a)(4)(A)(vi)) has no effect on the finality of the original judgment and does not toll the time for appeal. *Browder v. Director, Dept. of Corrections*, 434 U.S. at 263 n.7; *Cange v. Stotler & Co.*, 913 F.2d 1204, 1213 (7th Cir. 1990); *Wort v. Vierling*, 778 F.2d 1233, 1234 n.1 (7th Cir. 1985).

It is important to note that an appeal from the denial of a Rule 60(b) motion does not bring up for review the underlying judgment. *Gleason v. Jansen*, 888 F.3d 847, 851 (7th Cir. 2018); *see also Bell v. McAdory,* 820 F.3d 880, 883 (7th Cir. 2016)*; Tango Music, LLC v. DeadQuick Music, Inc*., 348 F.3d 244, 247 (7th Cir. 2003). The only question raised in a Rule 60(b) appeal is whether the trial court abused its discretion by refusing to grant the extraordinary relief recognized in that rule. *Gleason v. Jansen*, 888 F.3d at 851-52.

Further, Rule 60(b) cannot be used to evade the deadline to file a timely appeal. And, therefore, the court rejects the use of Rule 60(b) when a party fails to file a timely appeal and the relief sought could have been attained on appeal. *Mendez v. Republic Bank*, 725 F.3d 651, 659 (7th Cir. 2013); *Bell v. Eastman Kodak Co.*, 214 F.3d 798, 800 (7th Cir. 2000) (dismissing an appeal of a district court's denial of a Rule 60(b) motion where the motion "was nothing more than the first step in an attempt to take an untimely appeal"); *see also Groves v. United States*, 941 F.3d 315, 324 (7th Cir. 2019); *Banks v. Chicago Bd. of Educ.*, 750 F.3d 663, 666-68 (7th Cir. 2014). *But see Bell v. McAdory,* 820 F.3d 880, 884 (7th Cir. 2016) (Rule 60(b) motion treated as motion to extend time to appeal if timely filed pursuant to Fed. R. App. P. 4(a)(5)).

Importantly, an order denying a Rule 60 motion need not comply with the separate document rule. *See Lawuary v. United States*, 669 F.3 864 (7th Cir. 2012). And, it is worth noting that a party who does not prevail on a Rule 60(b) motion may challenge that "final" decision with a motion to alter or amend under Rule 59(e). *Martinez v. City of Chicago*, 499 F.3d 721, 727 (7th Cir. 2007).

Interlocutory Appeals.

(a) *Appeals under 28 U.S.C. § 1292(a)(1)*. The time for appeal runs from the date on which the district court enters the order "granting, denying, continuing, modifying, or dissolving" injunctive relief irrespective of when the written findings of fact are entered. *See Financial Services Corp. v. Weindruch*, 764 F.2d 197 (7th Cir. 1985); *see also SEC v. Quinn*, 997 F.2d 287 (7th Cir. 1993). *Cf. Chicago & North Western Transportation Co. v. Railway Labor Executives' Ass'n.*, 908 F.2d 144, 149-50 (7th Cir. 1990). The pendency of a motion to reconsider, filed within the 28-day period after entry of the district court's order, renders a notice of appeal ineffective. *See Square D Company v. Fastrak Softworks, Inc.*, 107 F. 3d 448 (7th Cir. 1997).

(b) *Permissive Appeals Under 28 U.S.C. § 1292(b)*. The petition for permission to appeal must be filed in the court of appeals within 10 days from the date on which the district court enters the order containing a proper § 1292(b) certification. *See* Fed. R. App. P. 5(a); *In re Cash Currency Exchange, Inc.*, 762 F.2d 542, 547 (7th Cir. 1985). Note that Saturdays, Sundays, and legal holidays are counted in accordance with a 2009 amendment to Fed. R. App. P. 26(a).

(c) *Appeals Under Collateral Order Doctrine*. The time for an appeal of an interlocutory order under the collateral order doctrine begins to run when the order is entered on the district court's civil docket. *Rubin v. The Islamic Republic of Iran*, 637 F.3d 783, 790 (7th Cir. 2011). There is, however, no obligation to take an immediate appeal; a party may wait until final judgment is entered. *Exchange Nat'l Bank v. Daniels*, 763 F.2d 286, 290 (7th Cir. 1985).

Extensions of Time to Appeal. The court of appeals cannot extend or enlarge the time for appeal. Fed. R. App. P. 26(b); *In re Fischer*, 554 F.3d 656 (7th Cir. 2009). The district court may, if an appellant shows good cause or excusable neglect, grant an extension of time. Fed. R. App. P. 4(a)(5).

A motion for extension of time must be filed within 30 days after expiration of the normal appeal period. 28 U.S.C. § 2107(c); *Harrison v. Dean Witter Reynolds, Inc.*, 974 F.2d 873, 886 (7th Cir. 1992); *Labuguen v. Carlin*, 792 F.2d 708, 710 (7th Cir. 1986); *United States ex rel. Leonard v. O'Leary*, 788 F.2d 1238, 1239 (7th Cir. 1986); *see also*

Bell v. McAdory, 820 F.3d 880, 884 (7th Cir. 2016) (Rule 60(b) motion filed within 30 day period treated as a Rule 4(a)(5) motion).

Importantly, both (1) the 30-day window following expiration of the time to appeal and (2) the showing of excusable neglect or good cause of 28 U.S.C. § 2107(c) are jurisdictional — neither requirement can be waived or forfeited. *See Nestorovic v. Metro. Water Reclamation Distr. of Greater Chicago*, 926 F.3d 427, 431 (7th Cir. 2019) (per curiam).

Rule 4(a)(5)(C) allows the district court to grant an extension of no more than 30 days past the normal appeal period or 14 days from entry of the order granting the extension, whichever is longer. Importantly, the limits in the rule are non-jurisdictional; rather, the rule is a claim-processing rule that can be forfeited or waived. But the limits remain mandatory if properly invoked. *Hamer v. Neighborhood Housing Services of Chicago*, 138 S. Ct. 13 (2017). On remand from the Supreme Court, a panel of the court determined that representations within appellees' docketing statement constituted a waiver of these limits. *Hamer v. Neighborhood Housing Services of Chicago*, 897 F.3d 835 (7th Cir. 2018).

Litigants should be mindful that the court will not close its eyes and accept an unchallenged district court finding of excusable neglect if it has reason to doubt that the appellant established neglect which can be interpreted as "excusable." *Prizevoits v. Indiana Bell Telephone Co.*, 76 F.3d 132 (7th Cir. 1996). *Cf. Norgaard v. DePuy Orthopaedics, Inc.*, 121 F.3d 1074 (7th Cir. 1997) (losing side cannot revive suit and proceed to court of appeals by the expedient of filing a motion under Rule 60(b)(6)).

A district court's determination whether excusable neglect is established is reviewed for an abuse of discretion. *Sherman v. Quinn*, 668 F.3d 421, 425 (7th Cir. 2012); *Abuelyaman v. Illinois State University*, 667 F.3d 800, 807 (7th Cir. 2011); *McCarty v. Astrue*, 528 F.3d 541, 544 (7th Cir. 2008); *Marquez v. Mineta*, 424 F.3d 539 (7th Cir. 2005) (district court abused its discretion in granting without explanation a one day extension where the appellant's only excuse was a miscalculation of the time to appeal). *Cf. Whitfield v. Howard*, 852 F.3d 656, 660-61 (7th Cir. 2017) ("the court may find excusable neglect in a *pro se* litigant's confusion about how [the federal rules] work," noting that the "federal rules are complex").

Many times a district judge will be persuaded — based on the stated reasons — to grant an extension, but she also would not have abused her discretion if she had denied the motion. In short, a litigant who

files a timely Rule 4(a)(5) motion throws "himself and his appeal on the discretionary mercy of the district court." *Mayle v. State of Illinois*, 956 F.3d 966, 969 (7th Cir. 2020).

Although a district court is not forbidden from issuing a summary order when deciding a motion brought under Rule 4(a)(5), the failure to explain its rationale requires an appellate determination whether, based on the reasons the movant offered, the district court has "leeway" in excusing the movant's neglect. *See Mayle v. State of Illinois*, 956 F.3d 966, 968-69 (7th Cir. 2020) (reasonable judges could differ on whether to excuse movant's neglect based on "understandable, albeit far from compelling" excuses offered); *cf. Nestorovic v. Metro. Water Reclamation Distr. of Greater Chicago*, 926 F.3d 427, 432 (7th Cir. 2019) (per curiam) (movant offered "no meaningful explanation" for untimely appeal, and record contained nothing that could have justified granting the motion).

The text of Rule 4(a)(5) does not distinguish between motions filed before or after the original appeal deadline. The rule makes clear that an extension can be granted for either good cause or excusable neglect regardless of when the motion is filed. Fed. R. App. P. 4(a)(5)(A)(ii).

The Committee Notes to the 2002 amendment to Rule 4(a)(5) point out that good cause and excusable neglect have different domains and are not interchangeable terms. The excusable neglect standard applies in situations in which there is fault. More specifically, "[n]eglect is excusable (though not justifiable — 'neglect' implies lack of justification) if there is a reason, which needn't be a compelling reason, to overlook it." *United States v. McLaughlin*, 470 F.3d 698, 700 (7th Cir. 2006). The good cause standard, on the other hand, applies in situations in which there is no fault — excusable or otherwise. *Sherman v. Quinn*, 668 F.3d 421, 425 (7th Cir. 2012).

Reopening the Time to Appeal. On occasion, a party may not receive notice of entry of judgment until the time to appeal has expired. Importantly, Rule 77(d)(2) of the Federal Rules of Civil Procedure states that the lack of notice of the judgment's entry does not authorize a district court to relieve a party for failing to file a timely notice of appeal "except as allowed by Federal Rule of Appellate Procedure (4)(a)."

Rule 4(a)(6) of the Federal Rules of Appellate Procedure permits a district court to create a 14-day window for the filing of a late appeal.

The following circumstances must be established in order to permit the district court to exercise its discretion to reopen the time to appeal: (1) the appellant did not "receive" notice under Fed. R. Civ. P. 77(d) of entry of the judgment within 21 days after the judgment's entry; (2) the motion to reopen must be filed with the district court within 180 days after entry of the judgment or order appealed, or 14 days after the appellant "receives" notice under Rule 77(d), whichever date is earlier; and (3) no party would be prejudiced. *See Armstrong v. Louden*, 834 F.3d 767 (7th Cir. 2016) (district court lacks authority to reopen appeal if Rule 4(a)(6) time limits are not met).

The Committee Notes to Rule 4(a)(6) show that it is designed to allow a district judge to reopen the time to appeal if notice of the judgment does not *arrive* — whether the fault lies with the clerk or the post office — at the litigant's address. But a litigant may not defer receipt of a document by failing to open the envelope containing it. *Lim v. Courtcall Inc.*, 683 F.3d 378 (7th Cir. 2012).

The court in *In re Fischer*, 554 F.3d 656 (7th Cir. 2009), issued a short opinion to provide guidance as to the proper steps to take to reopen the time to appeal under Rule 4(a)(6). The opinion sets out the full text the rule and points out that only the district court has the authority to reopen the time to appeal. *Id.* at 657. It also informs litigants that the motion should explain the circumstances by which the party learned that the district court entered the final order and should go on to explain whether any party would be prejudiced by reopening the time to appeal. *Id.*

The court further has pointed out that Rule 4(a)(6) does not grant a district judge carte blanche to allow untimely appeals to be filed, noting that the district judge must make findings that the conditions required under the rule are satisfied. *In re Marchiando*, 13 F.3d 1111, 1114 (7th Cir. 1994). If the conditions are satisfied, the district judge may exercise his or her discretion to reopen the time to appeal. *Id.* at 1115.

<u>*Unique Circumstances Doctrine*</u>. Simply put, the doctrine is no longer viable to extend the statutorily mandated filing deadline to appeal in a civil case. The doctrine had been used to postpone the time to appeal in situations where a party received specific assurances by a judicial officer that an otherwise untimely action was timely. *See, e.g., Robinson v. City of Harvey*, 489 F.3d 864, 870-71 (7th Cir. 2007). In *Bowles v. Russell*, 551 U.S. 205, 214 (2007), the Supreme Court bluntly stated that the "use of the 'unique circumstances' doctrine is illegitimate" in such a case.

The Supreme Court acknowledged that its ruling might occasionally yield inequitable results — not affording the court equitable powers to excuse compliance with a filing rule if the litigant was lulled into non-compliance by a judicial officer. But only Congress is empowered to create such an exception. *See*, *e.g.*, *Gleason v. Jansen*, 888 F.3d 847, 852-53 (7th Cir. 2018).

3. *Prisoner Mailbox Rule*.

"Courts have long recognized the sluggishness of prison mail, even going so far as to create special rules to stop delays in that system from causing unwarranted prejudice to prisoner-litigants." *Evans v. Griffin*, 932 F.3d 1043, 1047 (7th Cir. 2019); *see also Censke v. United States*, 947 F.3d 488, 489 (7th Cir. 2020) ("Prisoners face unique challenges when submitting legal filings," needing to "use the prison's mail system, where security concerns often cause the system to operate more slowly than standard mail."). One such rule is Fed. R. App. P. 4(c).

A *pro se* prisoner's notice of appeal will be deemed to have been filed the moment it is placed in the prison's mail system for forwarding to the district court, rather than when it reaches the court clerk. Fed. R. App. P. 4(c). This is known as the "prison mailbox rule." If a prisoner mistakenly mails the notice instead to the court of appeals, the combination of Rules 4(c) and 4(d) can be applied to determine whether the appeal is timely. *See Saxon v. Lashbrook*, 873 F.3d 982, 986-87 (7th Cir. 2017).

The rule provides that a prisoner's notice of appeal in either a civil or a criminal case, to be timely, must be deposited in the prison's "internal mail system", if it has one, by the due date. Fed. R. App. P. 4(c)(1). If the prison lacks such a system, prisoners may establish the timely filing of their appeal under this rule by a notarized statement or a declaration (in compliance with 28 U.S.C. § 1746) setting forth the date of deposit and stating that first class postage "is being" prepaid, or other evidence (such as postmark or date stamp) that shows the date of deposit and that postage was prepaid. Fed. R. App. P. 4(c)(1). See generally *Hurlow v. United States*, 726 F.3d 958, 962-64 (7th Cir. 2013), for an analysis of the rule; *see also* Fed. R. App. P. 25(a)(2)(C) (inmate filings). The required documentation should accompany the notice of appeal although the court of appeals may permit a later filing. *See* Fed R. App. P. 4(c)(1)(A), (B).

At times, a prisoner's affidavit or declaration will not satisfy his burden of proving the date of mailing, or may be contested. In such circumstances,

an evidentiary hearing (conducted by the district court) may be appropriate to determine the truthfulness of the prisoner's assertions — particularly if the assertions are contested by the opposing party or "seems fishy" to the court. *May v. Mahone*, 876 F.3d 896 (7th Cir. 2017) (if the veracity of an inmate's assertions is in doubt, an evidentiary hearing may be needed to resolve issues of credibility). The burden of establishing that the notice of appeal was mailed in a timely fashion rests with the prisoner. *May v. Mahone*, 913 F.3d 682 (7th Cir. 2019) (per curiam) (prisoner failed to carry his burden).

The date of mailing, however, does not govern the time for the filing of any other appeal in the case. The date that the district court dockets the prisoner's notice of appeal, not the date that it is mailed or received, commences the 14-day period for a second or subsequent appeal under rule 4(a)(3) and the 30-day period for a government appeal under Rule 4(b). Fed. R. App. 4(c)(2), (3).

The rule does not address a prison's electronic filing of a prisoner's appeal. The reason for the creation of the prison mailbox rule, however, justifies its application to documents electronically filed. Accordingly, a prisoner's legal documents are considered filed on the date that they are tendered to to prison staff for mailing or e-filing. *Armstrong v. Louden*, 834 F.3d 767 (7th Cir. 2016); *Taylor v. Brown*, 787 F3d 851, 858-59 (7th Cir. 2015); *see also Chavarria-Reyes v. Lynch*, 845 F.3d 275 (7th Cir. 2016) (prison mailbox rule applies to administrative actions).

The prison mailbox rule applies to incarcerated prisoners whether they are represented by counsel or not. *United States v. Craig*, 368 F.3d 738, 740 (7th Cir. 2004). However, if the notice of appeal (or other paper) was not sent from a prison — such as if the prisoner had a relative or a friend mail the notice — it would appear that the prisoner cannot invoke the rule.

4. *Appeals from Tax Court Decisions.*

Time Prescribed. A notice of appeal must be filed with clerk of the Tax Court in Washington, D.C., within 90 days from the date on which the Tax Court's decision is entered on its docket. If, however, one party files a timely notice of appeal, any other party may file its notice of appeal within 120 days from the date on which the decision was entered. Fed. R. App. P. 13(a)(1).

If the notice of appeal is filed by mail, the appeal will be timely if it is postmarked within the time prescribed. Fed. R. App. P. 13(b); *Estate of Lidbury v. Commissioner*, 800 F.2d 649, 655 n.6 (7th Cir. 1986).

Effect of Certain Post-Decision Motions. If a motion to vacate a decision or a motion to revise a decision is made within the time prescribed by the Rules of Practice of the Tax Court, the full time for appeal (90 or 120 days) runs from the date on which the order disposing of the motion(s) is entered or the date on which the final decision is entered, whichever is later. Fed. R. App. P. 13(a)(2).

Interlocutory Appeals. Certain interlocutory orders of the Tax Court may be appealed. *See* 26 U.S.C. § 7482(a)(2)(A). The statute operates like 28 U.S.C. § 1292(b).

5. *Appeals from Administrative Agencies*.

Like a notice of appeal in a civil case, the timely filing of a petition for review is jurisdictional and cannot be waived by the court. *Arch Mineral Corp. v. Director, Office of Workers' Compensation Programs, United States Dept. of Labor*, 798 F.2d 215, 217 (7th Cir. 1986); *Sonicraft, Inc. v. NLRB*, 814 F.2d 385 (7th Cir. 1987); Fed. R. App. P. 26(b). Parties should consult the applicable statutes for filing deadlines and tolling provisions.

I. The Notice of Appeal

The notice of appeal is a simple document. It includes three pieces of information. It must (1) identify the party or parties taking the appeal, (2) designate the judgment or order appealed, and (3) name the court to which the appeal is taken. Fed. R. App. P. 3(c)(1). *See Badger Pharmacal, Inc. v. Colgate-Palmolive Co.*, 1 F.3d 621, 624-26 (7th Cir. 1993).

Although compliance with Rule 3(c) is technically required, *Marrs v. Motorola, Inc.,* 547 F.3d 839, 840 (7th Cir. 2008), the Supreme Court has explained that it is "liberally construed." *Smith v. Barry*, 502 U.S. 244, 248 (1992); *see also JP Morgan Chase Bank, N.A. v. Asia Pulp & Paper Co., Ltd.*, 707 F.3d 853, 861 (7th Cir. 2013). Indeed, the rule itself goes on to say that appeals must not be dismissed "for informality of form or title of the notice of appeal, or for failure to name a party whose intent to appeal is otherwise clear from the notice." Fed. R. App. P. 3(c)(4). *Cf. Gonzales v. Taylor*, 565 U.S. 134, 147-48 (2012) (explaining why the *Torres* court determined the naming requirement was jurisdictional).

This court has described the appropriate inquiry as to the sufficiency of a notice of appeal to be whether adequate notice was given to apprise the other parties of the issues challenged, and additionally whether the intent to appeal from the judgment can be inferred from the notice and the appellee has not been misled by any defect. *United States v. Taylor*, 628 F.3d 420, 423 (7th Cir. 2010); *United States v. Segal*, 432 F.3d 767, 772-73 (7th Cir. 2005); *see also Harvey v. Town of*

Merrillville, 649 F.3d 526, 528 (7th Cir. 2011) (inept attempts to comply with Rule 3(c) are accepted as long as the appellee is not harmed).

1. *Identify Who Wants to Appeal.*

It remains the general rule that each party wanting to appeal should be identified by name in either the caption or the body of the notice, but Rule 3(c)(1)(A) permits an attorney representing more than one party the flexibility to indicate which parties are appealing without naming them individually. *Cf. Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988). The designation is sufficient if it is objectively clear from the notice that a party intended to appeal. *Spain v. Bd. of Educ. of Meridian Community Unit School District No. 101*, 214 F.3d 925, 929 (7th Cir. 2000).

A technical discrepancy does not warrant dismissal of the appeal if there is no real confusion as to the identity of the appellant. *Securities and Exchange Commission v. Wealth Management LLC*, 628 F. 3d 323, 331 (7th Cir. 2010) (notice identified appellants through their trust and not as individuals); *see also 1756 W. Lake Street LLC v. American Chartered Bank*, 787 F.3d 383, 385 (7th Cir. 2015) (notice of appeal that incorrectly named appellant was sufficient because it was otherwise clear from the notice of the correct appellant).

The rule also provides that a *pro se* appeal is filed on behalf of the notice's signer and the signer's spouse and minor children, if they are parties, unless the notice clearly indicates a contrary intent. Fed. R. App. P. 3(c)(2).

In a class action, whether or not certified as such, the notice is sufficient if it names one person qualified to bring the appeal as representative of the class. Fed. R. App. P. 3(c)(3).

The court will not review the award of sanctions against a lawyer personally unless the lawyer is identified in the notice of appeal as the party taking the appeal. *Allison v. Ticor Title Ins. Co.*, 907 F.2d 645, 653 (7th Cir. 1990); *FTC v. Amy Travel Service, Inc.*, 894 F.2d 879 (7th Cir. 1989); *but see Foreman v. Wadsworth*, 844 F.3d 620, 625-26 (7th Cir. 2016) (attorney's failure to name himself in notice of appeal — seeking review of a censure order — was harmless because his intent to appeal is otherwise clear from the notice).

Note that Rule 3(c) does not require the notice of appeal name each appellee. *Miller v. City of Monona*, 784 F.3d 1113, 1118-19 (7th Cir. 2015); *House v. Belford*, 956 F.2d 711, 717 (7th Cir. 1992).

2. *Designate the Judgment or Order Appealed.*

Rule 3(c)(1)(B) has not been interpreted to mean that every individual order in a case that preceded final judgment must be separately designated in order to be part of the appeal. *Kunik v. Racine County*, 106 F.3d 168, 172 (7th Cir. 1997); *see also Allied Signal, Inc. v. B. F. Goodrich Co.,* 183 F.3d 568, 571-72 (7th Cir. 1999).

A notice of appeal that merely names the Rule 58 final judgment or the order disposing of a Rule 59 motion (or its equivalent) as "the judgment, order, or part thereof appealed from" brings up for review all of the rulings in the case. *Kunik v. Racine County*, 106 F.3d at 172-73; *see also Luevano v. Wal-Mart Stores, Inc.*, 722 F.3d 1014, 1019-20 (7th Cir. 2013); *Moran Foods, Inc. v. Mid-Atlantic Market Development Company, LLC*, 476 F.3d 436, 440-41 (7th Cir. 2007).

The court has gone so far as to caution litigants that "[i]t is never necessary — and may be hazardous — to specify in the notice of appeal the date...of an interlocutory order or a post-judgment decision..., unless the appellant wants to confine the appellate issues to those covered in the specific order." *Librizzi v. Children's Memorial Medical Center*, 134 F.3d 1302, 1306 (7th Cir. 1998). That was the case in *Goulding v. Global Medical Products Holdings, Inc.*, 394 F.3d 466, 467 (7th Cir. 2005), where the appellant's notice, filed after entry of a final judgment, identified only an interlocutory decision; appellate review was limited to the specified interlocutory decision, and nothing else. *Cf. Dzikunoo v. McGaw YMCA*, 39 F.3d 166 (7th Cir. 1994) (the naming of the wrong order in the notice of appeal does not affect appellate jurisdiction, although it may limit the appeal to questions raised by the order designated in the notice).

In addition, an error in designating the order or judgment will not result in the loss of appeal if the intent to appeal the judgment or order may be inferred from the notice and the appellee is not misled by the defect. *United States v. Segal*, 432 F. 3d 767, 772 (7th Cir. 2005).

3. *Name the Court to Which the Appeal is Taken.*

Although Rule 3(c)(1)(C) makes the naming of the court to which the appeal is taken mandatory, an appeal generally will not be dismissed on this ground. *See Smith v. Grams*, 565 F.3d 1037 (7th Cir. 2009) (designation of Supreme Court instead of Seventh Circuit in a letter notice filed with the district court not fatal since appellant had only one available appellate forum). Litigants, however, are advised to review the court's decision in *Bradley v. Work*, 154 F.3d 704, 707 (7th

Cir. 1998), for a case that the court considered "to be on the margins of informality of form." *Cf. Ortiz v. John O. Butler Co.*, 94 F.3d 1121, 1125 (7th Cir. 1996) (sufficient that appellant's intent to appeal to Seventh Circuit is evidenced by the fact that, except in circumstances not applicable to this case, it's the only court to which appellant could have appealed and appellee not misled).

4. *Signature Requirement.*

A signature requirement is not among Rule 3(c)(1)'s specifications. Its omission is not a jurisdictional impediment to the pursuit of an appeal; rather, Fed. R. Civ. P. 11(a) calls for and controls that requirement. *Becker v. Montgomery*, 121 S. Ct. 1801, 1807 (2001). And, the remedy for the signature's omission on the notice originally filed is provided in Rule 11(a)'s final sentence — the "omission of the signature" may be "corrected promptly after being called to the attention of the attorney or party," such as by signing the paper on file or by submitting a duplicate that contains the signature. *Id.* at 1806; *see also Lewis v. Lenc-Smith Mfg. Co.*, 784 F.2d 829 (7th Cir. 1986).

5. *Amendments to the Notice of Appeal.*

Sometimes an appellant may choose to correct an error or omission in the notice of appeal by filing an amended or corrected notice of appeal. Regardless of the error or omission the appellant seeks to remedy, any such amended notice must be made within the time the rules prescribe to appeal, *Nocula v. UGS Corporation*, 520 F.3d 719, 723-24 (7th Cir. 2008); *see also Ammons v. Gerlinger*, 547 F.3d 724, 726 (7th Cir. 2008) (per curiam), and filed with the district court. *See Chathas v. Smith*, 848 F.2d 93, 94 (7th Cir. 1988).

Notably, the court of appeals will separately docket any amended or corrected notice of appeal as another appeal and assign it a new appellate docket number. And, another filing fee will be required. *But see* Fed. R. App. P. 4(a)(4)(B)(iii).

The only reason for an appellant to file a motion to amend a notice of appeal is to dispel any confusion on the part of an appellee and thereby forestall an argument that the appellee was misled, although this doubt-dispelling function could just as easily be performed by a letter to appellee's counsel. *Chathas v. Smith*, 848 F.2d at 94-95 (court denies motion to amend notice of appeal); *see also Marrs v. Motorola, Inc.,* 547 F.3d 839 (7th Cir. 2008) (per curiam) (motion to correct notice of appeal denied); *Harrison v. Dean Witter Reynolds, Inc.*, 974 F.2d 873, 886 (7th Cir. 1992) (court of appeals has no jurisdiction over motion to

amend notice of appeal not filed within the time limits set by Fed. R. App. P. 4(a)(1)). Courts of appeals have permitted notices of appeal to be amended where the notice contained a technical error. *Bach v. Coughlin*, 508 F.2d 303, 306-07 (7th Cir. 1974) (per curiam).

6. *Functional Equivalents*.

Any document that contains all of the information that Rule 3(c)(1) requires may be treated as a notice of appeal. *See Smith v. Barry*, 502 U.S. 244 (1992) (*pro se*'s informal brief treated as functional equivalent of notice of appeal).

The following cases include examples of filings that the court has treated as notices of appeals: *Owens v. Godinez*, 860 F.3d 434, 437 (7th Cir. 2017) (motion to extend time to appeal treated as notice of appeal); *Halsa v. ITT Educational Services, Inc.,* 690 F.3d 844, 849 (7th Cir. 2012) (appellant's opening appellate brief filed within 30 days of district court's costs order clearly gave notice of intent to contest that ruling and therefore treated as notice of appeal); *Deering v. National Maintenance & Repair, Inc.*, 627 F.3d 1039, 1042-43 (7th Cir. 2010) (Rule 59(e) motion treated as notice of appeal); *Remer v. Burlington Area School District,* 205 F.3d 990, 994-95 (7th Cir. 2000) (petition for interlocutory appeal functional equivalent of notice of appeal); *In re Davenport*, 147 F.3d 605, 608 (7th Cir. 1998) (petitions for leave to file successive section 2255 motions treated as notices of appeal); *Nichols v. United States*, 75 F.3d 1137, 1140 (7th Cir. 1996) (motion to proceed on appeal *in forma pauperis* contained all information required by Rule 3(c)); *Listenbee v. Milwaukee*, 976 F.2d 348, 350-51 (7th Cir. 1992) (motion to extend time qualified as a notice of appeal); *Bell v. Mizell*, 931 F.2d 444 (7th Cir. 1991) (application for certificate of probable cause treated as the notice of appeal).

Simply put, captions do not control, content controls. *See generally Cosgrove v. Bartolotta*, 150 F.3d 729, 732 (7th Cir. 1998). Still, the content of the document must constitute a concrete step toward the filing of an appeal. *See Wells v. Ryker*, 591 F.3d 562, 564-65 (7th Cir. 2010). *See also Smith v. Barry*, 502 U.S. at 248 ("[T]he notice afforded by a document, not the litigant's motivation in filing it, determines the document's sufficiency as a notice of appeal.").

On the other hand, a paper filed before the district court issues its final decision cannot be treated as a notice of appeal of that decision. *See Phillips v. United States*, No. 17-3404, 2018 WL 2670624 (7th Cir. May 23, 2018) (unpublished) (paper that district court treated as notice of appeal was filed before denial of § 2255 petition and "[did] not, and

indeed could not, indicate [petitioner's] intention to appeal the district court's future decision in this case" and "in no way is the functional equivalent of … a notice of appeal").

J. Mandamus

The historic and still central function of mandamus is to confine officials within the boundaries of their authorized powers. *Brotherhood of Locomotive Engineers and Trainmen v. Union Pacific Railroad Co.*, 707 F.3d 791, 794 (7th Cir. 2013); *In re United States*, 345 F.3d 450, 452 (7th Cir 2003). Indeed, "[o]ne of the more common and appropriate uses of mandamus authority is to keep a lower tribunal from interposing unauthorized obstructions to enforcement of a judgment of a higher court." *In re A.F. Moore & Assoc., Inc.*, _____ F.3d _____, _____ 2020 WL 5422791, at *2 (7th Cir. 2020) (per curiam) (internal quotation marks and citations omitted).

A mandamus petition can provide a litigant an opportunity to challenge some unappealable orders in exceptional circumstances, *In re Hudson*, 710 F.3d 716, 717 (7th Cir. 2013); *In re Barnett*, 97 F.3d 181 (7th Cir. 1996); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1294 (7th Cir. 1995), and to confine a judge or other official to his or her jurisdiction. *In re Page*, 170 F.3d 659, 661 (7th Cir. 1999). *See also In re United States*, 614 F.3d 661, 664 (7th Cir 2010) (mandamus is typically directed against non-appealable orders); *cf. In re Bergeron*, 636 F.3d 882 (7th Cir. 2011) (mandamus proper remedy to seek judge's removal from a case due to appearance of bias); *but see Fowler v. Butts*, 229 F.3d 788 (7th Cir. 2016) (impartiality can also be challenged on direct appeal).

But litigants must be mindful that mandamus is an extraordinary remedy reserved for extreme situations. *Mohawk Indus., Inc. v. Carpenter*, 130 S. Ct. 599, 607 (2009); *In re Whirlpool Corp.*, 597 F.3d 858, 860 (7th Cir. 2010); *United States ex rel. Chandler v. Cook* County, 277 F.3d 969, 981 (7th Cir. 2002); *United States v. Byerley*, 46 F.3d 694, 700 (7th Cir. 1995). Still, "it remains available to a litigant who can establish a clear right to relief and lacks any other way to protect his or her rights." *In re Commodity Futures Trading Commission*, 941 F.3d 869, 872 (7th Cir. 2019); *see also In re A.F. Moore & Assoc., Inc.*, _____ F.3d _____ 2020 WL 5422791 (7th Cir. 2020) (per curiam) (a district judge has no authority to stay a remanded case pending certiorari).

As a practical matter, an order that is effectively reviewable cannot be challenged in a mandamus petition. "[T]he possibility of appealing would be a compelling reason for denying mandamus." *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d at 1294. Virtually all interlocutory orders that can be reviewed after entry of a final judgment will preclude mandamus relief since "it cannot be said that the litigant 'has no other adequate means to seek the relief he desires.'" *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980). *But see In re Ryze Claims Solutions, LLC*,

968 F.3d 701, 707 (7th Cir. 2020) (mandamus is the appropriate procedural method to obtain review of a transfer order out of circuit because it would otherwise escape meaningful appellate review); *In re Mathias*, 867 F.3d 727, 729 (7th Cir. 2017) (the question of proper venue escapes meaningful appellate review without the availability of mandamus relief).

On the other hand, although the Supreme Court has refused to include discovery orders within the class of "collateral orders", which are appealable though interlocutory, the court has made clear that mandamus provides a "safety valve" enabling appellate review of such an order in the exceptional case. *In re Petition of Boehringer Ingelheim Pharmaceuticals, Inc.*, 745 F.3d 216, 219 (7th Cir. 2014) (district judge exceeded his authority to change, as a sanction, the agreed-upon site of the depositions of certain individuals residing in a foreign country); *see also United States ex rel. Chandler v. Cook County*, 277 F.3d 969, 981 (7th Cir.2002).

Further, on occasion an order that so far exceeds the proper bounds of judicial discretion (such that the district court's action can fairly be characterized as lawless or, at the very least, patently wrong) and cannot be effectively reviewable at the end of the case may satisfy the conditions for mandamus relief. *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d at 1295. The court will not, however, "treat attempted interlocutory appeals as petitions for mandamus when no arguments have been made that would support the issuance of an extraordinary writ." *Simmons v. City of Racine, PFC*, 37 F.3d 325, 329 (7th Cir. 1994); *cf. United States v. Henderson*, 915 F.3d 1127, 1132 (7th Cir. 2019). *But see Brotherhood of Locomotive Engineers and Trainmen v. Union Pacific Railroad Co.*, 707 F.3d 791 (7th Cir. 2013) (notice of appeal treated as petition for mandamus).

But always keep in mind that district courts have great authority to manage their caseloads. *Gonzales v. Ingersoll Milling Machine Co.*, 133 F.3d 1025, 1030 (7th Cir. 1998). And, this court will intervene in matters of case management only when it is apparent that the district judge has acted unreasonably. *Id. Cf. United States v. Perez*, 956 F.3d 970, 975 (7th Cir. 2020) ("a judge's ordinary efforts at courtroom administration or docket management are immune from claims of bias or partiality") (internal quotations omitted), citing *Liteky v. United States*, 510 U.S. 540, 556 (1994); *but see In re A.F. Moore & Assoc., Inc.*, _____ F.3d _____, _____ 2020 WL 5422791, at *4 (7th Cir. 2020) (per curiam) (district court's stay of proceedings following remand "incompatible with the clear spirit of our mandate").

In summary, three conditions must be satisfied for a writ of mandamus to issue. The party seeking the writ must (1) demonstrate that the challenged order is not effectively reviewable at the end of the case, that is, without the writ the party will suffer irreparable harm, and (2) establish a clear right to the writ; and the issuing court must (3) be satisfied that the writ is otherwise appropriate. *Abelesz v. OTP Bank*, 692 F.2d 638, 652 (7th Cir. 2012); *see also United States v. Henderson*, 915 F.3d at 1132-33.

VII. SUBJECT MATTER JURISDICTION

It may seem odd to devote a chapter of an appellate practice handbook to the topic of subject matter jurisdiction, but there is a good reason for doing so. The opinions of this court are littered with instances of litigants who pay scant attention to the basis of federal jurisdiction of their cases, at times agreeing to keep a case in federal court although it has no business being there. *See Carr v. Tillery*, 591 F.3d 909, 917 (7th Cir. 2010) (parties cannot by agreement authorize a federal court to decide a case that does not belong in federal court); *United States v. Tittjung*, 235 F.3d 330, 335 (7th Cir. 2000) (parties may not stipulate to subject matter jurisdiction).

Subject matter jurisdiction should be ascertained long before an appeal is filed. *See Bush v. United States*, 939 F.3d 839, 845 (7th Cir. 2019) ("[O]ne of the most fundamental rules of federal jurisdiction is that judicial authority depends on the state of affairs when the case begins … rather than on how things turn out."). Occasionally, often to the surprise and embarrassment of counsel, the matter is brought up at oral argument. *See, e.g.*, *Yassan v. J. P. Morgan Chase & Co.*, 708 F.3d 963, 968 (7th Cir. 2013). This should not happen. "Lawyers have a professional obligation to analyze subject-matter jurisdiction before judges need to question the allegations." *Heinen v. Northrop Grumman Corp.*, 671 F.3d 669, 670 (7th Cir. 2012); *see also Meyerson v. Showboat Marina Casino Partnership*, 312 F.3d 318, 321 (7th Cir. 2002) ("all members of our bar must assist the court in enforcing the limits of federal subject-matter jurisdiction").

Attorneys practicing in this court are reminded that the court relies on them to provide accurate jurisdictional information when the court must decide whether subject matter jurisdiction exists. *Baez-Sanchez v. Sessions*, 862 F.3d 638, 639 (7th Cir. 2017) (Wood, C.J., in chambers). In every appeal, therefore, the parties are required to address the topic of subject matter jurisdiction — initially in the Circuit Rule 3(c) Docketing Statement and later on in the Jurisdictional Statement section of the brief.

As with appellate jurisdiction, the court has an independent duty to ensure the existence of subject matter jurisdiction, *Buchel-Ruegsegger v. Buchel*, 576 F.3d 451, 453 (7th Cir. 2009), and neither the parties nor their lawyers may waive arguments that the court lacks jurisdiction. *Dexia Credit Local v. Rogan*, 602 F.3d 879, 883 (7th Cir. 2010). To put it another way, subject matter jurisdiction is so important that federal courts permit any party to challenge, or the court to question *sua sponte*, its existence at any time and at any stage of the proceedings. *Craig v. Ontario Corp.*, 543 F.3d 872, 875 (7th Cir. 2008).

If it is determined that subject matter jurisdiction does not exist, the court of appeals cannot reach the merits of the case, and instead it can only correct the district court's error in entertaining the suit. *Buchel-Ruegsegger v. Buchel*, 576 F.3d

451, 453 (7th Cir. 2009). Usually this means that the court will send the case back to the district court with instructions to dismiss for lack of subject matter jurisdiction. In appropriate cases, such as those based on diversity of citizenship, the court may consider remanding the case to give the parties an opportunity to initiate focused discovery, in order to identify the citizenship of one or more parties.

At the same time, it is important to keep in mind the difference between federal subject matter jurisdiction — the fundamental power to adjudicate a claim — and lesser restrictions, such as claim-processing rules and ingredients of a claim. "[U]nless Congress has unambiguously said in a statute that a particular limitation affects the district court's subject-matter jurisdiction, a limitation on the right to recover (such as number of employees, or extraterritorial reach, or scope of employment) describes an element of the case." *Guerrero v. BNSF Railway Co.*, 929 F.3d 926, 929 (7th Cir. 2019).

Importantly, defective allegations of jurisdiction can be amended in the court of appeals. 28 U.S.C. § 1653. A party need not return to the district court. *See, e.g., Newman-Green Inc. v. Alfonzo-Larrain*, 490 U.S. 826 (1989) (a court of appeals may grant a motion to dismiss a dispensable party whose presence spoils diversity jurisdiction); *Teamsters Local Union No. 727 Health and Welfare Fund v. L&R Group of Companies*, 844 F.3d 649, 651-52 (7th Cir. 2016). Instead, the court of appeals can order a party to file an amended pleading which establishes jurisdiction, or file a notice with the court explaining why that cannot be done. *See Heinen v. Northrup Grumman Corp.*, 671 F.3d 669, 670 (7th Cir. 2012) (following oral argument, court of appeals directed defendant to amend jurisdictional allegations in its notice of removal pursuant to 28 U.S.C. § 1653).

There comes a point in time, however, when subject matter jurisdiction cannot be challenged or reviewed. Once a case has gone to final judgment and all appellate remedies have been exhausted, subject matter jurisdiction can no longer be challenged or reviewed. *In re Brand Name Prescription Drugs Antitrust Litigation*, 248 F.3d 668, 669 (7th Cir. 2001); *see also United States v. Manriquez-Alvarado*, 953 F.3d 511, 512 (7th Cir. 2020) (if jurisdictional problem escapes notice, and the case goes to judgment on the merits, the result is conclusive); *Dexia Credit Local v. Rogan*, 602 F.3d 879, 883 (7th Cir. 2010) (subject matter jurisdiction may not be attacked collaterally).

It is also worth mentioning that an attorney may not lie back, holding a challenge to subject matter jurisdiction in reserve because he hopes to obtain a judgment on the merits. An attorney that does so engages in misconduct for which he can be disciplined. *Enbridge Pipelines (Illinois) L.L.C. v. Moore*, 633 F.3d 602, 606 (7th Cir. 2011).

The burden of establishing federal subject matter jurisdiction is on the party asserting it, *Muscarello v. Ogle County Board of Commissioners*, 610 F.3d 416, 425

(7th Cir. 2010); *Craig v. Ontario Corp.*, 543 F.3d 872, 876 (7th Cir. 2008), including Article III standing. *Collier v. SP Plus Corp.*, 889 F.3d 894, 896 (7th Cir. 2018) (per curiam). So, for example, a plaintiff's allegations about the parties' citizenship are accepted unless they are challenged or seem collusive, and then they must be proved. *Sanders v. Melvin*, 873 F.3d 957, 961 (7th Cir. 2017). And, when the facts that determine federal jurisdiction are contested, those facts must be established by a preponderance of the evidence. *Illinois Bell Telephone Co., Inc. v. Global Naps Illinois, Inc.*, 551 F.3d 587, 590 (7th Cir. 2008).

Sometimes the merits of a case can raise a serious question as to federal jurisdiction. The court has stated that a suit which is "utterly frivolous" does not engage the jurisdiction of the federal courts; as a practical matter this means that it is clear beyond any reasonable doubt that a case does not belong in federal court. *Carr v. Tillery*, 591 F.3d 909, 917 (7th Cir. 2010); *see also Crowley Cutlery Co. v. United States*, 849 F.2d 273, 276 (7th Cir. 1988).

The presumption, however, is that the dismissal of even a very weak case should be on the merits rather than because it is too weak to engage federal jurisdiction; to do otherwise would require too much time wasted in distinguishing degrees of weakness. *Carr v. Tillery, supra.* But in *Avila v. Pappas*, 591 F.3d 552 (7th Cir. 2010), the court concluded that the gulf between the claimed wrong and a violation of the federal Constitution was too great and instructed the district court to dismiss for lack of subject matter jurisdiction.

VIII. SCOPE OF REVIEW

An important part of any appeal is the identification of the applicable standard(s) of review that will govern the court of appeals' decision-making. The determination of what issues to raise on appeal — indeed, whether to file an appeal in the first place — will depend, in considerable part, on the scope of review that will guide the court of appeals in its consideration of the appeal.

The court of appeals considers questions of fact as well as questions of law. It does not, however, substitute its judgment for the verdict of a jury, or for the findings of a trial judge or an administrative agency; the scope of its factual review is limited to determining whether or not there is sufficient evidence to support the verdict or finding.

When the court reviews cases tried by a judge without a jury, it accords respect to the trial judge's superior opportunity to evaluate the credibility of witnesses, and ordinarily limits itself to reviewing the inferences and legal decisions which have been made. While questions of law are reviewed *de novo*, factual questions are reviewed deferentially and will not be reversed on the facts unless the court concludes that the findings of the district judge are "clearly erroneous." Fed. R. Civ. P. 52(a). Mixed questions of law and fact, where the legal conclusions are based on the application of a legal rule or standard to the facts of the case, are reviewed deferentially for clear error. *See United States v. Spears*, 965 F.2d 262, 270-71 (7th Cir. 1992).

Appellant's brief must include a statement of the appropriate appellate standard of review for each separate issue raised in the brief. Fed. R. App. P. 28(a)(9)(B). The statements may be in a separate section preceding the discussion of the issues or as a statement preceding the discussion of each individual issue. The appellee's brief need not include a statement of the standard of review unless the appellee disagrees with the appellant's statement. In that situation the appellee should set forth its contention as to the correct standard of review in its brief. Fed. R. App. P. 28(b)(4).

IX. MOTIONS AND DOCKET CONTROL

All motions should be filed in accordance with Fed. R. App. P. 27 and 32(c), and other applicable rules, with copies served on all other parties. Motions in the form of a letter to the clerk or to a judge are not allowed. Fed. R. App. P. 27 adds a requirement that all legal arguments should be presented in the body of the motion; a separate brief or memorandum must not be filed. Any affidavit in support of a motion should contain only factual information and not legal argument. In the case of a motion for extension of time within which to file a brief, Circuit Rule 26 requires the filing of a supporting affidavit.

The motion and any affidavit should be filed together, preferably with the motion on the top. They should be letter-size 8½" by 11", and double-spaced. The motion should include a caption, the title of the appeal, its docket number, and a brief heading descriptive of the relief sought therein (*e.g.*, "Motion for Extension of Time Within Which to File Appellant's Brief and Appendix"). Relatedly, "it is the substance of a motion that counts, not its label." *Brickstructures, Inc. v. Coaster Dynamix, Inc.*, 952 F.3d 887, 890 (7th Cir. 2020).

Any affidavit or other document necessary to support a motion must be served and filed with the motion. Whenever a motion requests substantive relief, a copy of the trial court's opinion or agency's decision must be attached. A notice of motion and a proposed order are unnecessary.

Motions and responses are limited to 5,200 words if you produce your document on a computer. If the document is handwritten or typed on a typewriter, you are limited to 20 pages; replies to a response are limited to 2,600 words if you use a computer, and 10 pages if handwritten or if a typewriter is used. *See* Fed. R. App. P. 27(d)(2).

All motions are decided upon the documents filed, without oral hearing, unless otherwise ordered by the court. Fed. R. App. P. 27(e). Oral hearing is rarely granted. Therefore, it is imperative that counsel attach copies of all documents necessary to decide the motion, particularly in emergency situations. Since the judges rule on many motions each week, brevity is extremely important. A terse and lucid statement of the facts and the relief sought is always to be preferred to a lengthy presentation in both the motion and any accompanying documents.

Motions are filed electronically with the court through ECF. Seventh Circuit Operating Procedure 1 sets out the court's practice in handling motions, and is worth reviewing. Some procedural motions are decided by court staff. 7th Cir. Oper. Proc. 1(c)(2); Fed. R. App. P 27(b). Most other motions will be submitted to and determined by a single judge, referred to as the "motions judge." However, an order that will dismiss or otherwise determine an appeal on the merits requires the agreement of two or more judges. Fed. R. App. P. 27(c); 7th Cir. Oper. Proc. 1(a).

Procedural motions, such as those for extensions of time, demand no responses; the court will act on them immediately unless it desires a response. Fed. R. App. P. 27(b). Notably, a motion for extension of time for filing a brief must be filed at least 7 days before the due date of the brief. Cir. R. 26.

Motions in which time is of the essence, such as those for stay, injunction, or bail, will go to the motions judge or panel of judges immediately. The judge(s) may grant or deny the motion outright, or enter an order requesting a response within a certain period of time. Unless otherwise ordered, an adversary may have ten days to respond to any other type of motion. Fed. R. App. P. 27(a)(3). A timely response filed after a ruling will be considered a motion to reconsider. 7th Cir. Oper. Proc. 1(c)(5).

With regard to case-management matters — briefing schedules, consolidation, brief length, and the like — the court has the option of reaching out to opposing parties and inviting a response, and often does so. Another option for the court is to wait a couple of weeks or so to see if another party responds. If you want this court to act quickly on your case-management motion, contact opposing counsel and ask whether they will consent to the motion, or at least state they will not oppose it, then put it in the motion. With that message, the court can be confident that it need not wait to protect the interests of the other parties. *Harrington v. Berryhill*, 876 F.3d 889 (7th Cir. 2017) (Hamilton, J., in chambers).

Any reply to a response must be filed within seven days after service of the response. Fed. R. App. P. 27(a)(4). As a general matter, a reply should not reargue propositions presented in the motion or present matters that do not relate to the response.

Counsel are reminded that a brief must be filed when due. If events justify a last-minute motion concerning jurisdiction, venue, sanctions, or any other subject, that motion may *accompany* the brief; a motion is *not* a substitute for a brief. *Ramos v. Ashcroft*, 371 F.3d 948 (7th Cir. 2004).

A. Emergency Motions

Counsel should not expect that electronic filings will be read and acted on outside of business hours, unless arrangements have been made in advance. Counsel who anticipate the need for emergency action while the Clerk's Office is closed should alert the Clerk's Office during business hours. Cir. R. 27. Documents must be filed in compliance with Circuit Rule 25, but failure to provide advance notice may delay court action.

The motion itself should highlight the date(s) relevant to the emergency relief requested: Is it the same day? The next day? Two days later? Next week? The court needs this information in order to determine when a ruling needs to be made.

Relatedly, counsel are reminded to file a notice of appeal in order to file an emergency motion. If the notice of appeal is being filed immediately before the emergency motion, make the district court aware of the need to expedite processing the notice of appeal. And, remember to file a disclosure statement along with the motion if one has not yet been filed.

One important question the court considers when a litigant seeks emergency relief is whether the litigant has brought the emergency on itself. If so, that may be a good reason to conclude the litigant is not entitled to emergency relief. *See Morgan v. White*, 964 F.3d 649, 651-52 (7th Cir. 2020) (per curiam).

B. Summary Disposition of Case

On occasion, the court may summarily decide an appeal when the motion papers, in conjunction with the record and the district court's opinion, show the appropriate disposition of the appeal with sufficient clarity that a call for briefs would be nothing but an invitation for the parties to waste their money and the court's time. Sparse briefing alone is not a reason to summarily affirm a district court judgment. *Semmerling v. Bormann*, 970 F.3d 886, 888 (7th Cir. 2020) (Brennan, J., in chambers). The court may summarily decide an appeal on its own initiative or on a party's motion even though the motion under consideration does not ask for such relief. *See Mather v. Village of Mundelein*, 869 F.2d 356, 357 (7th Cir. 1989) (per curiam).

Such summary proceedings are, however, an exception to the court's normal course of considering an appeal. *See Semmerling v. Bormann*, 970 F.3d 886, 888 (7th Cir. 2020) (Brennan, J., in chambers) ("this court generally disfavors motions for summary affirmance"). It "ought to be employed only when the appropriateness of such a course is clear and only with great solicitude for the substantial rights of the parties." *Williams v. Chrans*, 42 F.3d 1137, 1139 (7th Cir. 1994) (per curiam). An assessment is made whether "'the position of one party is so clearly correct as a matter of law that no substantial question regarding the outcome of the appeal exists.'" *Id.*, citing *Joshua v. United States*, 17 F.3d 378, 380 (Fed. Cir. 1994). For example, in deciding to grant a defendant's motion to file an interlocutory appeal, the court in *Johnson v. Pushpin Holdings, LLC*, 748 F.3d 769 (7th Cir. 2014), determined that the petition and response, together with the district court record, "adequately illuminate[d] the dispute". The panel, therefore, dispensed with further briefing and proceeded to decide the merits of the appeal.

C. Judicial Notice

The right place to propose judicial notice, once a case is in a court of appeals, is in a brief. There is no need to engage in motions practice. *In re Lisse*, 905 F.3d 495 (7th Cir. 2018) (Easterbrook, J., in chambers).

X. TEMPORARY RELIEF PENDING APPEAL

A party requesting relief soon after an appeal is filed should attempt to ensure that relevant parts of the district court docket are available electronically. Counsel should attach to a motion any necessary transcripts that are not yet available. A party requesting release in a criminal case should include a copy of the district court's order and the court's statement of reasons with the motion or as soon as practicable. Fed. R. App. P. 9(a) and (b). If, in an emergency, the appealed order is not available, counsel's statement of the reasons given by the district court for its action should be attached to the motion. The motion will usually be considered by a panel of judges but, if time is of the essence, a single judge may determine the motion. Fed. R. App. P. 8(a)(2), 9(a)(3), and 18(a)(2)(D).

If time is of the essence, counsel should advise the clerk's office that they will be filing an emergency motion. Cir. R. 27. Counsel should not expect that electronic filings will be read and acted on outside of business hours, unless arrangements for the emergency filing have been made in advance. Cir. R. 27. The motion should explain the necessity for having a quick response and should, if possible, be personally served on the other parties. Counsel should not wait until the last minute to make the request. Counsel should also include copies of all relevant district court orders and documents that the court may need to make a ruling. Cir. R. 8. *See also* this Handbook, *supra* at 101-02.

A. Civil Cases: Application for Stay Pending Appeal

Filing a notice of appeal does not automatically stay the operation of the judgment or order of which review is sought. *Employers Ins. of Wausau v. El Banco de Seguros del Estado*, 357 F.3d 666, 671-72 (7th Cir. 2004). A litigant must obey district court orders — regardless of the litigant's belief as to its correctness or validity — unless and until it is undone through proper channels, such as reconsideration by the district court or vacatur by the court of appeals, or stayed pending appeal. *MacNaughton v. Harmelech*, 932 F.3d 558, 565 (7th Cir. 2019).

Stays pending appeal are governed by Fed. R. Civ. P. 62, which works in conjunction with Fed. R. App. P. 8(a). Application for a stay should be made first to the district court. Fed. R. App. P. 8(a)(1). The court of appeals rarely will consider a motion for stay in the first instance.

If the motion is renewed in the court of appeals, the district court's reasons for its denial, in whole or in part, must be included. Fed. R. App. P. 8(a)(2)(A)(ii). The court prefers that the party attach the district court's written ruling or transcript of its oral ruling to the motion for stay. Cir. R. 8. But if copies are not available due to the need to present the motion on an emergency basis, counsel's statements of the court's reasons will suffice. *Id.*

The motion must also include "the reasons for granting relief requested and the facts relied on," and must be accompanied by "affidavits or other sworn statements" if the facts are in dispute and "relevant parts of the record." Fed. R. App. P. 8(a)(2)(B).

A stay pending appeal may be conditioned upon the filing of a bond or other security in the district court. Fed. R. App. P. 8(a)(2)(E).

The court will consider the following factors in determining the request for stay:

(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).

The court may use a sliding scale approach. So, if the appeal "has some though not necessarily great merit", then the moving party must show that the balance of equities strongly favors granting the stay. *Cavel Intern. v. Madison*, 500 F.3d 544, 546-47 (7th Cir. 2007).

B. Civil Cases: Motion for Injunction Pending Appeal

Sometimes a litigant may seek an injunction pending appeal. The court evaluates such a motion using the same factors for a preliminary injunction. *See Cavel Int'l, Inc. v. Madigan*, 500 F.3d 544, 547-48 (7th Cir. 2007). The moving party must establish that it has "(1) no adequate remedy at law and will suffer irreparable harm if a preliminary injunction is denied and (2) some likelihood of success on the merits." *Ezell v. City of Chicago*, 651 F.3d 684, 694 (7th Cir. 2011). Once the threshold requirements are met, the court weighs the equities, balancing each party's likelihood of success against the potential harms. *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of the U.S., Inc.*, 549 F.3d 1079, 1100 (7th Cir. 2008). The more the balance of harms tips in favor of an injunction, the lighter the burden on the party seeking the injunction to demonstrate that it will ultimately prevail. *Abbott Labs. v. Mead Johnson & Co.*, 971 F.2d 6, 12 (7th Cir. 1992).

C. Criminal Cases: Motions Concerning Custody Pending Trial or Appeal

1. Before sentencing.

Fed. R. Crim. P. 46 and 18 U.S.C. §§ 3142 and 3143 set forth the criteria governing the release of a defendant before trial, during trial, and after conviction but before sentencing. The order refusing or imposing conditions of release may be appealed to the court of appeals which may order the release of the defendant. Fed. R. App. P. 9(a); 18 U.S.C. § 3145. Unlike the normal appeal, the defendant, after filing a notice of appeal files a motion and the case is decided expeditiously upon the motion and response. *United States v. Daniels*, 772 F.2d 382, 383-84 (7th Cir. 1985). All requests for relief from custody or from an order granting bail or enlargement shall be by motion accompanied by a memorandum of law. Cir. R. 9(d).

2. After sentencing.

Fed. R. Crim. P. 38 allows the district court to stay the execution of a judgment of conviction upon such terms as the court sets. The defendant should initially request release pending appeal or modification of conditions of release in the district court. That court's order may then be reviewed on motion in the pending appeal of the conviction to the court of appeals, pursuant to Fed. R. App. P. 9(b) and 18 U.S.C. § 3145. "All requests for release from custody after sentencing and pending the disposition of the appeal shall be by motion" in the appeal of the conviction; no separate notice of appeal is needed. Cir. R. 9(c).

D. Administrative Agency Cases

Application should be made first to the agency. Fed. R. App. P. 18. If the agency denies relief or does not afford the relief requested, a petitioner can then apply to the court of appeals by motion. The motion may be made, on whatever notice is feasible, as soon as the agency order is entered. The motion should state what previous application for relief was made and what the result was. Grounds for the relief sought should be stated and the supporting material should be furnished. *Nken v. Holder*, 556 U.S. 418, 433-36 (2009).

XI. EXPEDITED APPEALS

In emergency situations an appeal may be expedited. If there is a need to expedite the appeal, counsel should promptly file the notice of appeal and be willing to file the brief in a severely shortened time period. The Seventh Circuit will act quickly when there is a compelling reason to do so, but counsel must make the court aware of the exigent circumstances so that the court can accelerate its decision of the appeal. *Wirtz v. City of South Bend*, 669 F.3d 860, 863 (7th Cir. 2012).

In the Seventh Circuit, the usual practice is to move simultaneously for an advancement of hearing and a stay of the judgment or order appealed from if that is necessary. Fed. R. App. P. 8 and 18. *See* this Handbook, Chapter X, s*upra* at 103-04.

The motion to advance should at a minimum describe the order or judgment appealed and explain why expedited treatment is necessary. If the advancement is granted, whether or not a stay is granted, the appeal will be set for oral argument at an early date even though the time usually permitted to file briefs may not have expired by the day of the hearing. Sometimes an appeal will be submitted to the court for decision without oral argument as a means of expediting. On occasion, an expedited scheduling is arranged via a case management conference held by the court in accordance with Circuit Rule 33. Counsel may request a case management conference for this purpose.

XII. APPEALS INVOLVING REQUESTS FOR RELIEF UNDER 28 U.S.C. § 2254 AND § 2255; PRISONER LITIGATION; DEATH PENALTY CASES

A. Collateral Attacks on Convictions or Sentences

28 U.S.C. § 2241, *et seq*., governs most collateral attacks on custody filed in federal court. But attacks on a conviction or sentence will involve § 2254 or § 2255. Federal Rule of Appellate Procedure 22(a) divests the courts of appeals of authority over original actions under § 2254 (state prisoners) and § 2255 (federal prisoners); the Seventh Circuit may consider only appeals from cases decided by a district court. Section 2253(c) and Appellate Rule 22(b) require petitioners attacking criminal convictions or sentences to file a notice of appeal and obtain a certificate of appealability. *Evans v. Cir. Ct. of Cook Cty., Ill.*, 569 F.3d 665 (7th Cir. 2009). An appeal will not be certified under § 2253(c) unless the petitioner can make a substantial showing of the denial of a constitutional right. If the district court's decision was based on a procedural barrier, then the petitioner must demonstrate not only a debatable constitutional claim, but also that the procedural ruling is debatable. *Davis v. Borgen*, 349 F.3d 1027 (7th Cir. 2003).

1. *Certificate of Appealability*.

Under Rule 11 of the Rules Governing § 2254 Cases and its corollary in the Rules Governing § 2255 Proceedings, the district court must either grant or deny a certificate of appealability when entering a final order adverse to the prisoner. Note, however, that a district court's failure to rule on whether to issue a certificate does not affect the timeline for filing a notice of appeal; the district court's decision is final as soon as collateral relief is denied.

If the district court declines certification or certifies fewer than all of a petitioner's claims, the petitioner may apply to the Seventh Circuit for certification (or for an expansion of the certificate to include additional claims). If the district court denied certification and the petitioner does not file a formal request for certification here, this court construes the notice of appeal as an implied request. *West v. Schneiter*, 485 F.3d 393, 394-95 (7th Cir. 2007). Be aware that an appeal from the denial of a post judgment motion in a closed § 2254 or §2255 case (*e.g.*, a Rule 60(b) motion) requires a certificate. *Id.* at 394.

Also, be mindful that only the issue(s) certified by this court or the district court are within the scope of appellate review. *See Peterson v. Douma*, 751 F.3d 524, 529 (7th Cir. 2014) ("[W]e have repeatedly said that an appeals panel will decide the merits of only those issues included in the certificate of appealability." (citation omitted)).

If the district court issues a certificate of appealability and the petitioner would like to brief additional claims, a formal, timely request to expand the certificate must be filed. *Hartsfield v. Dorethy*, 949 F.3d 307, 317 (7th Cir. 2020) (court declined petitioner's implicit request to expand certificate to include additional issues "late in the game"). Still, for *pro se* litigants who brief uncertified claims, the brief may be considered a request to expand the certificate. If, on the other hand, a review of the case reveals improperly certified claims, both the prisoner's counsel and government counsel have a duty to inform the court. *Lavin v. Rednour*, 641 F.3d 830 (7th Cir. 2011). *See Peterson v. Douma*, 751 F.3d 524, 529-530 (7th Cir. 2014), on the procedure for requesting amendments to a certificate of appealability.

2. *Appointment of Counsel; Pauper Status.*

When either the Seventh Circuit or the district court issues a certificate of appealability, this court regularly appoints counsel if the appellant cannot afford to retain counsel. *Lavin v. Rednour*, 641 F.3d 830, 834 (7th Cir. 2011). If the appellant proceeded in the district court with appointed counsel and the district court issues the certificate, this court does not automatically re-appoint counsel; the appellant generally must file a motion requesting the re-appointment of counsel. Unlike direct criminal appeals, *see* Cir. R. 51(a), there is no carry-over appointment of counsel in collateral attacks. *Johnson v. Chandler*, 487 F.3d 1037, 1038 (7th Cir. 2007) (per curiam); *see also Lavin*, 641 F.3d at 834 (prisoners do not have a right to counsel on collateral review). Thus, if an attorney that represented the petitioner in district court would like to continue the representation on appeal, counsel must file a motion for appointment.

In contrast, if the petitioner proceeded *in forma pauperis* in the district court, pauper status does carry over to the appeal. If the petitioner did not proceed *in forma pauperis* in the district court, an application for pauper status on appeal must be filed first in the district court. *See* Fed R. App. P. 24(a). Then, if the district court denies the *in forma pauperis* motion, the appellant may re-file that motion in this court.

All counsel appointments are made under the Criminal Justice Act. The Prison Litigation Reform Act, 28 U.S.C. § 1915(b), does not apply to *in forma pauperis* applications by prisoners filing collateral attacks; but the general *in forma pauperis* provisions, 28 U.S.C. § 1915(a), do apply. *See Walker v. O'Brien*, 216 F.3d 626, 633-37 (7th Cir. 2000).

3. *Successive Collateral Attacks.*

Prisoners are entitled to just one round of federal collateral review of a conviction or sentence. Prisoners who want to mount a second collateral attack must apply for permission from "the appropriate court of appeals." 28 U.S.C. §§ 2244(b) and 2255(h). *See Burton v. Stewart*, 549 U.S. 147 (2007). Circuit Rule 22.2 governs the form of these applications.

Accordingly, before reclassifying any post-judgment in a criminal case as one under § 2255, a district court must alert the movant and give him an opportunity to withdraw the motion, in order to avoid the limitations that attach to second or successive motions. *Castro v. United States*, 540 U.S. 375, 383 (2003).

B. Prisoner Litigation

The Prison Litigation Reform Act places restrictions on civil litigation by prisoners proceeding *in forma pauperis*. 28 U.S.C. § 1915(b). Fed. R. App. P. 24. Section 1915(b) requires the assessment and collection of the filing fee for an appeal, even in cases where the prisoner is granted leave to proceed *in forma pauperis*. The statute sets out a regimen for the assessment and collection of an initial partial filing fee and monthly payments from the prisoner's account until the fee is paid. The Act also restricts a prisoner's ability to file successive civil actions in federal court.

Notably, the Act bars prisoners from bringing an action in federal court without prepayment of fees if they have accrued three "strikes" from filing actions or appeals dismissed as frivolous. *See* 28 U.S.C. § 1915(g). The court, however, has never referred to the three-strike provision as a jurisdictional bar, instead treating it as one of the many procedural constraints imposed by the Act. *Isby v. Brown*, 856 F.3d 508, 520 (7th Cir. 2017) (explicitly holding the Act's three-strike provision as procedural, and not jurisdictional, in nature).

C. Death Penalty Appeals

All death penalty appeals (including direct criminal appeals in federal cases, federal collateral attacks under 28 U.S.C. § 2255, and state prisoner habeas corpus cases under 28 U.S.C. § 2254) proceed under the special procedures located in Circuit Rules 22 and 22.2.

The Antiterrorism and Effective Death Penalty Act of 1996 sets unique requirements for death penalty cases. Counsel handling death penalty appeals must carefully review the Act and any rules and case law addressing it.

Appeals in capital cases are expedited. Therefore, counsel must insure that preliminary matters handled by the district court, such as issuance of a certificate of appealability, motions for leave to proceed on appeal *in forma pauperis*, and motions for a stay of execution (both in state and federal court), are dealt with quickly.

Circuit Rule 22 requires counsel to do several things specific to death cases. For example, each side should keep the clerk informed of all phone numbers and email addresses (home, office, and cell) of one attorney who will serve as emergency representative. Lawyers handling these cases must consult the rule for guidance. Appointed counsel must also consult the court's Criminal Justice Act Plan, 18 U.S.C. §§ 3006A and 3599.

XIII. CROSS-APPEALS AND JOINT APPEALS

A. Cross-Appeals

The court of appeals is often called upon to decide more than one appeal from a single district court judgment. This is because sometimes the appellee too is dissatisfied with the court's judgment.

An appellee cannot attack the judgment, either to enlarge the appellee's own rights or to lessen the rights of the adversary, unless the appellee files a cross-appeal. *See American Bottom Conservancy v. U.S. Army Corps of Engineers*, 650 F.3d 652, 660 (7th Cir. 2011); *Kamelgard v. Macura*, 585 F.3d 334, 336 (7thCir. 2009); *Lee v. City of Chicago*, 330 F.3d 456, 471 (7th Cir. 2003); *Doll v. Brown*, 75 F.3d 1200, 1207 (7th Cir. 1996); *Tredway v. Farley*, 35 F.3d 288, 296 (7th Cir. 1994).

Simply put, a cross-appeal is necessary when alteration of a judgment is sought, even if the appellee seeks merely to correct an error in the judgment or to supplement the judgment with respect to a matter not dealt with below, J*ordan v. Duff & Phelps, Inc.*, 815 F.2d 429 (7th Cir. 1987); *see also Bernstein v. Beckert*, 733 F.3d 190, 224 (7th Cir. 2013), or to make the judgment more favorable to the appellee. *See Richardson v. City of Chicago*, 740 F.3d 1099, 1101 (7th Cir. 2014); *see also United States v. Jones*, 962 F.3d 956, 963 (7th Cir. 2020) (cross-appeal necessary if government is not just asking for affirmance but the alternative relief of vacatur and remand to enlarge a defendant's sentence); *MAO-MSO Recovery II, LLC v. State Farm Mutual Automobile Ins. Co.*, 935 F.3d 573, 577 (7th Cir. 2019) (where a defendant has won dismissal for lack of standing or some other jurisdictional ground, modifying the judgment to dismissal on the merits requires a cross-appeal).

The general rule requiring a cross-appeal does not apply, however, where a jurisdictional dismissal effectively bars relief on the merits in any judicial forum. *Matushkina v. Nielsen*, 877 F.3d 289, 296-97 (7th Cir. 2017).

On the other hand, an appellee may defend a judgment on any ground consistent with the record and not waived, even if the ground is rejected in the district court. *See WellPoint, Inc. v. Commissioner of Internal Revenue*, 599 F.3d 641, 650 (7th Cir. 2010). A cross-appeal should not be filed in this instance. *Weitzenkamp v. Unam Life Insurance Co. of America*, 661 F.3d 323, 332 (7th Cir. 2011); *Marcatante v. City of Chicago*, 657 F.3d 433, 438 (7th Cir. 2011); *Rose Acre Farms, Inc. v. Madigan*, 956 F.2d 670 (7th Cir. 1992). *See also* this Handbook, *supra* at 28-29.

When cross-appeals are filed, the court will consolidate the appeals and designate which party will file the opening brief as the main appellant. The court's practice alters the national rule which designates the party that files the first

appeal as the main appellant. In the Seventh Circuit the party most aggrieved by the judgment below files the opening brief although that party may not have filed the first appeal. *See* 7th Cir. Oper. Proc. 8. A party that believes the designation is inappropriate may file a motion for realignment of the briefing schedule. Cir. R. 28(d)(2). The party that is finally designated to file the opening brief also will be the first party to present oral argument. Fed. R. App. P. 34(c), (d).

Rule 28.1 of the Federal Rules of Appellate Procedure collects in one place the rules that pertain to briefing in cross-appeals. The court sets a briefing schedule in all cases involving cross-appeals. There will be four briefs filed by the two parties in the typical cross-appeal situation. No further briefs may be filed unless the court permits. Fed. R. App. P. 28.1(e)(5). The parties will not be allowed to file separate briefs in each appeal.

The Seventh Circuit has opted out of the changes to Fed. R. App. P.28.1 that decreased the word limit for briefs in cross-appeals. *See* Cir. R. 28.1. As with any appeal, the first brief is limited to 14,000 words or 30 pages and the brief's cover is blue. The second brief serves as the answering brief on appellant's appeal and as the main brief on appellee's cross-appeal. This brief must contain no more than 16,500 words or 35 pages and the cover of the brief is red. The third brief includes appellant's reply, if any, as to the main appeal and answering brief on the cross-appeal. This brief, like the first brief, is limited to 14,000 words or 30 pages and its cover is yellow. The fourth brief is the reply, if any, in the cross-appeal. This brief is limited to 7,000 words or 15 pages and the cover of the brief is grey. Note that all appellate docket numbers should be on the covers of all briefs. And, as with any appeal, the court will entertain motions for enlargement of the type volume or page limit if the party can establish the norm proves inappropriate. Cir. R. 28(d)(2).

B. Joint Appeals

Persons entitled to appeal whose interests are such as to make joinder practicable may file a joint notice of appeal or petition for review. The court may consolidate appeals when parties have filed separate timely notices or petitions, Fed. R. App. P. 3(b), 15(a), and the consolidated appeals will proceed as if it were a single appeal.

A separate appeal is docketed, a separate appellate docket number assigned, and separate filing and docketing fees assessed for each notice of appeal (or petition for review) that is filed. Therefore, if two or more parties intend to proceed in concert on appeal, their interests may be better served by filing one joint notice or petition.

The parties on the same side, or any number of them, may join in a single brief and are encouraged to do so. One party may adopt by reference any part of the brief of another, Fed. R. App. P. 28(i), except the jurisdictional statement. Each

separately filed appellant's brief must contain a jurisdictional statement. An appellee's brief must comply with Circuit Rule 28(b). Parties adopting, in total, the brief of another party should do so by motion.

Repetitious statements and arguments are to be avoided and can result in sanctions. *See United States v. Ashman*, 964 F.2d 596 (7th Cir. 1992). If more than one case involves the same question on appeal, they may be ordered by the court to be heard together as one appeal or set for argument on the same day before the same panel. Occasionally, the appeal in one or more cases may be suspended pending the decision in one of the related appeals.

XIV. APPEALS *IN FORMA PAUPERIS* AND COURT-APPOINTED COUNSEL

A. Appeals *In Forma Pauperis*

The Latin phrase *in forma pauperis* means "in the character or manner of a pauper." The district court and the court of appeals are authorized by 28 U.S.C. § 1915(a) and Fed. R. App. P. 24 to allow an appeal to be taken *in forma pauperis* — without prepayment of fees and costs or security for costs — by a party who makes an affidavit that he or she cannot pay them. The affidavit also must state the issues that the party intends to present on the appeal and the party's belief that he or she is entitled to redress. *See* Form 4, Affidavit Accompanying Motion for Permission to Appeal *In Forma Pauperis*, Appendix of Forms to Federal Rules of Appellate Procedure.

NOTE: The statement of issues is not needed for direct criminal appeals. Instead, the sole determination of *in forma pauperis* status for criminal matters is whether the defendant is "financially unable" to obtain adequate representation, not the inability to prepay fees and costs. 18 U.S.C. § 3006A(b). *See United States v. Durham*, 922 F.3d 845 (7th Cir. 2019) (Wood, C.J., in chambers).

Hiding assets, even if seemingly inconsequential, is not permissible. A party seeking *in forma pauperis* status must tell the truth and disclose all, and then argue why seemingly adverse facts are not dispositive. Failure to do so risks a court's determination (at any time) that the allegation of poverty is untrue, requiring dismissal of the case. *Kennedy v. Huibregtse*, 831 F.3d 441 (7th Cir. 2016).

Once the district court allows a party to proceed *in forma pauperis*, the party may continue on appeal *in forma pauperis* without further authorization unless the district court states that the appeal is not taken in good faith or the party's financial status has changed. Application may be made to the court of appeals only after the district court denies leave to proceed on appeal *in forma pauperis*.

Counsel handling civil litigation for incarcerated litigants must note that 28 U.S.C. § 1915 provides for installment payment of filing fees by prisoners. Counsel must consult the statute, Fed. R. App. P. 24, and case law interpreting the statute when handling these cases. *See, e.g., Thomas v. Zatecky*, 712 F.3d 1004 (7th Cir. 2013).

Court authorization is needed to obtain the necessary transcript for an indigent appellant. In a criminal case, court-appointed trial counsel should request the preparation of the transcript at the time of the determination of guilt, by filing C.J.A. Form 24 with the district court. If the district judge believes that an appeal is probable, the district judge will order transcription of the parts of the transcript

necessary for the appeal. The transcript is to be filed 40 days after the determination of guilt or seven days after sentencing, whichever is later.

If the court has not yet ordered the transcript by the time the notice of appeal is filed, counsel must renew the request in the district court immediately after filing the notice of appeal. Counsel for a defendant found guilty and later granted leave to appeal *in forma pauperis* should request the preparation of a transcript immediately. Cir. R. 10(d)(1). Counsel must utilize the "Seventh Circuit Transcript Information Sheet" as prescribed in Circuit Rule 10(c) when ordering transcripts or certifying that none will be ordered. *See* this Handbook, "A. Perfecting the Appeal" at Chapter XVI, *infra* at 130.

If the appeal is under the Criminal Justice Act, the district court or the court of appeals need only determine that the parts of the transcript requested are necessary to the issues to be raised on appeal. *See* 18 U.S.C. § 3006A(d)(1), (6); Fed. R. App. P. 10(b)(1). Counsel who seek to withdraw from a criminal appeal should order the preparation of either the plea hearing or trial transcript and the sentencing hearing transcript. In every other *in forma pauperis* case, the appeal and transcript preparation are conditioned on a determination by the district court or the court of appeals that the appeal is not frivolous and that the transcript sections are necessary to the appeal; request must first be made to the district court. Absent such a determination, the Administrative Office of the United States Courts will not pay for the transcript. *See* 28 U.S.C. § 753(f); Fed. R. App. P. 10(b).

Sometimes a litigant with a potentially meritorious claim isn't poor enough to qualify for *in forma pauperis* status but is financially unable to pay thousands of dollars for a trial transcript. In such a case, *in forma pauperis* status may be granted for the limited purpose of excusing the litigant from having to pay the cost of a transcript required for his appeal. *See Maus v. Baker*, 729 F.3d 708 (7th Cir. 2013) (Posner, J., in chambers) (ability to defray costs of transcripts assumed, without deciding).

B. Court-Appointed Counsel under the Criminal Justice Act

Until the passage of the Criminal Justice Act of 1964, 18 U.S.C. § 3006A, lawyers representing indigents were rewarded for their services only by the professional satisfaction of upholding an honorable tradition of the bar. *See McCaa v. Hamilton*, 959 F.3d 842, 845 (7th Cir. 2020) ("The tradition is older than the Nation or its courts."). The Act authorizes the payment of some compensation to lawyers who represent defendants in criminal cases. It says that a court must appoint counsel for an indigent criminal defendant when the Sixth Amendment so requires, *see* § 3006A(a)(1)(H), and may appoint counsel to pursue relief under 28 U.S.C. §§ 2241, 2254, or 2255. *See* § 3006(a)(2)(B). Prisoners who seek lower sentences following retroactive changes to the Sentencing Guidelines pursuant to 18 U.S.C. § 3582, however, cannot be appointed counsel under the Act. *United*

States v. Foster, 706 F.3d 887 (7th Cir. 2013). *But see United States v. Guerrero*, 946 F.3d 983, 985 (7th Cir. 2020) ("*Foster* holds that district courts are not *required* to appoint counsel … , but it does not *prohibit* them from doing so.") (emphasis in original).

The amount of compensation authorized has been increased over the years, but it is not meant to equal the rates charged by private counsel. The hourly rate of compensation for legal services provided on or after January 1, 2020, is $152.00 for in-court and out-of-court services, plus allowable expenses.

The statutory maximum amount of compensation is currently set at $8,400.00 for direct (non-capital) criminal appeals. The rate applies if counsel furnished any CJA-compensable work on or after January 1, 2020. The statute also allows compensation for discretionary appointment of counsel in habeas corpus cases and certain other proceedings not formerly falling within the terms of the statute. 18 U.S.C. § 3006A(d). The maximum amount of compensation for these appeals is also $8,400.00. Other representation required or authorized under the Act, including, but not limited to probation, supervised release hearing, material witness, and grand jury witness matters, is capped at $2,500.00. Appointed counsel in capital cases need to see 18 U.S.C. § 3006A and 21 U.S.C. § 3599(g)(1) which limits attorneys' fees in death penalty cases to $195.00 per hour, effective January 1, 2020.

The statutory maximum may be waived by the chief judge. To do so, the chief judge must find that the appeal is either "extended" or "complex". Many appeals fit in neither category, so counsel is often limited to the statutory maximum.

The Criminal Justice Act requires each circuit to put into effect a plan for furnishing representation for defendants charged with other than petty offenses who are financially unable to obtain an adequate defense. The Seventh Circuit Plan provides for a panel of attorneys from which counsel will be appointed by the court to represent defendants or other parties covered by the Act. The Plan can be found on the court's website.

For additional questions regarding the above or any other CJA matter, call Clarke Devereux, Seventh Circuit CJA/Case Budgeting Attorney, at (312) 818-6618 or email at clarke_devereux@ca7.uscourts.gov.

Attorneys wishing to join the panel of attorneys should complete the Volunteer Panel Questionnaire on the court's website and send it, along with a current resume, to Donald J. Wall, Counsel to the Circuit Executive. The Questionnaire asks whether counsel would be willing to handle appeals in which compensation is provided under the Criminal Justice Act or appeals in employment discrimination, civil rights and other civil or agency cases in which no compensation is available. Counsel that have multiple language skills should note that on the Questionnaire. Applications offering to serve as volunteers will be immediately acknowledged. Appointment to a specific appeal will not be made until some later

date, after counsel has first been notified by telephone as to the particular appeal needing appointed counsel. There are a limited number of appointments available, and normally counsel practicing within the Seventh Circuit are given preference.

The appointment of counsel in a direct criminal appeal is usually made by the court of appeals a short time after the appeal is docketed. Although the court is free to appoint other counsel, it will usually appoint the attorney who represented the defendant in the district court. Indeed, the attorney appointed in a criminal case by the district court must continue to represent his client on appeal unless and until he or she has been relieved of that responsibility by the court of appeals. *See* Plan, *infra*, and Cir. R. 51(a).

As the court is now live on the CJA eVoucher – Electronic Voucher Management System, counsel should refer to the Criminal Justice Act Information page on the court's website for eVoucher information and training. When an appointment is made, an email will automatically be sent to the appointed attorney. The email will confirm the appointment and provide a link to the CJA eVoucher program.

Circuit Rule 51(a) allows trial counsel to withdraw "freely" and for new counsel to be appointed in criminal cases. On the other hand, court-appointed counsel wishing to withdraw because the appeal is believed frivolous should consult Circuit Rule 51(b); *Anders v. California*, 386 U.S. 738 (1967); *United States v. Edwards*, 777 F.2d 364 (7th Cir. 1985); and *United States v. Wagner*, 103 F.3d 551 (7th Cir. 1996), in addition to *United States v. Bey*, 748 F.3d 774, 776 (7th Cir. 2014); *United States v. Konczak*, 683 F.3d 346 (7th Cir 2012); *United States v. Knox*, 287 F.3d 667 (7th Cir. 2002); and *United States v. Tabb*, 125 F.3d 583 (7th Cir. 1997) (per curiam) (a lawyer submitting an *Anders* brief is, in essence, offering an expert opinion that the appeal is devoid of merit).

Counsel should be mindful that the transcripts are essential in the preparation of a motion to withdraw based on *Anders*. *See United States v. Fernandez*, 174 F.3d 900, 902 (7th Cir. 1999) (per curiam). Attorneys who file an *Anders* motion in a case that was tried to a jury (or court) should pay particular attention to the court's discussion in *United States v. Palmer*, 600 F.3d 897 (7th Cir. 2010) (per curiam), reminding counsel that the court must have confidence that counsel thoroughly evaluated the record before the court will let the lawyer guide the court's review of the appeal.

Although prisoners do not have a right to counsel on collateral review of their state or federal court convictions, this court regularly recruits counsel to represent prisoners whose appeals have been certified because such cases are demonstrably colorable and quite often beyond the ability of the prisoner to address effectively. *Lavin v. Rednour*, 641 F.3d 830, 834 (7th Cir. 2011). If the district court appoints counsel in such a case, the appointment (unlike that in a criminal case) does not

carry over to the appeal. *Johnson v. Chandler*, 487 F.3d 1037 (7th Cir. 2007) (per curiam).

Importantly, the indigent defendant is not entitled to counsel of his choice. *See United States v. Gonzales-Lopez*, 126 S. Ct. 2557, 2565 (2006); *United States v. Bender*, 539 F.3d 449, 454 (7th Cir. 2008). And similarly, a defendant has no right to raise substantive issues while represented by counsel. *United States v. Cox,* 577 F.3d 833, 836 (7th Cir. 2009); *see also United States v. Cross*, 959 F.3d 847, 853 (7th Cir. 2020) ("A defendant does not have a right to represent himself when he is also represented by counsel."); *United States v. Oreye*, 263 F.3d 669, 673 (7th Cir. 2001) ("[W]e don't allow hybrid representation on appeal...because hybrid representation confuses and extends matters."). On the other hand, though a defendant does not have an affirmative right to submit a *pro se* brief when represented by counsel, nothing precludes an appellate court from accepting a *pro se* brief and considering the arguments contained in the brief for whatever they may be worth. *United States v. Eads*, 729 F.3d 769, 775 (7th Cir. 2013).

Sometimes, a defendant in a direct criminal appeal is adamant about proceeding on appeal without counsel. In such a situation, our task is to determine whether the defendant "knowingly and intelligently" waives the right to counsel on appeal. *See Faretta v. California*, 422 U.S. 806, 835 (1975); *United States v. Cross*, 959 F.3d 847, 852 (7th Cir. 2020) (in order to proceed *pro se*, a defendant must clearly and unequivocally raise the right to self-representation). The court usually will ask counsel to discuss with the defendant the consequences of handling an appeal without the benefit of counsel, in conformity with *Faretta*, to ensure that the defendant is fully aware of the hazards and disadvantages of self-representation on appeal, *see United States v. Eads*, 729 F.3d 769, 776 (7th Cir. 2013), and report back to the court. Counsel's discussion with the defendant should be thorough and include sufficient detail to ensure that the defendant's decision of self-representation is knowing, intelligent, voluntary and unequivocal. *See United States v. Clark*, 774 F.3d 1108, 1112-13 (7th Cir. 2014); *cf. United States v. Oreye*, 263 F.3d 669 (7th Cir. 2001) (inquiry regarding perils of self-representation should be sufficiently detailed).

To compensate counsel for prior work on the appeal, the appointment may be made retroactive to include any representation furnished pursuant to the Plan before appointment. However, trial counsel who handles the appeal must file separate vouchers for the representation of the indigent before the trial and appellate courts. Thus, there must be a reappointment by the court of appeals if counsel is to be paid under the Act for work on appeal.

Counsel is paid after appellate representation is finished and after the court issues its decision. Counsel is further reminded that appointment under the Criminal Justice Act in the court of appeals extends through preparing the case for the Supreme Court by filing a petition for a writ of certiorari if the appellant so

requests in writing and there are reasonable grounds for filing a petition. *See* Plan, *infra*. *See also United States v. Shaaban*, 514 F.3d 697 (7th Cir. 2008) (Ripple, J. in chambers) (interpreting the Plan to include a petition for rehearing).

Apart from compensation for work on the appeal, appointed counsel is also entitled to reimbursement for reasonably incurred expenses. *See* "Plan of the U.S. Court of Appeals for the Seventh Circuit" (Para. VI, Section 4). Counsel may only seek reimbursement for necessary travel and other costs which are documented, reasonable and allowable under the Criminal Justice Act Guidelines. Expenses in excess of $50.00 must be documented by a receipt or bill. If it is anticipated that such an expense will exceed $900.00, counsel should request prior permission of the court. Counsel must minimize travel expenses and, if air travel is warranted from the remote geographical areas of the circuit, counsel should contact Jeanette King in the Clerk's office at (312) 435-5860 for authorization to obtain governmental rates. This authorization should enable counsel to obtain government rates at hotels as well.

A number of years ago, the court presented day-long seminars in multiple locations specifically for the benefit of court-appointed counsel in federal criminal appeals. Judges, court staff and experienced appellate practitioners covered topics that every practitioner needs to know in representing indigent defendants in criminal appeals. The programs were taped and are available in DVD format. Counsel may contact staff at the William J. Campbell Library of the United States Courts, or any of its branch libraries throughout the circuit, to check out a set of the DVDs.

More recently, the court presented a day-long appellate practice seminar at The John Marshall Law School (Chicago, IL), now UIC John Marshall Law School. The video of the September 25, 2015 seminar can be found on the court's website. On the court's homepage, go to the Media Library. Access to the video is also available under News and Announcements on the court's website. The Seventh Circuit Bar Association also posted the entire program on its website in its Video Library.

C. Recruitment of Counsel in Civil Cases

There is no constitutional or statutory right to court-recruited counsel in federal civil litigation, *James v. Eli*, 889 F.3d 320, 326 (7th Cir. 2018); *Santiago v. Walls*, 599 F.3d 749, 760 (7th Cir. 2010), although an indigent litigant may ask the court to request an attorney to represent her. *Thomas v. Wardell*, 951 F.3d 854, 859 (7th Cir. 2020). All a court can do is seek a volunteer. *Ray v. Wexford Health Sources, Inc.*, 706 F.3d 864, 866-67 (7th Cir. 2013) (per curiam). Most indigent parties in civil litigation must fend for themselves. *See generally Bracey v. Grondin*, 712 F.3d 1012, 1016-17 (7th Cir. 2013) (standard for recruitment of counsel to handle a civil case in the district court discussed).

Unlike this court — which generally has an easier time recruiting counsel because of an appeal's limited scope and ability to draw on attorneys from throughout the nation in addition to the entire circuit — district courts are inevitably in the business of rationing a limited supply of free lawyer time due to the realities of recruiting from within the district for cases much broader in scope, which may include discovery, motion practice and trial. *McCaa v. Hamilton*, 959 F.3d 842, 845 (7th Cir. 2020). This court, therefore, often does not second guess a district court's discretionary decision to deny recruitment of counsel to an indigent litigant, and particularly recognizes the difficulty of accurately evaluating the need for counsel in the early stages of *pro se* litigation. *Mapes v. State of Indiana*, 932 F.3d 968, 971 (7th Cir. 2019) (per curiam).

Still, in a number of recent opinions, the court determined that the district court should have tried harder to recruit counsel. *See Thomas v. Wardell*, 951 F.3d 854 (7th Cir. 2020) (district court's discretionary call fell short of weighing the factors described in *Pruitt v. Mote*, 503 F.3d 647 (7th Cir. 2007) (en banc), and presence of counsel could have made a difference in the outcome of the litigation); *see also Walker v. Price*, 900 F.3d 933 (7th Cir. 2018); *McCaa v. Hamilton*, 893 F.3d 1027 (7th Cir. 2018); *James v. Eli*, 889 F.3d 320 (7th Cir. 2018); *Robinson v. Scrogum*, 876 F.3d 923 (7th Cir. 2017); *Davis v. Moroney*, 857 F.3d 748 (7th Cir. 2017). Of course, trying but failing to recruit counsel is another matter. A court that decides to recruit counsel need not continue the search indefinitely. *See McCaa v. Hamilton*, 893 F.3d at 1036 (Hamilton, J., concurring) (the supply of time and talent from generous lawyers is not infinite).

On the flipside, a recent opinion reminded judges that "they need not and should not recruit volunteer lawyers for civil claimants who won't cooperate with the basic requirements of litigation." *Cartwright v. Silver Cross Hospital*, 962 F.3d 933, 934 (7th Cir. 2020) (district court, without explanation, recruited a succession of pro bono attorneys to represent a "willfully uncooperative litigant"). The court reemphasized that the assistance of a pro bono lawyer in civil litigation — a limited resource — is a privilege and should not be squandered on *pro se* litigants who are "unwilling to uphold their obligations." *Id.* at 937. *Cf. Wells v. Caudill*, 967 F.3d 598, 601 (7th Cir. 2020) (whether *pro se* sought to hire a lawyer, without success, "matters" in determination to recruit counsel).

NOTE: Because of the current pandemic, which may affect prisoners' abilities to litigate from prisons for some time to come, courts may need to adjust the conditions for recruitment of counsel. *McCaa v. Hamilton*, 959 F.3d 842, 847 n.1 (7th Cir. 2020).

Often, however, counsel are willing to take cases that federal judges identify as worthy of legal assistance *pro bono publico* in civil cases not falling under the Criminal Justice Act. *Pruitt v. Mote*, 472 F.3d 484, 485 (7th Cir. 2006). These

attorneys not only provided free legal services to their clients but were also forced to absorb many incidental expenses of appeal.

To recognize the fine appellate representation provided by attorneys who accept *pro bono* civil appointments in the appellate court, the United States Court of Appeals for the Seventh Circuit has an appellate expense reimbursement program. Through this program, the Court hopes to encourage and enable more lawyers to accept *pro bono* appointments and provide much needed appellate representation by providing reimbursement for some of the necessary costs of appeal that lawyers must now absorb. The Court of Appeals will reimburse certain out-of-pocket expenses incurred by appointed counsel providing *pro bono* representation on appeal up to a maximum of $1,000.00.

Counsel who are recruited by a district court or the court of appeals and provide *pro bono* representation in the court of appeals may submit, at the conclusion of the appeal, an itemized request for reimbursement of certain necessary appellate expenses. Reimbursable expenses include the cost of reproducing and filing briefs and appendices, telephone charges for collect or long-distance calls, and reasonable costs of accommodations and travel to the court for oral argument. All expenses must be supported by a receipt and lodging expenses are subject to the same per diem amounts that apply to Criminal Justice Act appointments. Attorneys should try to keep their expenses to a minimum and always use the most cost-effective services. Expenses which are not supported by a receipt or that are deemed to be excessive or unnecessary will not be reimbursed. All requests for reimbursement and supporting documents should be submitted to the Clerk of the Court of Appeals after final disposition of the appeal.

Importantly, the recruitment of lawyers in civil cases do not carry over from one court to another. *DiAngelo v. Illinois Dept. of Public Aid*, 891 F.2d 1260, 1262 (7th Cir. 1989). This means that accepting a request by a district judge to handle a civil case is less onerous since counsel is not required to handle an appeal in the matter. Some lawyers who are willing to aid a party in one court may be unwilling to commit the time and resources necessary to do so in two courts. Other lawyers may think their skills suited to trials but not appellate work and therefore be reluctant to take a two-court appointment. Unsurprisingly, representation of indigent litigants on appeal come from members of the bar whose interests and skills run to appellate work.

Relatedly, litigants are reminded that a "nonlawyer can't handle a case on behalf of anyone except himself." *Georgakis v. Illinois State University*, 722 F.3d 1075, 1077 (7th Cir. 2013).

XV. GENERAL DUTIES OF COUNSEL IN THE COURT OF APPEALS

Cases in the court of appeals are governed by the Federal Rules of Appellate Procedure, the Circuit Rules of the United States Court of Appeals for the Seventh Circuit, and procedural orders of the court issued in most appeals.

Consistent and strict compliance with these rules and court orders is required of all attorneys handling appeals in this court. This enables the court to handle its cases effectively and smoothly, while lack of compliance causes needless delay and can result in dismissal of appeals or disciplinary action. Therefore, it should go without saying — do not ignore court orders. *See, e.g., In re Boyle-Saxton*, 668 F.3d 471 (7th Cir. 2012).

Counsel receives court-issued documents electronically via a "Notice of Docket Activity". The "Docket Text" of the Notice describes the content of the court's order. Importantly, that description may not completely reflect the content of the court's written order. Counsel, therefore, should always read the text of the order itself.

A. Settlement

Counsel, as an officer of the court, has a professional obligation to discuss with the client and opposing counsel the possibility of settling or otherwise disposing of the appeal without the need of a court decision. An agreed settlement is often superior to the remedy provided by a court decision since it provides a quicker, more certain resolution of the dispute and conserves the resources of both court and litigants. Counsel should keep the court informed of the progress of all settlement negotiations, especially for appeals under advisement or set for oral argument, by filing status reports with the clerk. When settlement becomes reasonably certain, counsel must so advise the clerk so that the court can decide whether to suspend its consideration of the appeal in anticipation of the appeal becoming moot. *See Selcke v. New England Insurance* Co., 2 F.3d 790, 791 (7th Cir. 1993). Once settlement is complete, counsel should immediately file an appropriate motion with the clerk.

On its own initiative, the court schedules confidential mediations in most types of fully-counseled civil appeals. Counsel in such appeals also may request that a mediation be scheduled. Fed. R. App. P. 33; Cir. R. 33; *see also* this Handbook, "B. Mediations" at Chapter XIX, *infra* at 141-42.

B. Appearance of Counsel

When an appeal is docketed by the court of appeals, the clerk will designate the counsel of record based on the first filed document from a party. *See* Cir. R. 3(d). That document should include counsel's post office address, email address, and telephone number.

Trial counsel in all criminal cases must continue their representation on appeal unless relieved of this responsibility by the court of appeals on motion to withdraw. Cir. R. 51(a). Only the court of appeals may make appellate appointments or relieve counsel of their duty to handle an appeal. *See also* this Handbook, Chapter XIV, *supra* at 114-19 and Chapter XVI, *infra*.

If an attorney is not representing the party on appeal, he or she should notify the court immediately of this fact by filing a notice of non-involvement. The lawyer seeking non-involvement should also provide address and telephone information for the party, if he or she is proceeding *pro se*, or for any substitute attorney. If the court is not made aware of counsel's non-involvement and the appeal is not prosecuted *pro se* or by another lawyer, needless delay ensues, and the case may get dismissed. Counsel of record may not withdraw from representation without leave of court unless another attorney of record is simultaneously substituted. Cir. R. 3(d).

C. Jurisdiction

A sizable minority of appeals are dismissed for lack of jurisdiction. Sometimes this occurs after the case has been fully briefed and many hours of staff and judge time have been invested in the case. To minimize this unfortunate occurrence, all counsel have a duty to ascertain appellate jurisdiction and trial court or administrative agency jurisdiction at the outset of the appeal process.

Circuit Rule 3(c) requires the early filing of an appellant's docketing statement, either with the notice of appeal in the district court or within seven days thereafter in the court of appeals. Circuit Rule 28(a) sets forth, in detail, the requirements for a comprehensive jurisdictional summary to be filed with the Cir. R. 3(c) statement and with the appellant's brief. Appellees must provide a complete statement of the basis for jurisdiction in both the district court and the court of appeals if they believe appellant's statement is not complete and correct. Simply pointing out the deficiencies in one's opponent's statement is not sufficient.

Also, counsel are often asked to submit "jurisdictional memoranda", addressing specific problems the court may have flagged. An appeal obviously lacking a jurisdictional basis may be considered frivolous. *See generally* Chapters VI & VII of this Handbook, *supra*.

D. Requirements for Filing Briefs

The court of appeals strictly enforces rules involving the timeliness and content of briefs. Counsel should review and follow closely the rules and orders governing this important stage of the appellate process. Briefing schedules in the court of appeals are established in most cases automatically by operation of Cir. R. 31(a) and Fed. R. App. P. 31(a) or by order of the court. Counsel must strictly adhere to all schedules.

If a brief cannot be filed by the date due, counsel must file a motion for extension of time at least seven days before the due date. These motions are not favored and must be supported by a detailed and complete affidavit in compliance with all provisions of Cir. R. 26. The fact that attorneys are busy and involved in other matters will not justify extensions of deadlines or failure to comply with the court's rules and orders. Attorneys practicing in this court must manage their practices so as to comply with this court's rules and orders. Not doing so can subject counsel to sanctions. *See, e.g.*, *In re Boyle-Saxton*, 668 F.3d 471 (7th Cir. 2012).

Also important are the form and content requirements for briefs filed in the court of appeals. *See* Fed. R. App. P. 28, 30, 31, 32; Cir. R. 12(b), 26.1, 28, 30, 31, 32. Lack of compliance with these rules, or attempts to circumvent them (*e.g.*, using type fonts not allowed under Fed. R. App. P. 32(a), not double spacing, or using improper margins) can result in a deficiency notice by the clerk's office or sanctions. *See Harvey v. Town of Merrillville*, 649 F.3d 526, 529-30 (7th Cir. 2011) (counsel warned that flouting the rules may lead to brief being stricken or sanctions).

In rare cases, counsel may find that an adequate argument cannot be presented within the type volume limitations of the court's rules. Extra text is allowed only by leave of court. Counsel, therefore, must file a motion for leave to file a brief that exceeds the applicable word or page limits well in advance of the due date. Counsel should explain the exceptional circumstances involved in the case and the efforts made to comply with the word or page limits. These motions are seldom granted and even then, only for a specific amount of additional text. Filing a brief before receiving permission can only result in needless delay and unnecessary production costs, and may result in sanctions, including the dismissal of the appeal. *Abner v. Scott Memorial Hospital*, 634 F.3d 962 (7th Cir. 2011). The practice of tendering an oversized brief with a motion for leave to file is unequivocally forbidden by this court. *See United States v. Devine*, 768 F.2d 210 (7th Cir. 1985) (en banc) (per curiam). A responding party is not entitled to extra pages or words simply because the other side was, and must file a motion containing its own arguments and explanation. *Green v. Carlson*, 813 F.2d 863 (7th Cir. 1987). *See also* this Handbook, *infra* at 184-85.

E. Requirement that all Appeals and Arguments be Well Grounded; Sanctions for Frivolous Appeals under Fed. R. App. P. 38

Counsel are advised to evaluate their appeal most carefully before proceeding in the court of appeals. Appellants must assure that any argument presented to this court, whether in motions, memoranda, or briefs, is well grounded in both law and fact. *See Stanard v. Nygren* 658 F.3d 792 (7th Cir. 2011) (attorney's arguments characterized as "irrelevant, conclusory and often incoherent"). Frivolous appeals abuse the right of access to the court, cause needless delay and expense, and can result in sanctions. *See, e.g.*, *Midlock v. Apple Vacations West, Inc.,* 406 F.3d 453 (7th Cir. 2005); *Rumsavich v. Borislow*, 154 F.3d 700, 703-704 (7th Cir. 1998).

Federal Rule of Appellate Procedure 38 provides that "[i]f a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee." Rule 38 is taken most seriously in this circuit. The rule serves to compensate prevailing parties in district courts for defending against meritless arguments on appeal and deters such appeals so that the court has adequate time to consider non-frivolous appeals. *See A.V. Consultants, Inc. v. Barnes*, 978 F.2d 996, 1003 (7th Cir. 1992); *A-Abart Elec. Supply, Inc. v. Emerson Elec. Co.*, 956 F.2d 1399, 1406 (7th Cir. 1992).

The court applies a two-part test for Rule 38 sanctions, determining: (1) whether the appeal is frivolous, and (2) whether sanctions are appropriate. *Harris N.A. v. Hershey,* 711 F.3d 794, 802, (7th Cir. 2013); *Lorentzen v. Anderson Pest Control*, 64 F.3d 327, 331 (7th Cir. 1995).

An appeal is frivolous if the result is foreordained by a lack of substance of appellant's arguments. *Ashkin v. Time Warner Cable Corp.*, 52 F.3d 140, 146 (7th Cir. 1995); *East St. Louis v. Circuit Court*, 986 F.2d 1142, 1145 (7th Cir. 1993). *See also Arnold v. Villarreal*, 853 F.3d 384, 389 (7th Cir. 2017). An appeal that is not necessarily groundless but was filed for an improper purpose, such as delay, is an abuse of process and is also sanctionable under the rule. *In re Hendrix*, 986 F.2d 195, 201 (7th Cir. 1993).

Rule 38 sanctions are appropriate if an appeal is perfunctory and makes no more than a cursory effort in challenging the district court's decision, *Clark v. Runyon*, 116 F.3d 275, 279 (7th Cir. 1997), is prosecuted with no reasonable expectation of altering the district court's judgment and for purposes of delay or harassment, or out of sheer obstinacy, *Smith v. Blue Cross & Blue Shield United*, 959 F.2d 655, 661 (7th Cir 1992), or when there is some evidence of bad faith. *See Ross v. Waukegan*, 5 F.3d 1084, 1090 (7th Cir. 1993); *Preze v. Board of Trustees, Pipefitters Welfare Fund Local 597*, 5 F.3d 272, 275 n.6 (7th Cir. 1993); *Koffski v. North Barrington*, 988 F.2d 41, 45 n.8 (7th Cir. 1993). *See also H.A.L. NY Holdings, LLC v. Guinan*, 958 F.3d 627, 637 (7th Cir. 2020) (appropriate to consider deterrent effect that sanctions offer).

It is worth emphasizing that good-faith arguments for modifying or reversing existing law do not warrant sanctions. But it is quite a different matter when an appellant fails to put together a coherent argument that comes to grips with the applicable law, the relevant facts, and the district court's reasoning. The court put it this way,

> "What is sanctionable is not merely repeating a losing argument. That is necessary to avoid waiver. What is sanctionable is doing so while failing to present any arguable reasons why the district court erred in rejecting the argument the first time."

H.A.L. NY Holdings, LLC v. Guinan, 958 F.3d 627, 636 (7th Cir. 2020) (internal quotation marks and citations omitted).

Although Fed. R. Civ. P. 11 does not apply to papers filed in the court of appeals, the provisions of that rule prohibiting groundless assertions and allowing severe penalties for noncompliance are looked to in interpreting Fed. R. App. P. 38. *See Sparks v. NLRB*, 835 F.2d 705, 707 (7th Cir. 1987); *Thornton v. Wahl*, 787 F.2d 1151, 1153 (7th Cir. 1986).

Rule 38 sanctions can be imposed either on motion of the appellee or on the court's own initiative, and counsel can be sanctioned personally when it is clear that the appellant is not at fault in filing a frivolous appeal. *Osuch v. Immigration & Naturalization Service*, 970 F.2d 394, 396 (7th Cir 1992). A litigant requesting sanctions should request them in a "separately filed motion" so the adverse litigant knows it should respond. *Heinen v. Northrop Grumman Corp.*, 671 F.3d 669, 671 (7th Cir. 2012); *McDonough v. Royal Caribbean Cruises, Ltd.*, 48 F.3d 256, 258 (7th Cir. 1995). The court may elect to award sanctions on its own initiative after giving reasonable notice to the persons that it is contemplating sanctioning and allowing them an opportunity to respond. *Heinen*, 48 F.3d at 258-59.

In extreme cases where a litigant has so abused his or her access to the court, and monetary or other sanctions have proven ineffective, the court may bar that litigant from filing any pleading (other than as a defendant in a criminal action or habeas corpus action involving the litigant) in any federal court in the circuit. In such case, the court will direct the clerks of the federal courts in the circuit not to accept filings from the litigant until the litigant complies with all prior sanction orders. *See In re City of* Chicago, 500 F.3d 582 (7th Cir. 2007); *Support Systems International, Inc. v. Mack*, 45 F.3d 185 (7th Cir. 1995).

Federal Rule of Appellate Procedure 46(c) authorizes the court to discipline any attorney 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. "Judges are better able than clients to separate competent from bungling attorneys, and we have a duty to ensure the maintenance of professional standards by members of our bar." *Sambrano v. Mabus*, 663 F.3d 879, 882 (7th Cir. 2011).

A thoughtful analysis of one's appeal, careful review of the procedural and substantive rules of practice, and compliance with those rules fosters a smooth and effective appeal process. Attorneys practicing in this court must proceed accordingly.

For more on appellate sanctions, *see* this Handbook, Chapter XXXIII, *infra*.

F. Responsibilities of Counsel When Appellate Adversary Appears *Pro Se*

When one side in an appeal is *pro se*, the counseled party should be particularly attentive to its own obligations. For example, in discussing the sufficiency of a *pro se* complaint, counsel should recognize that even in the wake of *Bell Atlantic Corp. v. Twombly* 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), pleading standards for *pro se* litigants are relaxed. *See Arnett v. Webster*, 658 F.3d 742, 751 (7th Cir. 2011) (reminding courts to "construe *pro se* complaints liberally and hold them to a less stringent standard than formal pleadings drafted by lawyers"); *see also Swanson v. Citibank, N.A.*, 614 F.3d 400, 404 (7th Cir. 2010) (explaining after *Iqbal* that the plaintiff need only "give enough details about the subject-matter of the case to present a story that holds together").

Importantly, *pro se* litigants who are attorneys are not entitled to the flexible treatment granted other *pro se* litigants. *Cole v. C.I.R.*, 673 F.3d 767, 773 (7th Cir. 2011). On the other hand, a *pro se* litigant who is assisted by a non-attorney advocate or jailhouse lawyer "is entitled to every indulgence in the court's procedural rulings." *Merritt v. Faulkner*, 697 F.2d 761, 769 (7th Cir. 1983) (Posner, J., concurring); *see also United States v. Sandoval-Lopez*, 409 F.3d 1193, 1198 (7th Cir. 2005) (viewing pleading broadly because litigant was "[p]roceeding pro se, or only with the assistance of a jailhouse lawyer").

As the court noted in *Osagiede v. United States*, 543 F.3d 399, 405 (7th Circuit 2008), *pro se* litigants "will, at times, confuse legal theories or draw the wrong legal implications from a set of facts. . .[b]ut we do not treat every technical defect as a grounds for rejection." Rather, the question for the court is whether the complaint "adequately presents the legal and factual basis for the claim, even if the precise legal theory is inartfully articulated or more difficult to discern." *Ambrose v. Roeckeman*, 749 F.3d 615, 618 (7th Cir. 2014) (citing *Osagiede*).

At the same time, "[d]istrict judges do not have an affirmative duty to coach or second-guess the choices that parties, even *pro se* parties, make about how to litigate their cases." *Kiebala v. Boris*, 928 F.3d 680, 681 (7th Cir. 2019). Put another way, "[d]istrict courts are not charged with seeking out legal issues lurking within the confines of the *pro se* litigant's pleadings, and the court's duties certainly do not extend so far as *to require* the court to bring to the attention of the pro se litigant or to decide the *unraised* issues." *Id.* at 684-85 (emphasis in original) (internal quotations omitted).

Counsel also should recognize that the court distinguishes between complaints that are unintelligible and those that are merely long. *Kadmovas v. Stevens*, 706 F.3d 843 (7th Cir. 2013). So, if a *pro se* litigant's complaint — though unwieldy — adequately states his claims, the court may ignore the litigant's failure to comply with the brevity and clarity requirement of Fed. R. Civ. P. 8(a). *Freeman*

v. Metro. Water Reclamation Distr. of Greater Chicago, 927 F.3d 961, 966 (7th Cir. 2019) (per curiam).

Finally, counsel should understand that, where appropriate, the court of appeals will construe a *pro se*'s filing in the district court as what the *pro se* intended it to be treated, regardless of its label. *Williams v. Milwaukee Health Services*, 732 F.3d 770 (7th Cir. 2013); *Smith v. Grams*, 565 F.3d 1037 (7th Cir. 2009); *Lewis v. Sternes*, 390 F.3d 1019, 1027 (7th Cir. 2004); *see also United States v. Sutton*, 962 F.3d 979, 984 (7th Cir. 2020) ("we review pro se filings by substance, not label"). *Cf. United States v. Guerrero*, 946 F.3d 983, 987 (7th Cir. 2020) ("It is 'exceptional' within our adversarial system for a court to recharacterize a party's request, especially when doing so may harm that party's interests.").

On appeal, the court of appeals construes *pro se* filings liberally and will address any cogent arguments it is able to discern in a *pro se* appellate brief. *Parker v. Four Seasons Hotels, Ltd.* 845 F.3d 807, 811 (7th Cir. 2017). But this does not mean that a *pro se* litigant is free to ignore the court's rules and orders. *See Correa v. White*, 518 F.3d 516, 517 (7th Cir. 2008) (per curiam).

Litigants, including those who proceed without counsel, must follow court rules and directives. *McInnis v. Duncan*, 697 F.3d 661, 665 (7th Cir. 2012) (per curiam). The brief, for example, must contain an argument consisting of more than a generalized assertion of error, and include citations to relevant supporting authority. A *pro se* brief that offers no articulable basis for disturbing the district court's judgment, merely repeating allegations in the complaint and citing irrelevant cases, justifies dismissal. *Anderson v. Hardiman*, 241 F.3d 544 (7th Cir. 2001). Nor will the court relax the rule for *pro se* litigants which prohibits the presentation of new evidence on appeal. *Hirmiz v. New Harrison Hotel Corp.*, 865 F.3d 475, 476 (7th Cir. 2017).

Also, the court of appeals has not hesitated to sanction persistent obstinacy or a desire to file repeated frivolous lawsuits, issuing *Mack* orders (to use a colloquial term) directed to offending litigants. S*ee*, *e.g.*, *In re City of Chicago*, 500 F.3d 582, 585-586 (7th Cir. 2007) (explaining *Mack* orders and how they are supposed to work). The court, however, generally warns the litigant before such action is taken.

As in any appeal, the counseled party should maintain its credibility by not misstating the law to take advantage of the relative inexperience of the *pro se* party. For example, the counseled party should not dismiss a *pro se*'s self-interested affidavits as unworthy of credence merely because they are self-serving. *Till v. Tangherlini*, 724 F.3d 965 (7th Cir. 2013); *Navejar v. Iyiola*, 718 F.3d 692 (7th Cir. 2013). Counsel further may consider alerting the *pro* se to obligations, such as the need for a transcript on appeal, *see* Fed. R. App. P. 10(b)(2), or the need for the non-lawyer litigant to retain counsel to represent another adult, corporation, or estate.

Rowland v. California Men's Colony, 506 U.S. 194, 201-02 (1993); *Nocula v. Tooling Systems International Corp.*, 520 F.3d 719, 725 (7th Cir. 2008); *Malone v. Nielson*, 474 F.3d 934, 937 (7th Cir. 2007); *see also Georgakis v. Illinois State University,* 722 F.3d 1075, 1077 (7th Cir. 2013).

One further note is appropriate here. A litigant who is represented by counsel is not authorized to act as his own lawyer; this is a confusing mode of representation and one not permitted. *Sheikh v. Grant Regional Health Center*, 769 F.3d 549, 552 (7th Cir. 2014).

XVI. DUTIES OF TRIAL COUNSEL IN CRIMINAL CASES WITH REGARD TO APPEALS

A. Perfecting the Appeal

Court-appointed and retained trial counsel must handle the appeal of a criminal defendant unless relieved by the court of appeals. Cir. R. 51(a). Retained trial counsel is generally appointed to represent the defendant on appeal if the defendant is no longer able to afford counsel and is granted leave to proceed on appeal *in forma pauperis* by the district court or the court of appeals. The order of appointment will be sent to appointed counsel, and a separate email will provide a link to the CJA eVoucher program. Trial counsel should take the following necessary steps to perfect the appeal:

1. Appointed counsel must request a transcript at the time guilt is determined and must renew that request at sentencing if the district judge has not ordered the transcript prepared. Cir. R. 10(d)(1).

2. Counsel, whether retained or appointed, must file a timely notice of appeal — a purely ministerial task that imposes no great burden on counsel — and pay the $5.00 filing fee and $500.00 docketing fee to the district court clerk unless defendant has been granted leave to proceed as a pauper. Fed. R. App. P. 3(e).

   NOTE: A lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable. *Garza v. Idaho*, 139 S. Ct. 738, 746 (2019).

3. Retained counsel must assist a defendant with the filing of a motion to proceed on appeal *in forma pauperis* if the defendant is financially unable to hire appellate counsel.

4. Within 14 days after filing the notice of appeal, retained counsel must order and arrange payment for the transcript or complete the necessary CJA forms. Fed. R. App. P. 10(b); Cir. R. 10(d).

5. Retained and appointed counsel should utilize the prescribed form in ordering transcripts or certifying that none will be ordered. This form, the "Seventh Circuit Transcript Information Sheet," may be obtained from the district court clerk or the court reporter. Cir. R. 10(c).

6. Counsel must participate in any docketing or case management conference. Cir. R. 33.

7. Counsel must ensure, within 21 days of the appeal's filing, that all electronic and nonelectronic documents necessary for appellate review are on the district court docket. Cir. R. 10(a)(3).

8. Within 7 days after the appeal is filed, counsel must appear and file a docketing statement. Cir. R. 3(c).

B. Counsel Who Does Not Wish to Proceed on Appeal

When a convicted defendant wants to appeal and appointed trial counsel wishes to withdraw, counsel is still responsible for representing the defendant until relieved by the court of appeals. *See* Cir. R. 51(a). Circuit Rule 51(a) requires retained trial counsel also to continue representation on appeal, unless relieved of this responsibility by the court of appeals. If the defendant lacks funds to pay his previously retained attorney for the appeal, the attorney should file a motion with the district court requesting leave to appeal *in forma pauperis*. *See generally United States v. Durham*, 922 F.3d 845 (7th Cir. 2019) (Wood, C.J., in chambers). If denied, the motion may be renewed in the court of appeals. If the district court grants the motion, counsel may proceed without further application to the court of appeals. Fed. R. App. P. 24. The court of appeals may then appoint counsel pursuant to the Criminal Justice Act. 18 U.S.C. § 3006A.

Counsel should not move to withdraw until the appeal is docketed. If counsel wishes to withdraw as counsel, a motion in the proper form, pursuant to Fed. R. App. P. 27, must be filed within 14 days of filing of the notice of appeal. Cir. R. 51(c). The motion should contain a proof of service on the defendant. The court of appeals will freely grant such motions and make all appellate appointments. Cir. R. 51(a). Counsel should also order all transcripts at the time the motion to withdraw is filed and file the required Circuit Rule 3(c) docketing statement.

If substitute counsel is retained, the motion to withdraw must reveal that new counsel has been retained to represent the defendant on appeal. The signed appearance of the new counsel should be tendered with the motion, along with the signed consent and acknowledgment of the defendant to the substitution of counsel.

Counsel also might move to withdraw because of inability to agree with the defendant as to the issues to be argued on appeal, or because after study counsel finds the appeal to be without merit. In the latter case, counsel must follow the procedure set forth in Circuit Rule 51(b). *See* this Handbook, "C. Withdrawal of Court-Appointed Counsel" at Chapter XVII, *infra* at 133-35.

NOTE: While the defendant has the ultimate authority to decide whether to take an appeal, the choice of what specific arguments to make within that appeal belongs to appellate counsel. *Garza v. Idaho*, 139 S. Ct. 738, 746 (2019).

If such a motion is granted in the case of an indigent defendant, the court may order the appointment of new counsel from the panel of attorneys maintained by the clerk for that purpose. Compensation will be made under the Criminal Justice Act. 18 U.S.C § 3006A. *See* this Handbook, "B. Court-Appointed Counsel under the Criminal Justice Act" at Chapter XIV, *supra* at 115-16.

No defendant, indigent or otherwise, will be allowed to proceed *pro se* (on his or her own behalf) on a criminal appeal except on a clear showing that the defendant insists upon doing so after having been advised of the right to counsel. If a defendant insists, counsel must advise the defendant of the brief filing requirements. *See Faretta v. California*, 422 U.S. 806, 835 (1975); *United States v. Cross*, 959 F.3d 847, 852 (7th Cir. 2020) (in order to proceed *pro se*, a defendant must clearly and unequivocally raise the right to self-representation). *See also United States v. Eads*, 729 F.3d 769, 776 (7th Cir. 2013); *United States v. Clark*, 774 F.3d 1108, 1112-13 (7th Cir. 2014); *cf. United States v. Oreye*, 263 F.3d 669 (7th Cir. 2001) (inquiry regarding perils of self-representation should be sufficiently detailed). *See also* this Handbook, *supra* at 118.

XVII. DISMISSAL OF ANY TYPE OF APPEAL AND WITHDRAWAL OF COURT-APPOINTED COUNSEL

A. Voluntary Dismissal

If an appeal has not been docketed, it may be dismissed by the district court on stipulation or upon motion and notice by the appellant. Fed. R. App. P. 42(a). Once docketed in the court of appeals, an appeal may be dismissed in that court on the stipulation of all parties or on motion of appellant. There is a presumption in favor of dismissal when the parties agree on terms, but the procedure is not automatic. *See Albers v. Eli Lilly & Co.*, 354 F.3d 644 (7th Cir. 2004). Further, the stipulation or motion should state who is to bear the costs on appeal. Fed. R. App. P. 42(b).

A request to dismiss the appeal of class action litigation receives heightened scrutiny due to the effects it may have on the interests of the unrepresented class members. *Safeco Ins. Co. of America v. American International Group, Inc.*, 710 F.3d 754, 759 (7th Cir. 2013).

If the court believes that a merits review would be "an opportunity to provide additional guidance to the district courts", it may choose not to grant a joint motion to dismiss because to do so would be, in the court's words, "irresponsible". *Americana Art China Co., Inc. v. Foxfire Printing & Packaging, Inc.*, 743 F.3d 243, 246 (7th Cir. 2014).

And, if the appeal is from a criminal conviction, there must be a signed acknowledgment and consent from the defendant in substantially the form set out in Appendix III to the Circuit Rules. Cir. R. 51(f).

B. Dismissal for Failure to Perfect Appeal

Practitioners in this court should be aware that deadlines are not to be taken lightly and that missing them may result in severe consequences. *See In re Bluestein & Company*, 68 F.3d 1022, 1027 (7th Cir. 1995) (per curiam).

The clerk is authorized to dismiss an appeal if the docketing fee is not paid within 14 days. Cir. R. 3(b). Failure of the appellant to file a brief when due may also result in dismissal of the appeal, Cir. R. 31(c), or the imposition of disciplinary sanctions. Fed. R. App. P. 46(c). Failure to timely file a docketing statement will result in fines or dismissal of the appeal. Cir. R. 3(c)(2). *See also* 7th Cir. Oper. Proc. 7(a).

C. Withdrawal of Court-Appointed Counsel — The *Anders* Brief

Appointed counsel who wishes to withdraw because the appeal is frivolous must file a brief in accord with *Anders v. California*, 386 U.S. 738 (1967), and

United States v. Edwards, 777 F.2d 364 (7th Cir. 1985), along with a motion to withdraw. The brief should refer to "anything in the record that might arguably support the appeal." *Anders v. California*, 386 U.S. at 744. A motion to withdraw accompanied by a brief which merely certifies that there is nothing in the record which might support an appeal is insufficient and does not comply with *Anders'* prohibition against "no merit" letters.

Counsel seeking to withdraw on the ground that there are no non-frivolous grounds for appeal must file a brief which should "(1) identify, with record references and case citations, any feature of the proceeding in the district court that a court or another lawyer might conceivably think worth citing to the appellate court as a possible ground of error; (2) sketch the argument for reversal that might be made with respect to each such potential ground of error; and (3) explain why counsel nevertheless believes that none of these arguments is non-frivolous." *United States v. Edwards*, 777 F.2d at 366. *See also United States v. Wagner*, 103 F.3d 551 (7th Cir. 1996). The clerk then serves notice on the appellant along with a copy of counsel's motion and *Anders* brief, who is then given 30 days to file a response. *See* Appendix II to Circuit Rules. This same procedure is to be followed when the appellee moves to dismiss and counsel for the appellant believes that any argument that could be made in opposition to that motion would be frivolous. Cir. R. 51(b).

Preparation of the record, including the transcripts, is necessary for the court to satisfy itself that counsel has been diligent in examining the record for meritorious issues and that the appeal is indeed frivolous. *United States v. Fernandez*, 174 F.3d 900, 902 (7th Cir. 1999) (per curiam); *see also United States v. Pippen*, 115 F.3d 422, 426 (7th Cir. 1997). In short, an *Anders* brief must set out the nature of the case and the course of the proceedings in enough detail to demonstrate that counsel evaluated the entire record. *See United States v. Palmer*, 600 F.3d 897 (7th Cir. 2010) (*Anders* brief did not reflect the close scrutiny expected of counsel).

The court will grant counsel's motion to withdraw and dismiss the appeal as frivolous if, after an examination of the *Anders* brief, it is satisfied that counsel has conscientiously examined the case and that the issues raised in the *Anders* brief are fully and intelligently discussed but nonetheless are groundless in light of legal principles and rulings. *United States v. Wagner*, 103 F.3d 551, 553 (7th Cir. 1996). To put it another way, the court will examine the *Anders* brief to see if "the brief appears to be a competent effort to determine whether the defendant has any grounds for appealing. That appearance reassures [the court] that the issues discussed in the brief are the only serious candidates for appellate review and so the only ones [the court] need consider." *United States v. Bey*, 748 F3d. 774, 776 (7th Cir. 2014).

The court will not conduct an independent top-to-bottom review of the record in search of additional issues that may not be frivolous. On the other hand, if the *Anders* brief is inadequate on its face, the court will deny the motion and either

direct counsel to file a new brief or discharge counsel and appoint a new lawyer for the defendant. Similarly, if the court identifies a non-frivolous issue in its examination of the *Anders* brief, the court will order full briefing on the merits.

Even though the court is not compelled to do so, as a matter of practice the court follows the *Anders* procedures for other criminal matters, such as appeals from the revocation of supervised release where court-appointed counsel represents the defendant. The court reasons that the *Anders* regimen has proven to be an effective way to weed out hopeless appeals. *United States v. Durham*, 922 F.3d 845, 847 (7th Cir. 2019) (Wood, C.J., in chambers), citing *United States v. Brown*, 823 F.3d 392, 394 (7th Cir. 2016).

D. Dismissal in *Pro Se* Appeals to Review a Conviction

As to a government motion to dismiss a *pro se* appeal to review a conviction for any reason other than failure to file a brief on time, *see* Cir. R. 51(d) and Appendix II to the Circuit Rules. *See also United States v. Mason*, 343 F.3d 893, 894-95 (7th Cir. 2003).

E. Incompetent Appellants

As to an incompetent appellant, *see* Cir. R. 51(g).

F. Fugitive Disentitlement Doctrine

It has been long recognized that dismissal of a criminal appeal is warranted when a defendant becomes a fugitive; dismissal, though, is discretionary. *United States v. Jacob*, 714 F.3d 1032 (7th Cir. 2013) (per curiam).

XVIII. HOW AN APPEAL IS TAKEN

The Federal Rules of Appellate Procedure cover the means of access to a United States Court of Appeals, whether by appeal from a district court as a matter of right or with permission; by appeal from the United States Tax Court; by petition to review or enforce an administrative agency determination; or by an original proceeding. Fed. R. App. P. 1. The parties on appeal are designated as they appeared in the district court. Depending upon the type of appellate proceedings, the party commencing the appeal is captioned "appellant" or "petitioner" and the adversary, "appellee" or "respondent", respectively. Actions seeking habeas corpus shall be designated Petitioner v. Custodian and not United States ex rel. Petitioner v. Custodian. Cir. R. 12(b). Since this Handbook cannot be exhaustive, parties should also consult the Federal Rules of Appellate Procedure, the Circuit Rules and current case law.

A. Appellate Jurisdiction

Counsel should check to make sure that the court of appeals has jurisdiction to handle the appeal. Common errors include appealing a conviction before sentencing, an order which is not final as to all parties and all claims, and a decision in a civil case beyond the time prescribed by statute. *See* Chapter VI of this Handbook, *supra*.

B. Civil and Criminal Appeals from the District Court as a Matter of Right

An appeal is taken by filing a notice of appeal with the clerk of the district court within the time prescribed. Fed. R. App. P. 3(a); Cir. R. 3(a). The notice of appeal must state the court to which the appeal is taken, individually name the parties taking the appeal, and designate the judgment or order appealed from. Fed. R. App. P. 3(c). *See* Form 1, Appendix of Forms to Federal Rules of Appellate Procedure. The clerk of the district court notifies the other parties that a notice of appeal has been filed and sends a copy of the notice of appeal, the judgment and order(s) appealed, and district court docket entries to the clerk of the court of appeals. Fed. R. App. P. 3(d); Cir. R. 3(a).

C. Bond for Costs on Appeal in Civil Cases. Fed. R. App. P. 7

The district court may require an appellant to file a bond or provide other security to ensure payment of costs on appeal under Fed. R. App. P. 7. The district court, however, has the discretion to waive a bond requirement. *In re Carlson*, 224 F.3d 716, 719 (7th Cir. 2000).

D. Appeals by Permission from Interlocutory Orders of the District Court under 28 U.S.C. § 1292(b)

Rule 5 of the Federal Rules of Appellate Procedure sets out the requirements of a petition for permission to appeal — which must be filed in the court of appeals. *See also* this Handbook, Chapter VI, *supra* at 60-62.

The petition for permission to appeal must state the controlling question of law which is being appealed, the facts necessary to understand the question, the relief sought, 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 v. Bd. of Trustees of the Univ. of Illinois*, 219 F.3d 674 (7th Cir. 2000). The order complained of must be included, as well as any related findings, conclusions, or opinion and any order stating the district court's permission to appeal.

The petition — excluding the accompanying documents required by Rule 5(b)(1)(E) — must not exceed 5,200 words if the petition is produced using a computer or 20 pages if handwritten or typewritten. Fed R. App. P. 5(c).

No docketing fee is required at the time of filing. The petition for leave to appeal will immediately be placed on the miscellaneous docket by the court of appeals clerk. The adverse party may answer the petition within 10 days. Unless otherwise ordered by the court of appeals, the application is submitted without oral argument after the expiration of the 10-day period or after the filing of the answer, whichever first occurs.

If permission to appeal is granted, a notice of appeal need not be filed. Fed. R. App. P. 5(d)(2). However, the docketing fee must then be paid to the district court clerk and the bond for costs on appeal, if required, must be filed. Both must be done within 14 days after entry of the order granting permission to appeal. Fed. R. App. P. 5(d)(1).

Once the fee is paid, the case will be assigned a new docket number on the court's general docket. Docketing the appeal then proceeds as in other civil appeals. The time for docketing the record runs from the date of the order of the court of appeals granting permission to appeal. That order is, for procedural purposes, analogous to a notice of appeal. Fed. R. App. P. 5(d)(2). Normally, briefing is set by court order.

At times, the petition, the adverse party's response, together with the district court's opinion explaining its decision and the record in the district court, provide an ample basis for deciding the appeal. In such a case, the court may dispense with further briefing and with oral argument and decide the appeal in the same order granting permission to appeal. *See, e.g., Motorola Mobility LLC v. AU Optronics Corp.*, 746 F.3d 842, 843 (7th Cir. 2014).

E. Bankruptcy Appeals

The usual appeal route is from the bankruptcy court to the district court to the court of appeals. Fed. R. App. P. 6. The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, 28 U.S.C. § 158(d), permits a direct appeal to the court of appeals from a final judgment, order, or decree of a bankruptcy court, if the bankruptcy court or the district court, acting on its own or on a party's motion, or if the parties acting jointly, certify one of the following: (1) the judgment, order, or decree involves a question of law as to which there is no controlling decision of the court of appeals for the circuit or of the Supreme Court of the United States, or involves a matter of public importance; (2) the judgment, order, or decree involves a question of law requiring resolution of conflicting decisions; or (3) an immediate appeal from the judgment, order, or decree may materially advance the progress of the case or proceeding in which the appeal is taken. 28 U.S.C. § 158(d)(2)(A). *See, e.g., In re Wright* 492 F.3d 829, 831-32 (7th Cir. 2007). The court of appeals must also authorize the direct appeal of the judgment, order, or decree. Any request for certification must be made no later than 60 days after the entry of the judgment, order or decree. 28 U.S.C. § 158(d)(2)(E).

After certification by the parties or the bankruptcy court, the party or parties requesting direct review must file a motion or petition requesting permission from this court to take a direct appeal within 30 days. Fed. R. Bank. P. 8006(g). *But see In re Turner*, 574 F.3d 349, 352 (7th Cir. 2009) (failure to file petition not always fatal).

This court is more likely to accept a direct appeal when the petition presents an issue that has divided bankruptcy courts or evaded higher court review, and where resolution of a contested issue will affect multiple parties or lead to a more rapid resolution of the case. *See In re Wright*, 492 F.3d at 831-32. This court is likely to decline review if further briefing and review by the district court will provide fuller consideration of the issue or "if there is no dispute between the parties on the issue that prompted the bankruptcy court to certify the case." *Marshall v. Blake*, 885 F.3d 1065, 1084-85 (7th Cir. 2018) (Manion, J., concurring).

F. Review of Decisions of the United States Tax Court

A notice of appeal, and a $500.00 appellate docketing fee are filed with the Tax Court clerk in Washington, D.C., within the 90 or 120 days prescribed by Fed. R. App. P. 13(a). Filing by mail is permitted. Fed. R. App. P. 13(b). The clerk mails the other parties a copy of the notice of appeal. Fed. R. App. P. 13(c). The content of the notice of appeal is the same as in appeals from district courts. *See* Form 2, Appendix of Forms to Federal Rules of Appellate Procedure. The Tax Court clerk sends a copy of the notice of appeal and docket entries to the clerk of the court of appeals who dockets the appeal.

G. Review of Orders of Certain Administrative Agencies, Boards, Commissions, or Officers

Review of administrative decisions is taken by filing a petition for review, as prescribed by the applicable statute, with the clerk of the court of appeals. Fed. R. App. P. 15(a). The form of petition for review is similar to that of a notice of appeal. *See* Form 3, Appendix of Forms to Federal Rules of Appellate Procedure. The respondent is the appropriate agency, board, or officer, as well as the United States, if so required by statute. The petition for review is filed with the court of appeals clerk. Payment of the $500.00 docketing fee to the court of appeals clerk is required at the time of the filing of the petition for review. The clerk serves each respondent with a copy of the petition but the petitioner himself must serve a copy on all the other parties to the administrative proceeding and file with the clerk a list of those so served. Fed. R. App. P. 15(c). The agency need not file a response to the petition for review.

H. Enforcement of Orders of Certain Administrative Agencies

When a statute provides for enforcement of administrative orders by a court of appeals, an application for enforcement may be filed with the court of appeals clerk. Fed. R. App. P. 15(b). The clerk serves the respondent with a copy of the application, but the petitioner must serve a copy on all the other parties to the administrative proceeding and file a list of those so served with the clerk. Fed. R. App. P. 15(c). No docketing fee is paid by a governmental agency. A cross-application for enforcement may be filed by the respondent to a petition for review if the court has jurisdiction to enforce the order. Fed. R. App. P. 15(b). The cross-application is filed and docketed as a separate action and payment of a separate docketing fee is required. The matters will be consolidated and heard as one appeal.

1. *Contents of Application for Enforcement; Answer Required.*

   An application for enforcement must contain a concise statement describing the proceeding in which the order sought to be enforced was entered, any reported citation of the order, the facts upon which venue is based, and the relief prayed. Fed. R. App. P. 15(b). The original is filed with the court of appeals clerk. Fed. R. App. P. 15(c). The respondent must serve and file his answer with the clerk within 20 days; otherwise judgment will be entered for the relief prayed. Fed. R. App. P. 15(b).

I. Original Proceedings

An application for writ of mandamus or prohibition directed to a judge, or a petition for other extraordinary writ, is originated by filing an original and three copies of a petition with the clerk of the court of appeals. The case caption is "In re [name of petitioner]. Fed. R. App. P. 21(a)(2)(A). Proof of service is required on the

respondent judge or judges and all parties to the action in the trial court. The application must conform to the reproduction requirements of Rule 32(a)(2)(C). Fed. R. App. P. 21(d). The clerk does not submit the petition to the court until the prescribed docket fee has been paid. Fed. R. App. P. 21(a). Then the petition is immediately taken to the motions judge without awaiting a response.

1. *Time Prescribed.*

   Extraordinary writs are usually not issued except in matters of great urgency; no time limit is prescribed.

2. *Contents of the Petition.*

   The petition must contain a statement of the issues and of the facts necessary to an understanding of them, the relief sought, and the reasons why the writ should issue. Copies of any opinion or order or other necessary parts of the record to understand the issue(s) presented in the petition must also be included. Fed. R. App. P. 21(a)(2). The ordinary "original record on appeal" is not, however, required.

3. *Length of Petition.*

   The petition — excluding the accompanying documents required by Rule 21(a)(2)(C) — must not exceed 7,800 words if the petition is produced using a computer or 30 pages if handwritten or typewritten. Fed. R. App. P. 21(d).

4. *Further Proceedings.*

   The court may either deny the petition without calling for an answer or call for an answer within a specified time. Relief is ordinarily not granted, except *pendente lite*, without first calling for an answer. The court may order or invite a response from the judge or judges named respondents, or more commonly may order a response from the real party in interest — usually the opposing party in the trial court. Fed. R. App. P. 21(b). All parties other than petitioners are deemed respondents for all purposes. The court usually will resolve the petition on the papers after any responses are filed, but occasionally the court may order further briefing and oral argument may be scheduled.

XIX. CASE MANAGEMENT CONFERENCES AND MEDIATIONS

Few transactions between counsel and the court take place in "real time", and few involve "face time" with court personnel. For counsel, appellate practice consists mainly of writing and filing motions, briefs, notices, reports and memoranda. For the court, it consists mainly of making decisions, large and small, that are entered on the docket.

The most familiar exception to this remote style of interaction is oral argument, which brings judges and counsel face-to-face. In addition, counsel have the opportunity to engage in two other kinds of live dialogue with the court — case management conferences and mediations. Both are governed by Fed. R. App. P. 33 and Cir. R. 33. Case management conferences are held to streamline appeals. Mediations are conducted to dispose of appeals by agreement. Generally, the court schedules case management conferences and mediations on its own initiative. However, counsel may request that one or the other — or both — be scheduled if they believe such a proceeding could be helpful.

A. Case Management Conferences

Case management conferences are held to address administrative and procedural complications in an appeal or set of related appeals, usually complex civil appeals and multi-defendant criminal appeals. Such conferences are generally conducted by the Counsel to the Circuit Executive and may be held at the court or by telephone. The items on the agenda for a case management conference may include requests to consolidate related appeals; to resolve record issues; to work out a schedule for filing the transcript and briefs; or to examine the court's jurisdiction. Counsel wishing to request a case management conference should do so by motion, explaining why it would be helpful and whether they propose that it be conducted in person or by telephone.

B. Mediations

The court schedules mediations in most types of fully-counseled civil appeals. Counsel (and often clients) are directed to meet with one of the court's mediators for the purpose of exploring a voluntary resolution of the appeal. The mediation may be conducted in person or by telephone. Attendance is mandatory.

Before the mediation, counsel are required to review the case thoroughly with their clients and obtain maximum feasible settlement authority. Whether, and on what terms, to settle is ultimately for the parties to decide with advice of counsel.

The mandate to participate in an appellate mediation is one that many parties and counsel welcome but that others are initially skeptical of. How likely is it that a case can be settled on appeal, when one side has "won" and the other "lost"? When previous settlement efforts have failed? When years of litigation have

deepened the antagonism and mistrust between parties and between counsel? In the face of such doubts, experience has shown that appeals can often be resolved through discussions with a circuit mediator, even in cases which neither side expected to settle. So, the requirement to participate is not so much a burden as it is an opportunity — to substitute a certain and mutually acceptable result for the delay, expense and uncertainty of a decision by the court.

The court has delegated the responsibility for conducting appellate mediations to three full-time, court-employed attorneys who are mediators — neutral settlement facilitators. They play no part in deciding appeals on the merits. Their role is to encourage each side to be realistic in its assessment of the case and its expectations of settlement, and to ensure that the needs and interests of the parties are fully considered. If the appeal is not resolved at the initial session and additional conversations are warranted, a follow-up conference may be arranged for all participants, or the circuit mediator may conduct further discussions, in person or by phone, with one side at a time. While active discussions are taking place, the briefing schedule may be modified or suspended to allow counsel and clients to focus on settlement. If an agreement is eventually reached, counsel prepare and finalize the settlement documents. If intractable issues arise in documenting the settlement, the circuit mediator may be called upon to assist in resolving them.

Mediation participants, including the circuit mediator, are forbidden to disclose the content of their settlement discussions to the judges of any court or to the public. Thus, participants are assured that they may speak freely and make every effort to settle the case without fear that what they say or propose might later be used against them.

Counsel may confidentially request that a mediation be scheduled. Such a request should be made directly to the Circuit Mediation Office, and not by motion. It may be initiated by letter, by email or by telephone. For further information, counsel are invited to visit the Circuit Mediation page on the court's website.

XX. DOCKETING, FEES, DOCKETING STATEMENT, AND DISCLOSURE STATEMENT

A. Docketing: Fees and Filing

Unless granted leave to appeal *in forma pauperis*, an appellant must pay the $5.00 filing fee and $500.00 appellate docketing fee to the district court clerk when filing the notice of appeal. The appeal may be dismissed by the clerk of the court of appeals if the docket fee is not paid. Cir. R. 3(b). Federal Rule of Appellate Procedure 12(a) requires that the appeal be docketed upon receipt from the district court of copies of the notice of appeal and the district court docket entries. At that time the matter is assigned a general docket number in numerical sequence separate from the district court docket number that had been assigned to the case. All subsequent filings in the court of appeals must bear that new appellate docket number.

B. Docketing Statement

Circuit Rule 3(c)(1) dictates that the appellant file a docketing statement, which must include a jurisdictional statement in compliance with Circuit Rule 28(a). It must be filed with the district court clerk at the time its notice of appeal is filed or with the clerk of the court of appeals within 7 days of filing the notice of appeal. *United States v. Lloyd*, 398 F.3d 978, 981 (7th Cir. 2005) (objections to the jurisdiction of the district court or the court of appeals should be noted in the docketing statement). The court prefers that the appellant file the docketing statement with the notice of appeal.

The statement enables the court to determine as early as possible whether or not it has jurisdiction of each appeal, whether an appeal is related to other appeals, where an incarcerated party is housed, and who current public officials are in official capacity suits. If done properly, the portion of the appellant's docketing statement informing of the basis for the district court's and appellate court's jurisdiction can be "cut and pasted" in the Jurisdictional Statement of the brief.

The court has emphasized the importance of docketing statements for other purposes. For example, affirmative statements in a docketing statement can waive rights under non-jurisdictional rules. *Hamer v. Neighborhood Housing Services of Chicago*, 897 F.3d 835, 839 (7th Cir. 2018). Likewise, the failure to timely file a docketing statement may forfeit an objection to a claim-processing rule. *Vergara v. City of Chicago*, 939 F.3d 882, 886 (7th Cir. 2019) (Circuit Rule 3(c)(1) is not a mandatory claim-processing rule and can be suspended for "good cause" under Circuit Rule 2).

Many courts of appeals require docketing statements, but the Seventh Circuit may be unique in requiring them to take the form of prose paragraphs rather than

fill-in-the-blank responses on a printed form. *See Hamer v. Neighborhood Housing Services of Chicago*, 897 F.3d 835, 838 (7th Cir. 2018).

The appellee has an obligation to file its own complete docketing statement if it disagrees with the appellant's or determines that it is not complete and correct. If such an appellee's docketing statement is necessary, it is to be filed with the clerk of the court of appeals within 14 days of the filing of the appellant's docketing statement. Cir. R. 3(c)(1). *See Vergara v. City of Chicago*, 939 F.3d 882, 886 (7th Cir. 2019). These early filings do not relieve either the appellant or the appellee of their obligations to file jurisdictional statements in their respective briefs pursuant to Circuit Rule 28(a) and (b).

For some time, the court has reviewed closely the docketing statements filed by counsel. If the information required by the rule is missing or incorrect, the parties are ordered to clear up the inadequacies or deficiencies. *See* this Handbook, "D. Court's Rejection of Jurisdictional Statements" at Chapter XXII, *infra* at 164-68, for common mistakes the court encounters.

C. Disclosure Statement; Corporate Disclosure Statement

The purpose of the disclosure statement is to enable the judges of the court to determine whether he or she is ineligible to participate in the case. S*ee Doe v. Village of Deerfield*, 819 F.3d 372, 377 (7th Cir. 2016).

Every attorney for a non-governmental party or amicus and any private attorney representing a governmental party must file a disclosure statement/corporate disclosure statement 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 in this court (whichever occurs first). Cir. R. 26.1(a), (c).

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 this court or any lower court or administrative agency. Cir. R. 26.1(b). All non-governmental corporate 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, or state that there is no such corporation. Fed. R. App. P. 26.1(a). The same requirements now apply to nongovernmental corporations that seek leave to intervene. *Id.*

Fed. R. App. P. 26.1 was amended in 2019 to require the government in criminal cases to identify organizational victims and to disclose the information that subsection (a) requires if the organization is a corporation. The government may be excused from this rule if it can show good cause. Fed. R. App. P. 26.1(b).

Subsection (c) of Rule 26.1 requires an appellant to disclose the names of all debtors in bankruptcy cases who are not named in the caption of the case. And, if the debtor is a corporation, appellant must further provide the information that subsection (a) requires.

Note that the court has updated its disclosure statement form to account for these changes to Rule 26.1.

A signed original must be filed if the statement is filed before inclusion in the party's brief. Additionally, the statement must be included in the party's principal brief even if earlier filed. Fed. R. App. P. 26.1; Cir. R. 26.1. Parties must file an updated disclosure statement within 14 days of any subsequent change in the information during the course of the appeal. Civ. R. 26.1(c). Misstatements or incomplete information can cause significant delays and the waste of already stretched judicial resources. *Sharp v. United Airlines, Inc.* 236 F.3d 373, 374 (7th Cir. 2001) (per curiam).

XXI. RECORD ON APPEAL

A. Ordering and Filing the Transcript

Within 14 days after filing 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). Counsel and court reporters are to utilize the "Seventh Circuit Transcript Information Sheet," which may be obtained from the district court clerk or the court reporter. If no transcript is needed, they must use the same form and so certify. Cir. R. 10(c). Upon its completion a copy of the form is to be sent immediately to the court of appeals clerk by the court reporter. Counsel in criminal cases should consult Circuit Rule 10(d) and Chapter XVI of this Handbook, *supra*.

The court may dismiss a challenge to a district court ruling if the absence of a transcript precludes meaningful appellate review. *RK Company v. See*, 622 F.3d 846, 853 (7th Cir. 2010).

When less than the entire transcript is ordered, the appellant must file and serve on the appellee a description of the parts to be included and a statement of the issues to be presented on appeal. Appellee has 14 days thereafter to counter-designate additional parts. Fed. R. App. P. 10(b)(3). Note that Circuit Rule 10(e) requires the indexing of all transcripts included in the record on appeal.

If the transcript cannot be completed by the due date, the court reporter must request an extension of time from the clerk of the court of appeals. Fed. R. App. P. 11(b). Requests to extend time for more than 60 days from the date of the ordering of the transcript must include a statement from the trial judge or the chief judge of the district that the request has been brought to the judge's attention and that steps are being taken to ensure that all ordered transcripts will be promptly prepared. Cir. R. 11(c)(2).

B. Transcription Fees

The Judicial Conference of the United States has provided that penalties will be assessed against the court reporter if the transcript is not filed within 30 days of being ordered. A court reporter may only bill for 90 percent of the normal fee if the transcript is filed more than 30 days after it is ordered and only 80 percent if it is filed more than 60 days from being ordered. Only the clerk of the court of appeals can grant a waiver of these provisions, and then only upon a showing of good cause by the court reporter.

C. Composition and Preparation of Trial Court Record

In district court or Tax Court cases, the record on appeal includes the original papers and exhibits and the transcript of proceedings. In addition, a certified copy of the docket entries prepared by the trial court clerk must be included. Fed. R. App. P. 10(a).

Certain types of exhibits and procedural filings in the trial court will not be included in the record unless specifically designated or ordered by the court of appeals. *See* Fed. R. App. P. 11(b)(2) and Cir. R. 10(a). Counsel should note that in cases on appeal from pre-trial motions such as summary judgment the "briefs and memoranda" excluded by the rule will often include the portions of the record, such as the statements of undisputed material facts, affidavits, exhibits, etc., most critical to the appeal. Counsel proceeding in this court on these types of appeal should always specifically designate those parts of the record necessary for appellate review.

Appellate records once complete are made available by the district court to view electronically. The record is no longer transmitted to this court. Counsel should note that briefing dates run from the date the appeal is docketed if the court does not have a conference or set a schedule. Cir. R. 31(a). If not ready when the record is complete, the transcripts are due 30 days after ordered by counsel. Later filed transcripts are electronically available for viewing once they are filed.

The electronic record on appeal can be viewed remotely by counsel through PACER, the acronym for Public Access to Court Electronic Records, which provides on-line access to federal appellate, district and bankruptcy court records and documents to the public. Information about using PACER, and how to register, can be obtained from its website at www.pacer.gov. Exhibits and other documents which are not in electronic form may be examined in the district court.

If a video (or audio) recording is submitted as evidence in the district court, it is generally submitted on a DVD, CD-ROM, or flash drive and therefore is not available to view on the district court docket. If any such recordings (or any other physical items) are relevant to the issues on appeal, counsel should ask the district court to transmit the recording or physical item to this court. (Remember, no physical record — paper or other physical items — is transmitted from the district court to this court unless specifically requested.) The clerk's office then can upload the content of any such recording so that it can be accessed electronically.

The parties should be sure that anything conceivably relevant to the issues on appeal is included in the record. The failure to do so makes appellate review difficult. As such, litigants should remember their obligation to develop a record, just as the district court should make every reasonable effort to ensure there is a record for its decisions. *Ruiz-Cortez v. City of Chicago*, 931 F.3d 592, 604 (7th Cir. 2019); *see*

also Passananti v. Cook County, 689 F.3d 655, 660 (7th Cir. 2012) (it is the responsibility of district courts and their staffs "to ensure that … documents delivered to the clerk or to the judge are made part of the court's file"). An incomplete record is grounds for forfeiture or dismissal. *Taplay v. Chambers*, 840 F.3d 370,375 (7th Cir. 2016) (dismissal is appropriate when a deficient record precludes meaningful appellate review); *Morisch v. United States*, 653 F.3d 522,529 (7th Cir. 2011).

Alternatively, the court could order the necessary material to supplement the record. *See* Fed. R. App. P. 10(e). This option, however, is discretionary and the court may choose not to exercise this option if the appellant had ample opportunity to correct the problem. *LaFollette v. George*, 63 F.3d 540, 544 (7th Cir. 1995).

Since the court and the judges have the record available to them, an appendix should include only the material significant enough that it should be immediately available with the brief. *See* Fed. R. App. P. 30 and Cir. R. 30(a), discussed in Chapter XXVI of this Handbook, *infra.* For the rare case in which no transcript is available, *see* Fed. R. App. P. 10(c). For the seldom used procedure whereby parties prepare and sign a statement of the case in lieu of the record on appeal, *see* Fed. R. App. P. 10(d).

If counsel, after the record is complete and made available in the district court, discovers that the record is incomplete, he should seek an agreement of opposing counsel to file a stipulation in the district court that a supplemental record be prepared and sent to the court of appeals by the district court clerk. However, if there is a dispute as to what is part of the record, the parties should resolve that in the district court. *See* Fed. R. App. P. 10(e); Cir. R. 10(b).

Of course, the record on appeal cannot be supplemented with new evidentiary materials not before the district court. *See Hirmiz v. New Harrison Hotel Corp.*, 865 F.3d 475, 476 (7th Cir. 2017) ("new evidence may not be presented on appeal"); *Berwick Grain Co., Inc. v. Illinois Dept. of Agriculture*, 116 F.3d 231, 234 (7th Cir. 1997) (appellate stage of litigation not the place to introduce new evidentiary material); *but see United States v. Miller*, 832, F.3d 703 (7th Cir. 2016). Rule 10(e) "is meant to ensure that the record reflects what really happened in the district court, but not to enable the losing party to add new material to the record in order to collaterally attack the trial court's judgment." *Gallo v. Mayo Clinic Health Sys. – Franciscan Med. Ctr., Inc.*, 907 F.3d 961, 964-65 (7th Cir. 2018) (citations omitted).

NOTE: If the district court denies a motion to supplement or modify the record, it is reviewable in this court, if at all, by a motion under Fed. R. App. P. 10(e)(2)(C) and Cir. R. 10(b). The district court's order is procedural and is not appealable separately from the merits. *Black Bear Sports Group, Inc. v. Amateur Hockey Ass'n of Illinois, Inc.*, 962 F.3d 968, 972 (7th Cir. 2020).

D. Composition and Transmission of Administrative Record

Within 40 days of the filing of the petition for review or application for enforcement (unless the statute authorizing review fixes a different time), the agency must transmit the record, or a certified list of what is included in the record, to the court of appeals. Fed. R. App. P. 17(a), (b). The record on review should consist of the order sought to be reviewed or enforced, the findings or report on which it is based, and the pleadings, evidence, and transcript of proceedings before the agency. Fed. R. App. P. 16(a). The rule permits the filing of less than the entire record even when the parties do not agree as to which part should be filed; each party can designate the parts that it wants filed; the agency then sends the parts designated by each party. Fed. R. App. P. 17(b).

The record may be corrected or supplemented by stipulation or by order of the court of appeals. Fed. R. App. P. 16(b). The National Labor Relations Board usually follows this latter procedure. The parties may also stipulate to dispense with the filing of the certified list. Fed. R. App. P. 17(b). However, where the record itself is not filed the appendix must contain a copy of the parts of the record the court will need to see in order to review the case. *See United States Steel Corp. v. Train*, 556 F.2d 822, 839, n.24 (7th Cir. 1977).

E. Composition and Transmission of Tax Court Record

Rules 10, 11, 12, and 13(a)(4) of the Federal Rules of Appellate Procedure govern the composition and transmission of the record in appeals from the Unites States Tax Court. Virtually all records are transmitted in electronic format.

F. Sealed Items in the Record

Documents that affect the disposition of federal litigation are presumptively open to public view. *See In re Commodity Futures Trading Commission*, 941 F.3d 869, 871-72 (7th Cir. 2019) (district court order directing parties not to say anything in public about upcoming hearing and to keep all legal filings secret is inconsistent with the law of this circuit). Secrecy makes it difficult for the public to know who's using the courts, to understand the grounds and motivations of a decision, why the case was brought and litigated, and what exactly was at stake in it; sometimes though, these concerns are overridden, and disclosure is not warranted. *Mueller v. Raemisch*, 740 F.3d 1128, 1135-36 (7th Cir. 2014); *Goesel v. Boley International (H.K.) Ltd.*, 738 F.3d 831, 833 (7th Cir. 2013) (Posner, J., in chambers).

The presumption of openness applies equally to district court records and its decisions. "Judges deliberate in private but issue public decisions after public argument based on public records." *Hicklin Engineering, L.C. v. Bartell*, 439 F.3d 346, 348 (7th Cir. 2006). The court went on to comment that "[a]ny step that withdraws an element of the judicial process from public view … requires rigorous justification." *Id. See also Mitze v. Saul*, 968 F.3d 689 (7th Cir. 2020) (per curiam).

Except to the extent portions of the record are required to be sealed by statute (*e.g.*, 18 U.S.C. §3509(d)) or a rule of procedure (*e.g.,* Fed. R. Crim. P. 6(e), Circuit Rule 26.1(b)), every document filed in or by this court (whether or not the document was sealed in the district court) is in the public record unless a judge of this court orders it to be sealed. *See United States v. Foster*, 564 F.3d 852, 853-54 (7th Cir. 2009) (Easterbrook, J., in chambers); *see also In re Husain*, 866 F.3d 832, 835-36 (7th Cir. 2017).

Because the record on appeal no longer is transmitted from the district court to this court, sealed items in the district court record will remain sealed absent action by the district court. If a party asks the district court to physically transmit to this court a sealed exhibit that is not available electronically, the party must file a motion in this court if it wants the exhibit to be maintained under seal in this court. A transmitted item will be maintained under seal in this court for 14 days, to afford time to request the approval required. 7th Cir. Oper. Proc. 10. Similarly, a party who wants to include a sealed document in its appendix must ask permission from this court to seal that portion of the appendix.

Before filing a motion to seal, attorneys are encouraged to confer regarding whether any party objects to disclosure of a document or information designated as confidential in the district court.

Counsel must demonstrate sufficient cause in their motion for sealing items. An agreement among the parties to seal certain documents is not binding on the court. *GEA Group AG v. Flex-N-Gate Corp.*, 740 F.3d 411, 419 (7th Cir. 2014). And, the existence of a confidentiality agreement alone is insufficient. *Goesel v. Boley International (H.K.) Ltd.*, 738 F.3d 831, 835 (7th Cir. 2013) (Posner, J., in chambers) (motions to seal settlement agreements discussed). Be mindful that motions to place documents under seal require specificity, document by document, of the propriety of secrecy, providing reasons and legal citations. *Baxter International, Inc. v. Abbott Laboratories*, 297 F.3d 544, 545-47 (7th Cir. 2002).

G. Ability to Litigate Anonymously

Secrecy in judicial proceedings, including concealment of parties' names, is disfavored. *Mueller v. Raemisch*, 740 F.3d 1128, 1135 (7th Cir. 2014). The public has "a right to know who is using [its] courts." *Doe v. Blue Cross & Blue Shield United of Wisconsin*, 112 F.3d 869, 872 (7th Cir. 1997). A litigant wishing to proceed

anonymously must rebut this presumption by showing the need for anonymity outweighs the harm of concealment; embarrassment, incrimination or exposure to further litigation, without more, simply will not do. *Mitze v. Saul*, 968 F.3d 689, 692 (7th Cir. 2020) (per curiam).

The court, therefore, requires evidence of an incremental social, rather than private, effect on the party if his or her name is disclosed in a judicial opinion, *Mueller v. Raemisch*, 740 F.3d at 1135; *see also Goesel v. Boley International (H.K.) Ltd.*, 738 F.3d 831, 833 (7th Cir. 2013) (Posner, J., in chambers) (an individual can litigate under a pseudonym if there are compelling reasons of personal privacy), for example, to avoid what may be an ongoing risk to the party's safety. *See R.R.D. v. Holder*, 746 F.3d 807, 809 (7th Cir. 2014). If the court is not persuaded to retain the secrecy of a party's identity, the court will reform the caption to include the party's name. *E.A. v. Gardner*, 929 F.3d 922, 926 (7th Cir. 2019) ("Only 'exceptional circumstances' justify use of a fictitious name for an adult.").

Unlike an adult, minors are entitled to litigate anonymously. Under Fed. R. Civ. P. 5.2(a)(3) the right way to provide anonymity is to use initials rather than generic names such as "John Doe." *E.A. v. Gardner*, 929 F.3d 922, 926 (7th Cir. 2019).

If permitted to litigate under a pseudonym, the parties should file confidential (sealed) briefs containing the party's name and other identifying information. Redacted copies of the brief, omitting the identity information, must also be filed and will be part of the public record. Also remember, that any litigant using a pseudonym must disclose his or her true name in the Circuit Rule 26.1 disclosure statement, and such a disclosure will be kept under seal. Cir. R. 26.1(b).

Importantly, a district court order denying leave to proceed anonymously is immediately appealable. *Doe v. Village of Deerfield*, 819 F.3d 372, 375-76 (7th Cir. 2016).

XXII. WRITING A BRIEF

An appellate brief generally is your first and best chance to persuade the court to rule in your favor. Take the time to do it right. Heed the advice of experts to keep it simple and as short as possible. And, above all else, never ever misrepresent the record or the law. So, let's get started with the specifics.

Federal Rule of Appellate Procedure 28(a) sets forth the appropriate subdivisions, and their sequence, of a brief. These requirements have been supplemented by Circuit Rules 12(b), 26.1, 28 and 30. Counsel must assure that the required subdivisions are provided under an appropriate heading and in the proper sequence. The clerk's office reviews all briefs, and counsel will be notified to rectify non-complying briefs. Once accepted as compliant, the brief is made publicly available. Until then, only counsel of record is able to readily access the brief.

The rules also permit the inclusion of a short statement explaining why oral argument is (or is not) appropriate. Cir. R. 34(f). Further, the court requires that any party requesting the certification of a question of state law to a state's highest court include the request in its brief. Cir. R. 52(a). Neither rule specifies the location of these subdivisions although, as a practical matter, they should be placed near the front of the brief.

The judges must rely on both parties to state the facts of record, point out the applicable rules of law, and make them aware of the equities of a particular case. Most appeals are decided largely on the basis of the briefs.

Many appellate lawyers write briefs (and make oral arguments) in a manner that assumes that judges are knowledgeable about every field of law, however specialized. The assumption is incorrect. Counsel should keep in mind that federal judges are generalists. *Chicago Truck Drivers, Helpers and Warehouse Workers Union (Independent) Pension Fund v. CPC Logistics, Inc.*, 698 F.3d 346, 350 (7th Cir. 2012). Individual judges have specialized knowledge of a few fields of law, depending on the judge's career before he or she became a judge or on special interests developed since, but the appellate practitioner cannot count on the three judges on the panel assigned to his case being intimate with the area of law in the appellate practitioner's case.

The use of specialized vocabulary in a brief (particular to specialized fields and practice areas that are infrequently addressed in the court) may make the brief difficult to understand. While there is nothing wrong with the use of specialized vocabulary, counsel may more effectively present their positions if they translate technical, specialized jargon into everyday English. *Indiana Lumbermens Mutual Ins. Co. v. Reinsurance Results, Inc.*, 513 F.3d 652, 658 (7th Cir. 2008) (court noted the "density of the reinsurance jargon" in the briefs); *see also Illinois Bell Telephone Co., Inc. v. Box*, 548 F.3d 607, 609 (7th Cir. 2008) (parties unnecessarily

"assault[ed]" the court "with 206 pages of briefs, brimming with jargon and technical detail" in an appeal involving the dual state-federal regulatory scheme of the telecommunications industry). In short, counsel should shoot for clarity, simplicity and brevity when drafting a brief. And, keep in mind that the court expects the tone of the brief to be temperate. *See Jeroski v. Federal Mine Safety and Health Review Committee*, 697 F.3d 651, 656 (7th Cir. 2012).

Relatedly, the use of acronyms that are not widely known is discouraged. *See Domanus v. Locke Lord LLP*, 847 F.3d 469, 474 (7th Cir. 2017) ("The briefs present a bewildering alphabet soup of abbreviations, which we prefer to avoid."). Like the use of specialized terminology, it is not hard for appellate judges to figure out, with just a bit of research, what most abbreviations stand for. But appellate lawyers shouldn't put judges to the trouble of doing that research. If you use an abbreviation that your reader is unlikely to know, make it easy and define it up front. Counsel, for example, may want to consider the inclusion of a glossary defining abbreviations and acronyms, other than those that are part of common usage. Such a glossary is required in briefs filed with the Court of Appeals for the D.C. Circuit. *See* D.C. Circuit Rule 28(a)(3).

Counsel also are reminded that incorporating photographs, maps, graphs, and the like into a brief can be extremely effective if used appropriately. Images can help make the complex readily understandable and esoteric facts relatable. As the court observed some time ago, "Appellate lawyering is an oververbalized activity" having "little appreciation of the power of images." *United States v. Barnes*, 188 F.3d 893, 895 (7th Cir. 1999); *see also Coffey v. Northeast Illinois Regional Comer Railroad Corp*. 479 F.3d 472, 478 (7th Cir. 2007) (many lawyers have a "curious and deplorable aversion…to visual evidence").

In writing the brief, one must bear in mind that the Seventh Circuit judges read the briefs in advance of oral argument. As noted earlier, the brief, therefore, is the first step in persuasion, as well as being by far the more important step. After oral argument, the briefs are usually reexamined by the judges and will be used in the writing of the opinion.

In general, the briefs should contain all that the judges will want to know, including references to anything other than the briefs that may have to be consulted in the record or in the precedents.

One last reminder. Once the brief is filed, that's it. No changes are permitted except to the extent allowed by a judicial order. *B.G. v. Bd. of Education of the City of Chicago*, 906 F.3d 632 (7th Cir. 2018) (per curiam); *see also Shipley v. Chicago Bd. of Election Comm'rs*, 947 F.3d 1056, 1065 (7th Cir. 2020) (appellants "willfully disregarded our order and went ahead and resubmitted their reply brief [correcting without permission some procedural deficiencies] with numerous substantive changes, without any signal they did so."). And if changes are permitted by court

order, counsel must exercise care in preparing the revisions to the brief. "[E]rrors made with an empty head are hard to excuse." *B.G.*, 906 F.3d at 634. In *Kahn v. Midwestern University*, 879 F.3d 838, 846-47 (7th Cir. 2018), the court observed that briefs must not be moving targets. Both the judges and opposing counsel rely on their ability to treat the filed version of a brief as definitive.

And relatedly, the paper and electronic versions of a brief must be identical. Some judges may read the paper version of a brief and other judges the electronic version. The court does not peruse both versions line by line to determine sameness. But, know that "to alter one version without informing the court is unethical." *Kahn*, 879 F.3d at 846.

A. Brief Content Requirements

As the court noted in *Jaworski v. Master Hand Contractors*, 882 F.3d 686, 690 (7th Cir. 2018), "[t]he purpose of an appeal is to evaluate the reasoning and result reached by the district court." *See also Wonsey v. City of Chicago*, 940 F.3d 394, 398 (7th Cir. 2019). To do this, the court "insist[s] on meticulous compliance with rules sensibly designed to make appellate briefs as valuable an aid to the decisional process as they can be." *Id.*, citing *Avitia v. Metro. Club of Chicago, Inc.*, 49 F.3d 1219, 1224 (7th Cir. 1995). Here are some of these rules.

Pursuant to Fed. R. App. P. 28(a), an appellant's principal brief — and an appellee's as well, subject to the exceptions of Fed. R. App. P. 28(b) — must contain the following sections in the order indicated:

1. A **Disclosure Statement**, if required. *See* Fed. R. App. P.26.1, Cir. R. 26.1.

2. A **Table of Contents**, with page references.

3. A **Table of Authorities**, that includes cases (alphabetically arranged), statutes, and other authorities, with page references for each section and citation.

   NOTE: Non-precedential dispositions are typically more summaries than fully reasoned explanations. As such, the court prefers counsel to stick to more authoritative sources. *Williams v. Wexford Health Sources, Inc.*, 957 F.3d 828, 833 (7th Cir. 2020).

4. A concise and comprehensive **Jurisdictional Statement**, explaining the statutory basis for appellate and district court (or agency) jurisdiction. Fed. R. App. P. 28(a)(4); Cir. R. 28(a).

   Circuit Rule 28(a) is very extensive and specific as to the contents of the statement of jurisdiction. It must be consulted.

NOTE: The appellee (or respondent) must check the appellant's (or petitioner's) statement of jurisdiction to see if it complies with Rule 28. If it does not, the appellee (or respondent) must explicitly state that the appellant's (or petitioner's) jurisdictional statement is "not complete and correct" and include a complete and correct statement of jurisdiction in its brief; it is insufficient to merely point out the incorrect or incomplete portions of the statement. Cir. R. 28(b). This requirement is not a mindless formality, as the court explained in *Baez-Sanchez v. Sessions*, 862 F.3d 638, 641 (7th Cir. 2017) (Wood, C.J., in chambers); *see also Freeman v. Mayer*, 95 F.3d 569, 571 (7th Cir. 1996).

Litigants are regularly confused about their responsibilities when they are originally named as an appellee, but they then file a cross-appeal and become the "appellee/cross-appellant". Under Fed. R. App. P. 28.1(c) the appellee/cross-appellant must comply with Rule 28(a), including the necessity to provide a complete jurisdictional statement. Fed. R. App. P. 28(a)(4). The appellee/cross-appellant, therefore, needs to do more than say that the original appellant's jurisdictional statement is complete and correct. A cross-appellant is an appellant for purposes of Rule 28(a).

Importantly, if a party believes jurisdiction is lacking, it has an obligation to say so in its Jurisdictional Statement. *Boogaard v. National Hockey League*, 891 F.3d 289, 293 (7th Cir. 2018).

A litigant's errant citation to the statutory basis for jurisdiction is bothersome but not necessarily fatal. "[W]here the record provides enough information to establish appellate jurisdiction, we may exercise such jurisdiction despite the parties' failure to direct us to its proper statutory source." *United States v. Lee*, 937 F.3d 797, 815 (7th Cir. 2019).

As part of the court's routine procedure, the Jurisdictional Statement of all counseled briefs are screened before oral argument or submission on the briefs. Its purpose is to ensure that our jurisdiction is secure and to catch any problems. *See Lowrey v. Tilden*, 948 F.3d 759, 760 (7th Cir. 2020) (Wood, C.J., in chambers). If the statement is deficient in any respect, the party is ordered to submit a compliant amended statement, usually within seven days.

Examples of common mistakes in drafting a jurisdictional statement are reviewed in this Handbook, "D. Court's Rejection of Jurisdictional Statements", *infra* at 164-68.

NOTE: Counsel should take the time to review pages 164-68 of this Handbook to avoid these and similar mistakes. The court should not have to endlessly prod litigants to supply the required information. *Dalton v. Teva North America*, 891 F.3d 687, 691 (7th Cir. 2018) (court struggled to get the information needed to determine whether diversity existed, requiring "two rounds of jurisdictional statements, oral argument, and supplemental briefing, to extract … basic information from the parties").

5. A **Statement of the Issue (or Issues)** presented for review. This requires careful selection and choice of language. An appellee or respondent need not state the issues unless dissatisfied with appellant's or petitioner's statement. *See* Fed. R. App. P. 32(a)(4) for proper form.

The main issue should be stressed, and an effort made to present no more than two or three questions. *Antrim Pharmaceuticals LLC v. Bio-Pharm, Inc.*, 950 F.3d 423, 428 n.2 (7th Cir. 2020) ("This court has cautioned appellate counsel to focus on one central issue if possible, or at most on a few key issues.") (internal quotations and citations omitted); *see also United States v. Lathrop*, 634 F.3d 931, 936 (7th Cir. 2011) (noting that presenting "nearly a dozen sources of error, effectively ignoring our advice that the equivalent of a laser light show of claims may be so distracting as to disturb our vision and confound our analysis" (citations omitted)).

The court recently emphasized the importance of issue selection this way: "The claims chosen should be few and carefully measured for maximum effect. A circumspect approach boosts credibility, while raising every conceivable challenge on appeal can dilute the persuasiveness of plausible arguments." *United States v. Friedman*, 971 F.3d 700, 709-10 (7th Cir. 2020). Experienced appellate advocates, too, have long stressed the importance of winnowing out weaker arguments and focusing on one central issue if possible, or at most on a few key issues. *See United States v. Boscarino*, 437 F.3d 634, 635 (7th Cir. 2006).

The questions selected should be stated clearly and simply. Below are a few examples of well stated issues:

(i) Which court, the district court or the court of appeals, has jurisdiction to review certain regulations promulgated under the Federal Water Pollution Control Act of 1972, 33 U.S.C. §§ 1251-1376?

(ii) Whether police officers' removal of heroin from the defendant's automobile after stopping him for a traffic violation and the subsequent introduction of the heroin at trial violated his rights under the Fourth Amendment?

(iii) Whether a private cause of action for damages against corporate directors is to be implied in favor of a stockholder under 18 U.S.C. § 610, which makes it an offense for a corporation to make "a contribution or expenditure in connection with any election at which Presidential and Vice-Presidential electors . . . are to be voted for"?

(iv) Whether state regulations that permit welfare payments to workers on strike are inconsistent with and, therefore, precluded by

(a) federal labor policy (cite statute and regulations)?

(b) federal welfare policy (cite statute and regulations)?

(v) Was there a material issue of fact as to whether the contract had been revoked which precluded summary judgment?

On occasion, although not usually, the questions may be better understood, or stated more simply, if preceded by an introductory factual paragraph.

As you can see, the above examples are concise without being vague or too general. The following issues are not well stated: Did the district court err in granting a directed verdict? Was summary judgment properly granted? Was there sufficient evidence to support the jury's verdict? Did the order obtained by the prosecutors after indictment requiring defendant Doe to furnish evidence directly to the prosecutors grant the government a mode and manner of discovery not sanctioned by the law and in violation of the Fourth, Fifth, Sixth, and Fourteenth Amendment rights of defendant Doe, thereby rendering evidence relating thereto as inadmissible?

6. A **Statement of the Case** indicating the nature of the case, the course of proceedings, the disposition in the court below, and a concise and objective statement of the facts relevant to the issues presented for review. The appellee or respondent may omit this section from its brief if satisfied with appellant's or petitioner's statement.

Counsel should note that an amendment to the Federal Rules of Appellate Procedure, effective December 1, 2013, merged the

Statement of Facts into the Statement of the Case and eliminated Fed. R. App. P. 28(a)(7).

The fact portion of the statement should be a narrative, chronological summary, rather than a digest or an abstract of what each witness said. The judges view the statement of facts as a very important part of the brief. Great care should be taken that the facts are well marshaled and stated. If this is done, the facts themselves will often develop the relevant and governing points of law. An effective statement summarizes the facts so that the reader is persuaded that justice and the precedents both require a decision for the advocate's client.

Every fact must be supported by a reference to the document and page or pages of the electronic record on appeal and the appendix (if included) where the fact appears, and the statement must be a fair summary without argument or comment. Cir. R. 28(c); *see Wiesmueller v. Kosobucki*, 547 F.3d 740 (7th Cir. 2008) (Posner, J., in chambers).

While Fed. R. App. P. 28(b) provides that the appellee need not make any statement of the case or of the facts unless controverting that of the appellant, the appellee should present a statement if the appellee believes that the relevant facts have not been fairly presented by the appellant or that the appellant has omitted or stated them incorrectly.

A long factual statement should be suitably divided by appropriate headings. Nothing is more discouraging to the judicial reader (or any other reader, for that matter) 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 that are being made.

7. A **Summary of the Argument**, which must contain a succinct, clear and accurate statement of the arguments made in the body of the brief, and not merely a repeat of the argument headings. Fed. R. App. P. 28(a)(7). For longer summaries it is useful to the court that the summary includes references to the pages of the brief at which the principal contentions are made. *Cf. Allen-Noll v. Madison Area Technical College*, 969 F.3d 343, 351 (7th Cir. 2020) ("a 30-page summary of the argument [is] hardly 'succinct' and 'clear'").

8. A statement of the appellate **Standard of Review**. The brief must contain a statement of the standard of review for each individual issue raised. Fed. R. App. P. 28(a)(9)(B). This can be a separate section or precede each argument depending on how it is best presented to the

reader. If the appellee or respondent disputes appellant's or petitioner's statement, appellee's or respondent's brief should contain a statement of the standard of review.

9. The **Argument** section should be suitably broken up into the main points with appropriate headings and contain the reasons in support of one's position, including an analysis of the evidence, if that is called for, and a discussion of the authorities. Where possible, the emphasis should be on reason, not merely on precedent, unless a particular decision is controlling.

A few good cases on point, with a sufficient discussion of their facts to show how they are relevant, are preferred over a profusion of citations. A long discussion of the facts of the cases cited is usually not needed, except where there is a precedent so closely on point that it must be distinguished if the party is to prevail.

NOTE: Non-precedential dispositions are typically more summaries than fully reasoned explanations. As such, the court prefers counsel to stick to more authoritative sources. *Williams v. Wexford Health Sources, Inc.*, 957 F.3d 828, 833 (7th Cir. 2020).

Lawyers are not entitled to ignore controlling, adverse precedent. *Jackson v. City of Peoria*, 825 F.3d 328, 331 (7th Cir. 2016). Relatedly, the court requires a compelling reason, such as overruling by a higher court or a supervening statutory amendment, to warrant revisiting precedent so quickly. *See McClain v. Retail Food Emp'rs Joint Pension Plan*, 413 F.3d 582, 586 (7th Cir. 2005).

Do not incorporate by reference arguments made in the district court. Appellate judges may not have immediate access to the papers in which the arguments incorporated by reference appear. *See Norfleet v. Walker*, 684 F.3d 688, 690-91 (7th Cir. 2012). On the other hand, counsel are encouraged to avoid unnecessary duplication and may want to consider adopting parts of a co-party's appellate brief. *See United States v. Torres*, 170 F.3d 749 (7th Cir. 1999); *United States v. Ashman*, 964 F.3d 596 (7th Cir. 1992).

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 case cited does not have a good quote, a terse summary in a sentence or two will show the court that the case should be read.

The pertinent part of relevant statutes or regulations, with citations to the United States Code, Code of Federal Regulations, or state

statutory compilation should be set out in the brief. If these are voluminous, they should be incorporated in the appendix. Fed. R. App. P. 28(f). Counsel also should remember that statutes and regulations always have some purpose or object to accomplish, and therefore, one should use dictionaries as sources of statutory meaning only with great caution. *United States v. Costello*, 666 F.3d 1040, 1043 (7th Cir. 2012); *see also Sandifer v. United States Steel Corp.*, 134 S. Ct. 870, 876-78 (2014) (historical and statutory context examined to give meaning to words used in statutes in addition to use of dictionaries).

Where state law is applicable, the federal courts must take the law as it has been laid down by the state courts. The state court interpretation of state law will control, and a federal court cannot disregard state decisions even though it may disagree with them. However, if the law of the state appears to be uncertain, it is desirable not to confine discussion of the law to the particular state involved if helpful precedents exist elsewhere. For certifying question of state law, *see* Cir. R. 52 and discussion in Chapter XXV of this Handbook, *infra*.

References to and quotations from law reviews and legal writers are always permissible.

The brief writer should never forget that the judges are reading the briefs in six cases in preparation for each day of oral argument. The writer must select what is important and deal only with that; all that is not necessary should be ruthlessly discarded. Except in unusually complicated cases, a brief that treats more than three or four matters runs a serious risk of becoming too diffused and giving the overall impression that no one claimed error can be very serious. *United States v. Friedman*, 971 F.3d 700, 710 (7th Cir. 2020).

Though counsel should embrace brevity, time and again we have warned litigants that an argument containing little analysis and no citation to authority may be deemed waived. *See Mahaffey v. Ramos*, 588 F.3d 1142, 1146 (7th Cir. 2009) ("Perfunctory, undeveloped arguments without discussion or citation to pertinent legal authority are waived."); *see also Uncommon, LLC v. Spigen, Inc.*, 926 F.3d 409, 419 n.2 (7th Cir. 2019); *Crespo v. Colvin*, 824 F.3d 667, 674 (7th Cir. 2016); *Adams v. Raintree Vacation Exchange, LLC*, 702 F.3d 436, 439 (7th Cir. 2012) ("When there are authorities to cite for a key proposition, the party asserting the proposition must cite them … and the failure to do so forfeits reliance on the proposition."). *Cf. McCurry v. Kenco Logistics Services, LLC*, 942 F.3d 783, 792 (7th Cir. 2019) ("[T]here is no functional difference between a scanty brief and an overly long, borderline-unintelligible brief. … In both cases we are

frustrated in performing our review function and in evaluating the judgment below.").

Importantly, the appellant's brief must engage the reasons the appellant lost; an appellant who does not do so has no prospect of success. *Klein v. O'Brien*, 884 F.3d 754, 757 (7th Cir. 2018); *see also Hackett v. City of South Bend*, 956 F.3d 504, 510 (7th Cir. 2020). And, if an appellant loses in the district court on multiple grounds, appellant must contest all on appeal; prevailing on one will not suffice. *United States v. Boliaux*, 915 F.3d 493, 496 (7th Cir. 2019).

The court's ordinary procedure is to dismiss an appeal if the appellant fails to supply a minimally adequate brief. *See Anderson v. Hardman*, 241 F.3d 544, 545-46 (7th Cir. 2001). "We will not fill this void by crafting arguments and performing the necessary legal research." *Shipley v. Chicago Bd. of Election Comm'rs*, 947 F.3d 1056, 1063 (7th Cir. 2020), quoting *Fednav Int'l Ltd. v. Cont'l Ins. Co.*, 624 F.3d 834, 842 (7th Cir. 2010). In short, an appellate brief must be supported by legal arguments and authority and not merely dropped in the lap of the court of appeals. *See Gunn v. Continental Casualty Co.*, 968 F.3d 802, 807 (7th Cir. 2020) ("Law does not exist without some definite authority behind it. Claims and defenses have to come from somewhere. Proof of [them] in the air, so to speak, will not do.") (internal quotations and citations omitted).

Relatedly, an appellant cannot conjure up brand new legal arguments on appeal. Failure to raise an argument with the district court generally means that you cannot make that argument on appeal. *See Wheeler v. Hronopoulos*, 891 F.3d 1072 (7th Cir. 2018); *see also Builders NAB LLC v. Federal Deposit Ins. Corp.*, 922 F.3d 775, 778 (7th Cir. 2019) (legal contentions must be presented in the district court before it acts rather than in a motion filed after judgment).

The appellee's or respondent's brief should squarely meet the appellant's or petitioner's points. The same care should be taken by the appellee or respondent to avoid diffusion and yet present all substantial additional arguments available in support of the judgment below.

Finally, a reply brief must be limited to matters in reply. New arguments raised for the first time in a reply brief may be stricken and deemed waived. But importantly, an appellant or petitioner may respond to arguments raised for the first time in the appellee's or respondent's brief. *Loja v. Main Street Acquisition Corp.*, 908 F.3d 680, 684 (7th Cir. 2018).

The writing style in a brief, and particularly the argument section, should be simple, graceful, and clear. To achieve these qualities, the writer will usually need to revise carefully the initial draft and subsequent drafts. The court prefers that italics, underlining, bolding and footnotes be used sparingly and all caps should not be used in headings. Accuracy is imperative in statements, record references, citations, and quotations.

10. A short **Conclusion** stating the exact relief that the party is seeking on appeal.

11. A **Certification** that the type-volume limitation of Circuit Rule 32(c) (and in cross-appeals, Circuit Rule 28.1) has been complied with.

12. **Appendix**. *See* Circuit Rule 30 and discussion in Chapter XXVI of this Handbook, *infra*. Note particularly the requirement of Circuit Rule 30(d) of a statement that all required materials are in the appendix. Counsel should err on the side of inclusion, especially of relevant statutes or decisions claimed to be controlling.

B. Amicus Briefs

The filing of an amicus brief is the exception, not the rule, in the Seventh Circuit. The status of would be *amicus curiae* is generally irrelevant to the decision-making process. Rather, the court looks at whether the brief will assist the judges by presenting ideas, arguments, theories, insights, facts, or data that are not found in the briefs of the parties. *Voices for Choices v. Illinois Bell Telephone Co.*, 339 F.3d 542, 544-45 (7th Cir. 2003) (Posner, J., in chambers); *see also Sierra Club, Inc. v. E.P.A.*, 358 F.3d 516, 518 (7th Cir. 2004).

An amicus brief need not comply with Fed. R. App. P. 28, but still must include the following sections: a disclosure statement if the amicus is a corporation and for any attorney listed on the cover of the brief; a table of contents; a table of authorities cited; a concise statement of the identity of the amicus, its interest in the case, and the source of its authority to file; an argument; and a certificate of compliance if length is computed using a word or line limit. Fed. R. App. P. 29 (a)(4); Cir. R. 26.1.

And, unless the amicus is the United States or an officer or agency of the United States or a state, amicus must include a statement whether a party's counsel authorized the brief in whole or in part; whether a party, its counsel or any other person — other than amicus, its members, or its counsel — contributed money to fund the preparation and submission of the brief, and if so, they must be identified. Fed. R. App. P. 29(a)(4)(E).

Additionally, the cover of the brief must identify the party supported and indicate whether the amicus supports affirmance or reversal. Fed. R. App. P. 29(c).

In order to avoid repetition or restatement of arguments, counsel for amicus curiae should ascertain, before preparing a brief, the arguments that will be made in the brief of any party whose position amicus curiae is supporting.

C. Noncompliant Briefs

The clerk's office reports that about 10-15% of the briefs tendered by counsel for filing are found to be deficient because they do not comply with one or more of the court's rules. If the brief is deficient, the clerk's office issues a notice to counsel pointing out what needs to be corrected. All corrections must be made within seven days. If satisfactorily corrected, the brief will be filed on the date originally tendered.

NOTE: Counsel is not free to make other revisions to the brief. Briefs must remain unchanged after filing, except to the extent allowed by a judicial order. *B.G. v. Bd. of Educ. of City of Chicago*, 906 F.3d 632, 634 (7th Cir. 2018) (per curiam).

The clerk's office has prepared a checklist to assist litigants in the preparation of briefs and, if requested, will preview briefs for compliance with court rules. The "Seventh Circuit Brief Filing Checklist" is obtainable from the Seventh Circuit's website.

D. Court's Rejection of Jurisdictional Statements

The court relies on the parties to provide accurate jurisdictional information when it reviews the basis for subject matter and appellate jurisdiction. Particular attention, therefore, should be given to the "Jurisdictional Statement" section of the brief. The appellant's (or petitioner's) brief must provide all the information that Fed. R. App. P. 28(a)(4) and Circuit Rule 28(a) require as to the basis for jurisdiction of both the district court (or agency) and the court of appeals. The court should not have to look to other sections of the brief or refer to the record to determine jurisdiction.

The inclusion of the necessary information in the Jurisdictional Statement should be a simple matter when drafting the brief because the appellant (or petitioner) was required to provide the same information in the Circuit Rule 3(c) docketing statement. Still, briefs that contain inadequate, incomplete or incorrect Jurisdictional Statements are not an uncommon occurrence and are no longer tolerated. *See, e.g.*, *Smoot v. Mazda Motors of America, Inc.*, 469 F.3d 675, 677-78 (7th Cir. 2006).

The court screens the Jurisdictional Statement section of all counseled briefs before argument to ensure that all the necessary information about the jurisdiction

of both the district court (or agency) and the court of appeals is included. *See Baez-Sanchez v. Sessions*, 862 F.3d 638, 639 (7th Cir. 2017) (Wood, C.J., in chambers). As noted in *Baez-Sanchez*, a "distressing" number of briefs contain Jurisdictional Statements that fail to comply with Cir. R. 28. *Id.* Noncompliant Jurisdictional Statements are rejected, and the litigant is ordered to provide an Amended Jurisdictional Statement furnishing missing details or supplying correct information. *West v. Louisville Gas & Electric Co.*, 951 F.3d 827, 829-30 (7th Cir. 2020).

Counsel typically is given seven days to file an Amended Jurisdictional Statement, correcting the statement's deficiencies.

Carelessness with regard to the required information to establish diversity jurisdiction is particularly troublesome, and may be sanctioned. *See, e.g.*, *Smoot v. Mazda Motors of America, Inc.*, 469 F.3d 675, 677-78 (7th Cir. 2006); *BondPro Corp. v. Siemans Power Generation, Inc.*, 466 F.3d 562 (7th Cir. 2006) (per curiam); *Meyerson v. Harrah's East Chicago Casino*, 299 F.3d 616 (7th Cir. 2002). And remember, Circuit Rule 28(a)(1) requires the disclosure of citizenship even in a case dismissed for lack of diversity jurisdiction.

Some of the common deficiencies of jurisdictional statements in diversity cases include the following:

(a) A naked statement that there is diversity of citizenship is never sufficient. *Dalton v. Teva North America*, 891 F.3d 687, 690 (7th Cir. 2018); *Thomas v. Guardsmark, LLC*, 487 F.3d 531, 533-35 (7th Cir. 2007). The Jurisdictional Statement must identify the states of which the parties are citizens and the amount in controversy. *Wise v. Wachovia Securities, LLC*, 450 F.3d 265, 266 (7th Cir. 2006). And remember, diversity jurisdiction depends on matters as they stand when the complaint is filed. *Johnson v. Wattenbarger*, 361 F.3d 991, 992 (7th Cir. 2004).

Also, allegations of citizenship based on "information and belief," or "the best of my knowledge and belief," or similar language, are by themselves insufficient to show citizenship in a diversity case; something more is needed. *Medical Assurance Co. v. Hellman*, 610 F.3d 371, 376 (7th Cir. 2010).

(b) A statement that an individual is a resident of a state is insufficient. Residency and citizenship are not synonyms, and it is the latter that matters for purposes of diversity jurisdiction. *Meyerson v. Harrah's East Chicago Casino*, 299 F.3d 616, 617 (7th Cir. 2002); *see also Heinen v. Northrop Grumman Corp.*, 671 F.3d 669, 670 (7th Cir. 2012).

(c) The failure to recognize that a corporation may be a citizen of more than one state. A corporation has two places of citizenship: where it is incorporated, and where it has its principal place of business, and both must be separately identified. *Smoot v. Mazda Motors of America, Inc.*, 469 F.3d 675, 676 (7th Cir. 2006); *see also Dalton v. Teva North America*, 891 F.3d 687, 690 (7th Cir. 2018) ("what matters for citizenship of a corporation is its state of incorporation and its principal place of business, not its 'headquarters'"); *Hoagland v. Sandberg, Phoenix & von Gontard, P.C.*, 385 F.3d 737, 739-41 (7th Cir. 2004) (business and non-business corporations treated the same for diversity purposes).

(d) A limited liability company is not the same as a corporation for diversity purposes. The citizenship of a limited liability company is that of its members. *Belleville Catering Co. v. Champaign Market Place, L.L.C.*, 350 F.3d 691, 692 (7th Cir. 2003). The court, therefore, needs to know the identity of each member and the member's citizenship, and if necessary "each member's members' citizenships". *Hicklin Engineering, L.C. v. R. J. Bartell*, 439 F.3d 346, 347-48 (7th Cir. 2006). *But see* 28 U.S.C. § 1332(d)(10).

(e) A partnership is neither an individual nor a corporation for diversity purposes. A federal court must look to the citizenship of a partnership's limited, as well as its general, partners to determine whether there is complete diversity. *Carden v. Arkoma Associates*, 110 S. Ct. 1015, 1019-21 (1990). And, if the partners are themselves partnerships, the inquiry must continue to their partners, and so on. *Hart v. Terminex International*, 336 F.3d 541, 543 (7th Cir. 2003). And while it is a partnership's right to keep its ownership secret, one consequence is lack of access to federal courts if the partnership bears the burden of establishing diversity. *Meyerson v. Showboat Marino Casino Partnership*, 312 F.3d 318, 321, (7th Cir. 2002) (per curiam).

(f) Do not stop at the first layer of citizenship if left with something other than individuals or corporate entities. The citizenship of partnerships and unincorporated business entities must be traced through however many layers of partners or members there may be. *Meyerson v. Harrah's East Chicago Casino*, 299 F.3d 616, 617 (7th Cir. 2002); *see also Americold Realty Trust v. Conagra Foods, Inc.,* 136 S. Ct. 1012, 1014 (2016) ("While humans and corporations can assert their own citizenship, other entities take the citizenship of their members.").

In one recent case, it took a litigant multiple court-ordered attempts, resulting in four single-spaced pages, to identify the owners of a partnership — an ownership structure that litigant determined was 14

levels deep, though the court concluded there was 17 rather than 14 levels. *West v. Louisville Gas & Electric Co.*, 951 F.3d 827, 830 (7th Cir. 2020) (tracing must continue until one reaches either a corporation or natural person).

(g) Parties cannot assume that foreign business entities enjoy the same corporate status as the United States understands it. Diversity cases involving foreign business entities pose unique problems. Litigants should provide detail in their jurisdictional statements as to the business structure of foreign entities. *White Pearl Inversiones S.A. (Uruguay) v. Cemusa, Inc.*, 647 F.3d 684 (7th Cir. 2011).

(h) An allegation that a party is "not a citizen" of the state of the opposing party — an allegation of negative citizenship — is not sufficient to establish diversity. *Myerson v. Showboat Marina Casino Partnership*, 312 F.3d 318, 320 (7th Cir. 2002) (per curiam). All parties to the action must be listed by name and the state(s) of their citizenship identified, including the identities of all members and partners of an LLC or partnerships. *West v. Louisville Gas & Electric Co.*, 951 F.3d 827, 829-30 (7th Cir. 2020). *But see Pain Center of SE Indiana v. Origin Healthcare Solutions LLC*, 893 F.3d 454, 458-59 (7th Cir. 2018) ("John Doe" defendants — identified only as individuals, corporations, or associations and alleged in complaint not to be citizens of Indiana (the citizenship of all plaintiffs) — are mere placeholders and can be ignored for purposes of diversity jurisdiction).

(i) In Class Action Fairness Act cases, a specific, diverse class member must be identified. An allegation of negative citizenship — as in ordinary, non-class diversity cases — fails to satisfy the Act's minimal diversity requirement. *Dancel v. Groupon, Inc.*, 940 F.3d 381 (7th Cir. 2019); *see also Toulon v. Continental Casualty Co.*, 877 F.3d 725 (7th Cir. 2017) (defendant supplemented the record pursuant to 28 U.S.C. § 1653 with affidavits identifying citizenship of specific class members after plaintiff unable to do so).

Other problems that the court sees on a recurring basis include the following:

(a) Section 2201 of Title 28 United States Code (declaratory judgments) is not a basis for subject matter jurisdiction. The substantive claims of the case determine whether federal jurisdiction exists. *New Page Wisconsin System Inc. v. United Steel*, 651 F.3d 775, 776 (7th Cir. 2011).

(b) The presence of a contractual arbitration provision cannot confer federal jurisdiction. *Royce v. Michael R. Needle P.C.*, 950 F.3d 939, 949

(7th Cir. 2020); *Magruder v. Fid. Brokerage Servs. LLC*, 818 F.3d 285, 287 (7th Cir. 2016) ("The Federal Arbitration Act, 9 U.S.C. §§ 1-16, does not grant federal jurisdiction."). Access to federal court requires an independent jurisdictional basis of the case.

(c) An appellee does not explicitly state whether an appellant's jurisdictional statement is both "complete and correct". Cir. R. 28(b); *see Baez-Sanchez v. Sessions*, 862 F.3d 638 (7th Cir. 2017) (Wood, C.J., in chambers). A statement that appellee "agrees" or "concurs" with an appellant's statement (or use of similar language) is insufficient.

If an appellee determines that an appellant's statement does not fully comply with the requirements of Fed. R. App. P. 28(a)(4) and Cir. R. 28(a), the appellee must provide a complete jurisdictional summary as to the jurisdictional basis of both the district court and the court of appeals. Cir. R. 28(b); *see Dalton v. Teva North America*, 891 F.3d 687, 690 (7th Cir. 2018) (Circuit Rule 28 "obligates an appellee to provide a complete and correct jurisdictional statement when the appellant's statement falls short"); *Pastor v. State Farm Mutual Automobile Inc. Co.*, 487 F.3d 1042, 1048 (7th Cir. 2007); *Professional Service Network, Inc. v. American Alliance Holding Company*, 238 F.3d 897, 902-03 (7th Cir. 2001).

An appellee that mistakenly states an appellant's jurisdictional statement is "complete and correct", when it is not, compounds the problem. *Pastor v. State Farm Mutual Automobile Ins. Co.*, 487 F.3d at 1048; *BondPro Corp. v. Siemens Power Generation, Inc.*, 466 F.3d 562 (7th Cir. 2006) (per curiam). *See also Cincinnati Ins. Co. v. Eastern Atlantic Ins. Co.*, 260 F.3d 742, 747-48 (7th Cir. 2001) (appellee taken to task for incorrectly stating that appellant's jurisdictional statement is complete and correct, when it was not; parties' counsel reprimanded).

Relatedly, the court views noncompliance of Circuit Rule 28(b) by counseled appellees less understandable than a violation of Circuit Rule 28(a) by a *pro se* litigant.

(d) Litigants regularly appear confused about their responsibilities when they are originally named as an appellee, but they then file a cross-appeal and become the "appellee/cross-appellant." Under Fed. R. App. P. 28.1(c), the appellee/cross-appellant must comply with Fed. R. App. P. 28(a), which requires a complete jurisdictional statement. Fed. R. App. P. 28(a)(4). It is not enough, therefore, to state that the original appellant's jurisdictional statement is complete and correct.

(e) The statement neglects to include information of a magistrate judge's involvement. If a magistrate judge issues the final decision in a case, the jurisdictional statement must so state and provide the dates that the parties consented. Cir. R. 28(a)(2)(v); *see Lowery v. Tilden*, 948 F.3d 759 (7th Cir. 2020) (Wood, C.J., in chambers).

(f) The failure to provide both the date of entry of the judgment or order appealed and the date that the notice of appeal (or petition to review) was filed. A statement that the appeal (or petition to review) was "timely filed" is not sufficient. Cir. R. 28(a)(2)(i), (iv).

(g) A typographical error as to any of the required dates may suggest that an appeal is untimely (or premature). Counsel should proofread the statement to make certain that the correct dates are provided.

(h) Not enough information is included if the appeal is from an order other than a final judgment. The statement must provide additional information, so the court can determine whether the order is immediately appealable. Check Cir. R. 28(a)(3) which provides an illustrative list.

(i) Necessary post-judgment information is not included. If any post-judgment motion is claimed to toll the time to appeal the judgment, the statement must provide both the date of the motion's filing and the date of entry of its disposition. Cir. R. 28(a)(2)(ii), (iii).

(j) At times, counsel will copy and paste erroneous jurisdictional allegations from the original complaint or similar district court pleadings. This should be avoided absent a review of the completeness and correctness of the earlier allegations. *See Cincinnati Ins. Co. v. Eastern Atlantic Ins. Co.*, 260 F.3d 742, 747 (7th Cir. 2001) (Counsel "lamely state[ ] that the reason for the erroneous allegations of jurisdiction in the original briefs was that the complaint had alleged jurisdiction so" — an excuse the court found "feeble".).

Nearly two dozen Jurisdictional Statements are rejected each month because of these and other deficiencies. "There is no reason why, month after month, year after year, the court should encounter jurisdictional statements with such obvious flaws. This imposes needless costs on everyone." *Baez-Sanchez v. Sessions*, 862 F.3d at 642. The lesson to be learned from these examples is quite simple — counsel could have been spared the necessity to revise the Jurisdictional Statement had counsel just carefully read the rules and proofread the statement.

E. Motion to Strike Briefs

Typically, motions to strike a brief are unnecessary, unauthorized and pointless. *Custom Vehicles, Inc. v. Forest River, Inc.*, 464 F.3d 725 (7th Cir. 2006) (Easterbrook, J., in chambers). A motion to strike a brief, or any portion of a brief, which requires an analysis of the record to evaluate the motion's challenge, in particular are disfavored largely because it duplicates work that would be required for deciding the merits of the appeal. *See Wiesmueller v. Kosobucki* 547 F.3d 740, 741 (7th Cir. 2008) (Posner, J., in chambers). Instead, a party should point out rule violations or other errors contained in a principal brief — appellant's opening brief or appellee's responsive brief — in one's responsive or reply brief. *Custom Vehicles, Inc. v. Forest River, Inc.*, 464 F.3d at 726. *But see Correa v. White*, 518 F.3d 516 (7th Cir. 2008) (per curiam) (noncompliant *pro se* brief stricken, on motion of appellee, and *pro se* litigant given opportunity to file a brief that "complies substantially" with the rules; dismissal of the appeal is too harsh a sanction).

XXIII. REQUIREMENTS AND SUGGESTIONS FOR TYPOGRAPHY IN BRIEFS AND OTHER PAPERS

Federal Rule of Appellate Procedure 32 contains detailed requirements for the production of briefs, motions, appendices, and other papers that will be presented to the judges. Rule 32 is designed not only to make documents more readable but also to ensure that different methods of reproduction (and different levels of technological sophistication among lawyers) do not affect the length of a brief. The following information may help you better understand Rule 32 and associated local rules. The Committee Notes to Rule 32 provides additional helpful information.

This section of the Handbook also includes some suggestions to help you make your submissions more legible — and thus more likely to be grasped and retained. In days gone past lawyers would send their work to printers, who knew the tricks of that trade. Now composition is in-house, done by people with no education in printing. Some tricks of that trade are simple to master, however, if you think about them. Subsection 5, below, contains these hints.

1. Rule 32(a)(1)(B) requires text to be reproduced with "a clarity that equals or exceeds the output of a laser printer." The resolution of a laser printer is expressed in dots per inch. First generation laser printers broke each inch into 300 dots vertically and horizontally, creating characters from this 90,000-dot matrix. Second generation laser printers use 600 or 1200 dots per inch in each direction and thus produce a sharper, more easily readable output; commercial typesetters use 2400 dots per inch.

Any means of producing text that yields 300 dots per inch or more is acceptable. Daisy-wheel, typewriter, commercial printing, and many ink-jet printers meet this standard, as do photocopies of originals produced by these methods. Dot matrix printers and fax machines use lower resolution, and their output is unacceptable. Although Rule 32(a) applies only to briefs, we urge counsel to maintain this standard of clarity in appendices. A faxed copy of the district court's opinion, or text from Lexis or Westlaw printed by a dot-matrix printer, is needlessly hard to read. Use photocopies of the district court's original opinion and other documents in the record.

2. Rule 32(a)(5) distinguishes between proportional and monospaced fonts, and between serif and sans-serif type. It also requires knowledge of points and pitch.

Proportionally spaced type uses different widths for different characters. Most of this Handbook is in proportionally spaced type. A monospaced face, by contrast, uses the same width for each character. Most typewriters produce monospaced type, and most computers also can do so using fonts with names such as "Courier,"

"Courier New," or "Andale Mono." The rule leaves to each lawyer the choice between proportional and monospaced type.

> This sentence is in a proportionally spaced font; as you can see, the m and i have different widths.
>
> ```
> This sentence is in a monospaced font; as
> you can see, the m and i have the same
> width.
> ```

Serifs are small horizontal or vertical strokes at the ends of the lines that make up the letters and numbers. The next line shows two characters enlarged for detail. The first has serifs, the second does not.

Studies have shown that long passages of serif type are easier to read and comprehend than long passages of sans-serif type. The rule accordingly limits the principal sections of submissions to serif type, although sans-serif type may be used in headings and captions. This is the same approach magazines, newspapers, and commercial printers take. Look at a professionally printed brief; you will find sans-serif type confined to captions if it is used at all.

> This sentence is in Century Schoolbook, a proportionally spaced font with serifs. Baskerville, Bookman, Caslon, Garamond, Georgia, and Times are other common serif faces.
>
> This sentence is in Helvetica, a proportionally spaced sans-serif font. Arial, Eurostile, Trebuchet, Univers, and Verdana are other common sans-serif faces.

Variations of these names imply similar type designs.

Type must be large enough to read comfortably. For a monospaced face, this means type approximating the old "pica" standard used by typewriters, 10 characters per horizontal inch, rather than the old "elite" standard of 12 characters per inch. Because some computer versions of monospaced type do not come to exactly 10 characters per inch, Rule 32(a)(5)(B) allows up to 10½ per inch, or 72 characters (including punctuation and spaces) per line of type.

Proportionally spaced characters vary in width, so a limit of characters per line is not practical. Instead the rules require a minimum of 12-point type. Circuit

Rule 32 permits the use of 12-point type in text and 11-point type in footnotes; Fed. R. App. P. 32(a)(5)(A) standing alone would have required you to use 14-point type throughout.

"Point" is a printing term for the height of a character. There are 72 points to the inch, so capital letters of 12-point type are a sixth of an inch tall. This advice is in 12-point type. Your type may be larger than 12 points, but it cannot be smaller. *See* Circuit Rule 32(b). Word processing and page layout programs can expand or condense the type using tracking controls, or you may have access to a condensed version of the face (such as Garamond Narrow). Do not use these. Condensed type is prohibited by Rule 32(a)(6). It offers no benefit to counsel under an approach that measures the length of briefs in words rather than pages, and it is to your advantage to make the brief as legible as possible.

This is a 9-point type.

This is a 10-point type.

This is 11-point type.

This is 12-point type.

This is 12-point type, condensed. Condensed type is not acceptable.

This is 13-point type.

This is 14-point type.

3. Rule 32(a)(6) provides that the principal type must be a plain, roman style. In other words, the main body of the document cannot be bold, italic, capitalized, underlined, narrow, or condensed. This helps to keep the brief legible. Italics or underlining may be used only for case names or occasional emphasis. Boldface and all-caps text should be used sparingly.

4. Circuit Rule 32(c) determines the maximum length of a brief. It permits you to present as much argument as a 50-page printed brief. The variability of proportionally spaced type makes it necessary to express this length in words rather than pages. Other rules extend this approach to other documents. For example, Fed. R. App. P. 29(a)(5) provides that an *amicus* brief may be no more than half the length allowed for a party's principal brief.

Lawyers who choose monospaced type may avoid word counts by counting lines of type. Unless the brief employs a lot of block quotes or footnotes it will be enough to count pages and multiply by the number of lines per page. (Fifty pages at 26 lines per page is 1,300 lines.) The line-count option is not available when the brief uses proportional type.

Principal briefs of 30 pages or less, and reply briefs of 15 pages or less, need not be accompanied by a word or line count. Think of Rule 32(a)(7)(A) as a safe harbor. Lawyers who need more should use Circuit Rule 32(c). A brief that meets the type volume limitations of Circuit Rule 32(c) is acceptable without regard to the number of pages it contains.

5. What has gone before has been a description of requirements in Fed. R. App. P. 32 and Circuit Rule 32. Now we turn to advice, offered for mutual benefit of counsel seeking to make persuasive presentations and judges who want the most legible briefs so that they can absorb what counsel has to offer. Nothing in what follows is mandatory.

Typographic decisions should be made for a purpose. *The Times of London* uses Times New Roman to serve an audience looking for a quick read. Lawyers don't want their audience to read fast and throw the document away; they want to maximize retention. Achieving that goal requires a different approach — different typefaces, different column widths, different writing conventions. Briefs are like books rather than newspapers. The most important piece of advice we can offer is this: read some good books and try to make your briefs more like them.

This requires planning and care. Any business consultant seeking to persuade a client prepares a detailed, full-color presentation using the best available tools. Any architect presenting a design idea to a client comes with physical models, presentations in software, and other tools of persuasion. Law is no different. Choosing the best type won't guarantee success, but it is worthwhile to invest some time in improving the quality of the brief's appearance and legibility.

Judges of this court hear six cases on most argument days and nine cases on others. The briefs, opinions of the district courts, essential parts of the appendices, and other required reading add up to about 1,000 pages per argument session. Reading that much is a chore; remembering it is even harder. You can improve your chances by making your briefs typographically superior. It won't make your arguments better, but it will ensure that judges grasp and retain your points with less struggle. That's a valuable advantage, which you should seize.

Two short books by Robin Williams can help lawyers and their staffs produce more attractive briefs. *The PC is not a Typewriter* (1990), and *Beyond the PC is not a Typewriter* (1996), contain almost all any law firm needs to know about type. These books have counterparts for the Mac OS: *The Mac is not a Typewriter* and *Beyond the Mac is not a Typewriter*. Larger law firms may want to designate someone to learn even more about type. For this purpose, curling up with Robert Bringhurst, *The Elements of Typographic Style,* has much the same value for a brief's layout and type as Strunk & White's *The Elements of Style* and Bryan A. Garner's *The Elements of Legal Style* do for its content.

Another way to improve the attractiveness and readability of your brief or motion is to emulate high-quality legal typography. The opinions of the Supreme Court, and the briefs of the Solicitor General, are excellent models of type usage. The United States Reports are available online in Acrobat versions that retain all of their original typography. You can find them at https://www.supremecourt.gov/opinions/boundvolumes.aspx. Briefs of the Solicitor General also are available online in Acrobat versions. Go to https://www.justice.gov/osg/search-osg-briefs-pdfs. The Supreme Court's opinions and the SG's briefs follow all of the conventions mentioned below, as do the printed opinions of the Seventh Circuit.

Here are some suggestions for making your briefs and other papers more readable.

- Use proportionally spaced type. Monospaced type was created for typewriters to cope with mechanical limitations that do not affect type set by computers. With electronic type it is no longer necessary to accept the reduction in comprehension that goes with monospaced letters. When every character is the same width, the eye loses valuable clues that help it distinguish one letter from another. For this reason, no book or magazine is set in monospaced type. If you admire the typewriter look nonetheless, choose a slab-serif face with proportional widths. Caecilia, Lucida, Officina, Serif, Rockwell, and Serifa are in this category.

- Use typefaces that are designed for books. Both the Supreme Court and the Solicitor General use Century. Professional typographers set books in New Baskerville, Book Antiqua, Calisto, Century, Century Schoolbook, Bookman Old Style and many other proportionally spaced serif faces. Any face with the word "book" in its name is likely to be good for legal work. Baskerville, Bembo, Caslon, Deepdene, Galliard, Jenson, Minion, Palatino, Pontifex, Stone Serif, Trump Mediäval, and Utopia are among other faces designed for use in books and thus suitable for brief-length presentations.

- Use the most legible face available to you. Experiment with several, then choose the one you find easiest to read. Type with a larger "x-height" (that is, in which the letter x is taller in relation to a capital letter) tends to be more legible. For this reason, faces in the Bookman and Century families are preferable to faces in the Garamond and Times families. You also should shun type designed for display. Bodoni and other faces with exaggerated stroke widths are effective in headlines but hard to read in long passages.

Professional typographers avoid using Times New Roman for book-length (or brief-length) documents. This face was designed for newspapers, which are printed in narrow columns, and has a small x-height in order to squeeze extra characters into the narrow space. Type with small x-height functions well in columns that contain just a few words, but not when columns are wide (as in briefs and other legal papers). In the days before Rule 32, when briefs had page limits rather than word limits, a typeface such as Times New Roman enabled lawyers to shoehorn more argument into a brief. Now that only words count, however, everyone gains from a more legible typeface, even if that means extra pages. Experiment with your own briefs to see the difference between Times and one of the other faces we have mentioned.

- Use italics, *not* underlining, for case names and emphasis. You don't see case names underlined in the United States Reports, the Solicitor General's briefs, or law reviews; for good reason. Underlining masks the descenders (the bottom strokes of characters such as g, j, p, q and y). This interferes with reading, because we recognize characters by shape. An underscore makes characters look more alike, which not only slows reading but also impairs comprehension.

- Use real typographic quotes ("and") and real apostrophes (’), not foot and inch marks. Reserve straight ticks for feet and inches.

- Put only one space after punctuation. The typewriter convention of two spaces is for monospaced type only. When used with proportionally spaced type, the extra spaces lead to what typographers call "rivers" — wide, meandering areas of white space up and down a page. Rivers interfere with the eyes moving from one word to the next.

- Do not justify your text unless you hyphenate it too. If you fully justify unhyphenated text, rivers result as the word processing or page layout program adds white space between words so that the margins line up.

- Do not justify monospaced type. Justification is incompatible with equal character widths, the defining feature of a monospaced face. If you want variable spacing, choose proportionally spaced face to start with. Your computer *can* justify a monospaced face, but it does so by inserting spaces that make for big gaps between (and sometimes within) words. The effects of these spaces can be worse than rivers in proportionally spaced type.

- Indent the first line of each paragraph ¼ inch or less. Big indents disrupt the flow of text. The half-inch indent comes from the tab key on a typewriter and is never used in professionally set type.

- Cut down on long footnotes and long block quotes. Because block quotes and footnotes count toward the type volume limit, these devises do not affect the length of the allowable presentation. A brief with 10% text and 90% footnotes complies with Rule 32, but it will not be as persuasive as a brief with the opposite ratio.

- Avoid bold type. It is hard to read and almost never necessary. Use italics instead. Bold italic type looks like you are screaming at the reader.

- Avoid setting text in all caps. The convention in some state courts of setting the parties' names in capitals is counterproductive. All-caps text attracts the eye (so does boldface) and makes it harder to read what is in between — yet what lies between the parties' names is exactly what you want the judge to read. All-caps text in outlines and section captions also is hard to read, even worse than underlining. Capitals all have one same rectangular shape, so the reader cannot use shapes (including ascenders and descenders) as cues. Underlined, all-caps, boldface text is almost illegible.

  One common use of all-caps text in briefs is argument headings. Please be judicious. Headings can span multiple lines, and when they are set in all-caps text are very hard to follow. It is possible to make heading attractive without using capitals. Try this form:

ARGUMENT

I. The Suit is Barred by the Statute of Limitations

A. Perkins had actual knowledge of the contamination more than six years before filing suit

This form is harder to read:

ARGUMENT

I. THE SUIT IS BARRED BY THE STATUTE OF LIMITATIONS

A. Perkins had actual knowledge of the contamination more than six years before filing suit

If you believe that italics and underscores are important to getting your idea across, try something like this (replacing underlining with a rule line beneath the text):

ARGUMENT

I. The Suit is Barred by the Statute of Limitations

A. Perkins had actual knowledge of the contamination more than six years before filing suit

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XXIV. FILING AND SERVING BRIEFS

Listed below are the technical and procedural requirements pertaining to briefing the appeal. The requirements and suggestions for brief writers appear in Chapters XXII and XXIII of this Handbook, *supra*. If in doubt, counsel should check the court's web site for checklists and sample documents. Counsel may contact the clerk's office for assistance if the rules, caselaw or this Handbook or the court's website (which contains various samples, forms and checklists) do not provide the information that counsel is seeking. But again, remember, clerk's office employees cannot interpret the rules or give legal advice.

A. Time for Filing and Serving Briefs

Briefs must be filed and served as set forth in the scheduling order. If there has been no scheduling order, the appellant or petitioner has 40 days from the docketing of the appeal to file and serve his or her brief even if the record was incomplete at the time that the appeal was docketed. Cir. R. 31(a). The opening brief in any petition for review or application for enforcement of an order of an administrative agency (in NLRB applications for enforcement, the private party — respondent files the first brief) is due 40 days from the filing of the administrative record or certified list of the record. Fed. R. App. P. 31(a).

The appellee or respondent then has 30 days from the service of the opening brief to file and serve a brief. Within 21 days after service of the appellee's or respondent's brief and at least 7 days before oral argument, appellant or petitioner may file and serve a reply brief. Fed. R. App. P. 31(a).

In cross-appeals a four brief schedule is established by court order, usually as follows: (1) the appellant files an opening brief in the main appeal; (2) the appellee/cross-appellant files a combined responsive brief in the main appeal and opening brief in the cross-appeal 30 days later; (3) the appellant/cross-appellee files a combined reply brief in the main appeal and responsive brief in the cross-appeal 30 days later; and (4) the appellee/cross-appellant files a reply brief in the cross-appeal 21 days later. Fed. R. App. P. 28.1(f). The scheduling order usually will call on the party principally aggrieved by the judgment to file the opening brief. 7th Cir. Oper. Proc. 8. The court will entertain motions to realign briefing or increase the volume of text allowed when the norm established by the rule proves inappropriate.

All briefs of parties represented by counsel must be filed electronically in accord with the "Electronic Case Filing Procedures" established by the court pursuant to Fed. R. App. P. 25(a)(2)(D) and Cir. R. 25(d). These procedures are found on the court's website. Briefs and appendices will be considered timely once they are submitted to the court's electronic filing system. They are filed on the court's docket only after a review for compliance with applicable rules, acceptance by the Clerk, and issuance of a Notice of Docket Activity (NDA). *Courthouse News*

Service v. Brown, 908 F.3d 1063, 1065 fn.1 (7th Cir. 2018) (clerk's office undertakes certain administrative processing before a filing is made publicly available). Until then, the brief is readily accessible only by counsel of record. Filers are also required to submit 15 duplicate paper copies of briefs and 10 copies of separate appendices in accordance with Fed. R. App. P. 30(a)(3) and Circuit Rules 31(b). Duplicate paper copies must be received by the Clerk within seven days of the Notice of Docket Activity generated upon acceptance of the electronic brief or appendix.

Unrepresented parties may file briefs or other documents on paper by mail. Briefs filed by *pro se* litigants are considered filed for purposes of the rules on the date that they are mailed. Fed. R. App. P. 25(a). For administrative efficiency a *pro se* brief is filed as of the date of receipt (if there is compliance with all other prerequisites). Briefs are not back-dated for filing by the court of appeals clerk's office. All other documents, including petitions for rehearing, are considered filed only upon actual receipt by the clerk of the court.

A brief or other document due on a Saturday, Sunday, or holiday is due on the next business day. Fed. R. App. P. 26(a).

B. Extension of Time

Extensions of time to file briefs are not favored. Consult Circuit Rule 26 for grounds which may merit consideration. The court strictly enforces the provision of this rule and failure to comply can result in dismissal of the appeal or disciplinary sanctions. A motion for an extension, with supporting affidavits and proof of service on opposing counsel, must be filed at least 7 days before the brief is due. Cir. R. 26. The motion and affidavit shall set forth the due date for the brief, any previous requests for extension of time and the court's ruling on each request, the date for which the appeal is scheduled for oral argument (if scheduled) and facts that establish (with specificity) why, with due diligence and priority given to the preparation of the brief, it will not be possible to file the brief on time. In criminal or other cases in which such information is pertinent, the custodial status and bail conditions of the party must be set forth in the affidavit. Consult Circuit Rule 26 for grounds which may merit consideration. The court strictly enforces the provision of this rule and failure to comply can result in dismissal of the appeal or disciplinary sanctions.

C. Failure of a Party to Timely File a Brief

If counsel for appellant in a criminal appeal, or appellant's court-appointed counsel in a civil case, fails to file a brief, the clerk enters an order directing counsel to show cause within 14 days why disciplinary action should not be commenced. Cir. R. 31(c)(1). In all other cases, the clerk enters an order directing counsel or the *pro se* litigant to show cause within 14 days why the appeal should not be dismissed. Cir. R. 31(c)(2). If the appellee fails to file a brief, the clerk enters

an order to show cause why the appellee should not be denied oral argument. Fed. R. App. P. 31(c); Cir. R. 31(d). In all instances, the court will take appropriate action. Good reason must be shown by the tardy party to allow the late filing of such brief; otherwise, Seventh Circuit Operating Procedure 7(a) authorizes the clerk to dismiss the appeal. In criminal appeals with court-appointed counsel, the clerk may discharge counsel and order them to show cause why the abandonment of the client should not lead to disbarment.

D. Additional Authority

Pertinent and significant authorities coming to the attention of a party after its brief has been filed or after oral argument but before decision may be cited to the court by a letter to the clerk with a copy to all other parties. The letter must refer either to a page of the brief or a point orally argued to which the citations pertain and state the reasons for the supplemental citations. Fed. R. App. P. 28(j) limits these letters to 350 words or less, and Cir. R. 28(e) requires counsel to file an original and ten copies of the letter. When filing a Rule 28(j) letter with the clerk, counsel should provide a certification that the letter does not exceed 350 words. A copy of any authority not yet available in a publicly accessible electronic database must accompany each copy of the letter. Fed. R. App. P. 32.1(b).

The filing may be made on the day of argument, if absolutely necessary, but should be made sooner. Cir. R. 34(g). Any response to the filing must be made promptly and is similarly limited to 350 words.

E. Brief of an Amicus Curiae

Court permission or consent of all parties is required in order to file an amicus brief, unless the brief is filed by one of the listed governmental entities. Fed. R. App. P. 29(a). The United States, an agency or officer thereof, or any state may file an amicus brief without leave of court. The court will scrutinize such motions carefully, and lawyers are advised to review the court's decisions in *Voices for Choices v. Illinois Bell Telephone Co.,* 339 F.3d 542 (7th Cir. 2003), and *Ryan v. Commodity Futures Trading Commission*, 125 F.3d 1062 (7th Cir. 1997).

Absent leave of court, an amicus curiae brief must be filed no later than 7 days after the principal brief of the party whose position it supports is filed. Fed. R. App. P. 29(a)(6). The rule requires the applicant to identify its interest and state the reason why an amicus brief is desirable, and the relevance of the matters asserted to the disposition of the case. The applicant must attach its brief to the motion. Fed. R. App. P. 29(a)(3).

The brief may not exceed one-half the maximum length authorized by the rules for a party's principal brief. In the Seventh Circuit, a brief need not comply with the portion of Fed. R. App. P. 29(a)(5) that limits the length of the brief to one-half of the length established in Fed. R. App. P. 32(a)(7). An amicus brief filed

during the initial consideration of a case on the merits is acceptable if it contains no more than 7,000 words. Cir. Rule 29. Importantly, counsel should note that the reduced limit contained in Fed. R. App. P. 29(b)(4) applies if the amicus brief is filed during consideration of whether to grant rehearing — the brief must not exceed 2,600 words.

Participation by an amicus curiae in oral argument will be allowed only with the court's permission. Fed. R. App. P. 29(a)(8).

F. Citation of Unreported Opinion

Citation is permitted of federal judicial opinions, orders, judgments and other written rulings that have been designated as unpublished, not for publication, non-precedential, or the like, so long as they were issued on or after January 1, 2007. Fed. R. App. P. 32.1(a).

When a decision that is not available in a publicly accessible electronic database is cited in a brief or other document filed with the court, a copy of that decision should be attached to each copy of the document, or in the appendix to a brief, including those served upon opposing counsel. Fed. R. App. P. 32.1(b).

Counsel are reminded that such unpublished orders are not binding on subsequent panels. *United States v. Townsend*, 762 F.3d 641, 646 (7th Cir. 2014); *see also Williams v. Wexford Health Sources, Inc.*, 957 F.3d 828, 833 (7th Cir. 2020).

G. Number of Copies

Fifteen paper copies of each brief, Cir. R. 31(b), and ten paper copies of a separate appendix, Fed. R. App. P. 30(a)(3), must be tendered to the court within 7 days of electronic filing.

H. Format

The front of each brief must set forth: (1) the name of the court; (2) the docket number of the appeal centered at the top; (3) the title of the appeal; (4) the nature of the proceeding, the case number below, and the name of the court and trial judge or agency below (*e.g.*, Appeal from the United States District Court for the Northern District of Illinois; Petition to Review Order of the National Labor Relations Board); (5) the title of the document (*e.g.*, Appellant's Reply Brief); and (6) the names, addresses, and telephone numbers of counsel representing the party filing the brief. Fed. R. App. P. 32(a)(2). Note that when two or more appeals are consolidated, each brief must bear the appellate case numbers and captions of all related appeals.

Pages of the brief (starting with the jurisdictional statement) should be sequentially numbered through the conclusion. The disclosure statement and tabular matter may be separately numbered.

The paper copies of briefs may be photocopied or reproduced by any process that produces a clear black image on a single side of light paper. Binding is acceptable if it is secure and does not obscure the text. Briefs must have pages no larger than 8-1/2" by 11" and type matter not exceeding 6-1/2" by 9", with double spacing between each line of text. Fed. R. App. P. 32(a). Allowable typefaces and type styles are detailed in Fed. R. App. P. 32(a)(5) and (6) and provides as follows:

> (5) Typeface. Either a proportionally spaced or monospaced typeface may be used.
>
> > (A) A proportionally spaced face must include serifs, but sans-serif type may be used in headings and captions. A proportionally spaced face must be 12-point or larger.
> >
> > (B) A monospaced face may not contain more than 10.5 characters per inch.
>
> (6) Type Styles. A brief must be set in a plain, roman style, although italics or boldface may be used for emphasis. Case names must be italicized or underlined.

Circuit Rule 32 allows variance from the 14-point type requirement of Fed. R. App. P. 32(a)(5)(A). A brief is acceptable if proportionally spaced type is 12-points or larger in the body of the brief, and 11-points or larger in footnotes. The court discourages the use of all-capitals text for any purpose other than the caption on the cover and first page, and section headings such as "ARGUMENT". Note that the court also strongly recommends the use of italics, *not* underlining, for emphasis. *See* Chapter XXIII of this Handbook, *supra.*

Counsel must ensure that each page of photocopied briefs be produced with sufficient clarity and that appendices are legible. Fed. R. App. P. 32(a)(1), (b)(2).

Briefs must have covers colored as follows:

Appellant	Blue
Appellee	Red
Appellee/Cross-Appellant	Red
Appellant Reply/Cross-Appellee	Yellow
Intervenor or Amicus Curiae	Green
Reply Brief.....	Grey
Appendix (if separately prepared)	White
Any Supplemental Brief	Tan

NOTE: On occasion, the court appoints counsel to act as amicus to argue the side of an appellant or an appellee. In such a case, the color of the "amicus" brief should be blue or red, not green, depending on which side the amicus was appointed to argue.

I. Contents

Consult Fed. R. App. P. 28; Circuit Rule 28 and discussion in Chapter XXII of this Handbook, *supra*.

J. Length of Briefs

The Seventh Circuit opted out of the Federal Rules of Appellate Procedure word changes for the parties' briefs, meaning that 14,000 words remain acceptable for a principal brief and 7,000 words remain acceptable for a reply brief. *See* Circuit Rule 32(c). The court also retained the word limits for the briefs in a cross-appeal, Cir. Rule 28.1, and amicus briefs, Cir. Rule 29. Alternatively, Fed. R. App. P. 32(a)(7) creates a "safe harbor" page limit for those who choose it, rather than the line or word limit.

Without the court's permission, briefs filed in the Seventh Circuit cannot exceed the following lengths, and in most cases should be substantially shorter than the lengths permitted:

> Appellant's brief and appellee's brief: 30 pages, or comply with the line limits of Fed. R. App. P. 32(a)(7)(A), (B), or word limits of Cir. Rule 32(c).
>
> Appellant's and appellee/cross-appellant's reply brief: 15 pages, or comply with the line limits of Fed. R. App. P. 32(a)(7)(A), (B), or word limits of Cir. Rule 32(c).
>
> Appellee/Cross-appellant's combined principal brief and response: 35 pages, or comply with the line limits of Fed. R. App. P. 28.1(e)(2)(B)(ii), or word limits of Cir. Rule 28.1.
>
> Appellant/Cross-appellee's combined reply and response: 30 pages, or comply with the line limits of Fed. R. App. P. 28.1(e)(2)(A)(ii), or word limits of Cir. Rule 28.1.
>
> Amicus briefs filed during the initial consideration of a case on the merits: one-half the length of a party's principal brief, meaning it may not exceed 15 pages or 7000 words. Fed. R. App. P. 29(d); Cir. Rule 29.

No matter which approach is used to determine a brief's length — page, line or word — the brief must contain a certification that the brief's length does not exceed what the rule provides. Fed. R. App. P. 32(g).

As pointed out in the court's Circuit Briefing Filing Checklist, counsel "must ensure that they count all words in the brief before certifying compliance with Rule 32." Word count errors, other than the sort of unintentional error made by differences in word processor counting functions may be perceived deliberate and sanctionable. *Pecher v. Owens-Illinois, Inc.*, 859 F.3d 396, 402-03 (7th Cir. 2017).

1. *What's Included*

In computing the length of a brief, headings, footnotes and quotations are counted. The following items are not:

- the cover page
- a corporate disclosure statement
- a table of contents
- a table of citations
- a statement regarding oral argument
- an addendum containing statutes, rules and regulations
- certificates of counsel
- the signature block
- the proof of service
- any item specifically excluded by these rules or by legal rule

Fed. R. App. P. 32(f). Only those items mentioned in Rule 32(f)'s list are excluded. Everything else counts. *Vermillion v. Corizon Health, Inc.*, 906 F.3d 696, 697 (7th Cir. 2018) (Easterbrook, J., in chambers).

It is worth noting that incorporation of arguments, by reference to briefs filed in the district court, in an appellate brief is forbidden. The main reasons are to prevent evasion of the limits on the length of such briefs and to ensure that the party's arguments engage with the findings and analysis in the decision appealed from. *See Norfleet v. Walker*, 684 F.3d 688, 690-91 (7th Cir. 2012).

One final important word about the length of briefs. Verbosity is to be avoided, use no more words or pages than necessary to present one's claims fully. *See, e.g., Pinno v. Wachtendorf*, 845 F.3d 328, 331-32 (7th Cir. 2017). Word limits encourage clarity and economy in briefing — and that is a good thing.

2. *Oversized Brief*

Permission to submit a brief in excess of the page, line or word limit may be obtained from the court on motion supported by affidavit. Such motions are not favored, however, and will be granted only when exceptional circumstances are shown. *See Vermillion v. Corizon Health, Inc.*, 906 F.3d 696, 697 (7th Cir. 2018) (Easterbrook, J., in

chambers) ("14,000 [words] suffices for all but the rare cases with lengthy trials, complex administrative records, or multiple complex issues").

The motion must be filed well before the date the brief is due to be filed. *Fleming v. County of Kane*, 855 F.2d 496 (7th Cir. 1988). "A party should not attempt to present [the court] with a *fait accompli* by submitting an oversized brief before his motion for leave to file such a brief has been acted on." *United States v. Devine*, 768 F.2d 210 (7th Cir. 1985) (en banc) (per curiam).

Such a motion, however, should not be filed too early. The appropriate time to assess the need to file an oversized brief is after the brief has started to be written — not when the appeal is filed (for an appellant's motion) or the opening brief is filed (for an appellee's motion).

The motion should be specific, listing the issues on appeal and the particular reasons why additional pages, lines or words are necessary — for example, due to the number of parties, length of trial or transcripts, or complexity of issues. And, it should go without saying, do not file an oversized brief without the court's permission. *Abner v. Scott Memorial Hospital*, 634 F.3d 962 (7th Cir. 2011) (litigants warned that a violation of Rule 32 alone may justify dismissal of appeal as a sanction). "Me too" requests, seeking parity with another party's brief, will not be successful.

K. Required Short Appendix

The decision(s) being appealed must always be bound with the appellant's brief as an attached appendix. Certain other required contents of the appendix may also be bound with the brief if the total pages of the appendix do not exceed 50 pages. Cir. R. 30(a), (b). *See* this Handbook, Chapter XXVI, *infra.*

L. References to the Record

No fact shall be stated in the Statement of the Case unless it is supported by a reference to the document number and page or pages of the electronic record or appendix where the fact appears. Fed. R. App. P. 28(e).

M. Agreement of Parties to Submit without Oral Argument

Federal Rule of Appellate Procedure 34(f) provides that the parties may agree to submit a case without oral argument, but the court will make the final determination whether to hear oral argument.

Relatedly, Circuit Rule 34(f) allows a party to include, as part of a principal brief, a short statement explaining why oral argument is or is not appropriate under the criteria of Fed. R. App. P. 34(a). As a practical matter, the inclusion of such a statement is neither necessary nor helpful; the court schedules oral argument in all cases that are counselled on both sides. But if a statement is included, it should be near the beginning of the brief.

N. Sequence of Briefing in National Labor Relations Board Proceedings

Each party adverse to the NLRB in an enforcement or a review proceeding shall proceed first on briefing and at oral argument. Fed. R. App. P. 15.1. Even though a party adverse to the Board in an enforcement proceeding is actually the respondent, it must file the opening blue-covered brief. That same party is allowed to file a grey-covered reply brief in response to the red-covered responsive brief of the NLRB. The same party will also proceed first at oral argument.

O. Sealed Briefs

Briefs, like other documents that affect the disposition of federal litigation, are open to public view. But a party may obtain permission to file two briefs — a redacted public brief and a second, sealed brief that contains confidential information — if reasons exist for doing so. *See In re Krynicki*, 983 F.3d 74 (7th Cir. 1992) (Easterbrook, J., in chambers) (procedure for the simultaneous filing of a public brief and a sealed brief discussed). See also discussion in this Handbook, "F. Sealed Items in the Record" and "G. Ability to Litigate Anonymously" at Chapter XXI, *supra* at 149-51.

In addition, the clerk's office has prepared some suggestions that counsel may find helpful. The "Redaction Methodology Suggestions" is obtainable from the Seventh Circuit's website.

P. Summary of Certain Technical Requirements

Document	Cover Color	Copies	Time	Page Limit	Word Limit
Separate Appendix	White	10	40 Days	No Limit	—
Appellant's Brief	Blue	15	40 Days	30 Pages†	14,000
Appellee's Brief	Red	15	30 Days	30 Pages†	14,000
Combined	—	—	—	—	—
Appellee/Cross-Appellant's Brief	Red	15	30 Days	35 Pages†	16,500
Reply/Cross-Appellee's Brief	Yellow	15	30 Days	30 Pages†	14,000
Reply Brief	Grey	15	21 Days	15 Pages†	7,000
Amicus Brief	Green	15	††	15 Pages†††	7,000†††
Intervenor's Brief	Green	15	††	30 Pages†	14,000†
Supplemental Brief	Tan	15	Per Order	Per Order	Per Order
Petition for Rehearing	White	15	14 Days	15 Pages††††	3,900
Petition for Rehearing En Banc	White	30	14 Days	15 Pages††††	3,900

† Page limits apply unless brief complies with the line limitations of Fed. R. App. P. 32 (a)(7)(B), which provides that a principal brief may contain no more than 1,300 lines if it uses monospaced type, or the word limitations of Cir. Rule 32, which provide that it contains no more than 14,000 words. A reply brief may contain no more than half of the above. In cross appeals the page limit applies unless the appellee's combined response brief/cross-appellant's brief contains no more than 16,500 words, Cir. Rule 28.1, or 1500 lines of text for a brief that uses monospaced type. Fed. R. App. P. 28.1(e)(2)(B).

†† An intervenor brief is due on the same date as that of the party whose position it supports. Amicus brief due within 7 days of the brief it supports.

††† Amicus brief is not more than one half of a principal brief. Cir. Rule 29.

†††† The page limit applies only if the petition is handwritten or typewritten. If the petition is produced using a computer, the word limit applies.

XXV. CERTIFICATION OF STATE LAW TO STATE SUPREME COURT

When the rules of the highest court of a state provide for certification to that court by a federal court of state law questions which will control the outcome of an appeal, the court of appeals, on its own initiative or on motion of one of the parties, may certify such a question to the state court. Cir. R. 52(a). The Illinois, Indiana, and Wisconsin Supreme Courts have such rules.

Motions to certify are to be included near the beginning of the brief — preferably immediately after the jurisdictional statement — but the moving party also should call it to the clerk's attention by noting it on the cover of the brief. The decision as to certification will be made after the briefs have been filed and may be deferred until after oral argument. *See, e.g., State Farm Mutual Ins. Co. v. Pate*, 275 F.3d 666, 671-73 (7th Cir. 2001).

The most important consideration in determining whether to certify a question of state law for resolution by the state's highest court is "whether we find ourselves genuinely uncertain about a question of state law that is key to a correct disposition of the case." *In re Hernandez*, 918 F.3d 563, 570 (7th Cir. 2019) (internal quotation marks omitted), quoting *Lyon Fin. Servs., Inc. v. Ill. Paper & Copier Co.*, 732 F.3d 755, 766 (7th Cir. 2013). Additionally, in exercising its discretion to certify a question, the court "also considers whether the case concerns a matter of vital public concern or is an issue likely [to] recur in other cases." *Id.*, quoting *Zahn v. N. Am. Power & Gas, LLC*, 815 F.3d 1082, 1085 (7th Cir. 2016).

Within 21 days after the state supreme court issues its decision, the parties must file a statement of their position about what action the court should take to complete the resolution of the appeal. Cir. R. 52(b).

XXVI. PREPARING AND SERVING APPENDIX

The first step in analyzing an appeal is understanding the basis of the district court's decision. A court of appeals cannot decide whether a judge made a reversible mistake without knowing what the judge did and why. And this is why the court wants ready access to all judgments, orders, and rulings that are relevant to the appeal, *United States v. White*, 472 F.3d 458, 465-66 (7th Cir. 2006), including a copy of the transcripts of the court's oral rulings. *United States v. Clark*, 657 F.3d 578, 585 (7th Cir. 2011). This is the rationale for Circuit Rule 30. *See Jaworski v. Master Hand Contractors, Inc.*, 882 F.3d 686, 690 (7th Cir. 2018).

Circuit Rule 30(a) requires that the appellant "submit, bound with the main brief, an appendix containing the judgment or order under review and any opinion, memorandum of decision, findings of fact and conclusions of law, or oral statement of reasons delivered by the court or administrative agency upon the rendering of that judgment, decree, or order." Be mindful that the Rule 58 judgment is distinct from the opinion; both must be included in the bound appendix. *Wonsey v. City of Chicago*, 940 F.3d 394, 401 (7th Cir. 2019).

Circuit Rule 30(b) adds that the appellant also must include in an appendix other opinions or orders that address the issues raised on appeal, including:

(1) Copies of any other opinions, orders or oral rulings in the case that address the issues sought to be raised. If appellant's brief challenges any oral ruling, the portion of the transcript containing the judge's rationale for that ruling.

(2) Copies of any opinions or orders in the case rendered by magistrate judges or bankruptcy judges that address the issues sought to be raised.

(3) Copies of all opinions, orders, findings of fact and conclusions of law rendered in the case by administrative agencies (including their administrative law judges and adjudicative officers such as administrative appeals judges, immigration judges, members of boards and commissions, and others who serve functionally similar roles). This requirement applies whether the original review of the administrative decision is in this court or was conducted by the district court.

(4) Copies of all opinions by any federal court or state appellate court previously rendered in the criminal prosecution, any appeal, and any earlier collateral attack, if collaterally attacking a criminal conviction.

(5) An order concerning a motion for new trial, alteration or amendment of the judgment, rehearing, and other relief sought under Fed. R. Civ. P. 52(a) or 59.

(6) Any other short excerpts from the record, such as essential portions of the pleading or charge, disputed provisions of a contract, pertinent pictures, or brief portions of the transcript, that are important to a consideration of the issues raised on appeal.

The documents required by Cir. R. 30(b) may also be included with the brief if the total of the documents required by Circuit Rule 30(a) and (b) do not exceed 50 pages. Otherwise the documents required by Circuit Rule 30(b) should be in a bound appendix and electronically submitted separately. Counsel is free to include other documents in a separately bound appendix but should note the warning in Circuit Rule 30(e) that an appendix should not be lengthy and costs for a lengthy appendix will not be awarded. Like briefs, counsel must submit paper copies of appendices after acceptance of the electronically filed version.

A party can include, with this court's permission, a DVD or CD-ROM as part of the appendix to the paper copies of the party's brief. Court permission is required because of the rule that the electronically-filed version and paper copy of the brief and any appendices must be identical. *See B.G. v. Bd. of Educ. of the City of Chicago*, 906 F.3d 632 (7th Cir. 2018) (per curiam).

Only 10 copies of an appendix not attached to the brief are required. Fed. R. App. P. 30(a)(3). If bound with the party's brief, 15 copies are required. Cir. R. 31(b).

If an appeal involves more than one appellant represented by different counsel, counsel may want to consider requesting permission of the court that its brief need not include materials contained in a co-appellant's appendix, particularly if the material is lengthy. *See* Fed. R. App. P. 30(f).

Relatedly, it is worth noting that the brief of a cross-appellant (the second brief filed in a cross-appeal) must comply fully with Circuit Rule 30, although a cross-appellant need not include materials contained in the appendix of the appellant. Cir. R. 30(c).

The parties may file a joint appendix, or the appellee may file with its brief a supplemental appendix containing relevant material not included in an appendix previously filed. Deferred appendices filed pursuant to Fed. R. App. P. 30(c) are seldom allowed.

If the parties choose to file a stipulated joint appendix, as provided in Cir. R. 30(e), counsel for the appellant should consult with the other parties as soon as the record is ready to be filed in order to reach agreement as to the contents of the appendix. It is important to note that, regardless of whether a stipulated joint

appendix is filed, the brief of the appellant or petitioner must include, bound at the back of the brief, an appendix consisting of the order, judgment or opinion under review, no matter what its length. Cir. R. 30(a).

The appendix must include its own table of contents, describing each item included and listing the appendix page on which each item or portion of the transcript can be found. Fed. R. App. P. 30(d). References should also include the date of the proceedings and the respective pages of the electronic transcripts. If the appendix contains portions of the transcript of proceedings, the appendix shall comply with Fed. R. App. P. 30(d), and must also contain an index which complies with Circuit Rule 10(e). *See* Cir. R. 30(f).

Note the requirement of Circuit Rule 30(d) that the appellant's appendix contain a statement, which should be at the front of the appendix, certifying that such appendix does in fact include all the materials required by Circuit Rule 30(a) and (b). Failure to supply the necessary documents goes to the heart of the appellate court's decision-making process. This is why the court insists on meticulous compliance with the rule. *Jaworski v. Master Hand Contractors, Inc.*, 882 F.3d at 690.

The clerk's office does not check whether an appendix complies with Rule 30(a). Instead it relies on counsel's honesty. If the certificate is in its proper form, this court accepts the brief "without independent inquiry into compliance with Rule 30(a)." *Sambrano v. Mabus*, 663 F.3d 879, 881 (7th Cir. 2011).

Sanctions can be imposed on counsel who fail to comply with the rule. Compare *United States v. Johnson* 745 F.3d 227, 232 (7th Cir. 2014) (counsel sanctioned $2,000.00 for an intentional violation) with *United States v. Rogers*, 270 F.3d 1076, 1084 (7th Cir. 2001) (counsel sanctioned $1,000.00 for a negligent violation); *see also United States v. Evans*, 131 F.3d 1192 (7th Cir. 1997); *Matter of Galvan*, 92 F.3d 582 (7th Cir. 1996); *Hill v. Porter Memorial Hospital*, 90 F.3d 220 (7th Cir. 1996); *Guentchev v. INS*, 77 F.3d 1036 (7th Cir. 1996); *United States v. Smith*, 953 F.2d 1060 (7th Cir. 1992).

Recently, the court differentiated between false certifications in civil litigation and those in criminal cases. In a civil case, a false certificate of compliance with Circuit Rule 30(a) and (b) may lead to summary affirmance or dismissal of the appeal. *See Jaworski v. Master Hand Contractors, Inc.*, 882 F.3d at 690. In criminal cases, the court will give the defendant plenary appellate review and penalize the lawyer directly. *See United States v. Boliaux*, 915 F.3d 493, 497 (7th Cir. 2019) (the presumptive fine for Rule 30 violation in a criminal case should be $1,600.00).

The court hopes to limit the expense and work of producing an appendix without sacrificing the material necessary for the judges' convenient consideration of the appeal. It is unnecessary to include everything in the appendix, as the entire

record is readily accessible to each of the judges. Although both the appellant and appellee may pay for the preparation of the appendices, those expenses are recoverable if the court awards costs to the winning party. However, the court will not award costs for a lengthy appendix. Cir. R. 30(e).

XXVII. ORAL ARGUMENT AND SUBMISSION WITHOUT ORAL ARGUMENT

A. Submission without Oral Argument

Many cases are decided after oral argument. However, some cases are decided without oral argument, pursuant to Fed. R. App. P. 34(a). The parties may agree, with the court's approval, to submit a case without oral argument. Fed. R. App. P. 34(f). An appellee seeking affirmance or an administrative agency seeking enforcement of its order may suggest that a case be decided without oral argument.

Circuit Rule 34(f) allows a party to include, as part of a principal brief, a short statement explaining why oral argument is or is not appropriate under the criteria of Fed. R. App. P. 34(a). Oral argument is to be allowed unless a panel of three judges, after examination of the briefs and record, shall be unanimously of the opinion that oral argument is not needed, generally for one of the following reasons:

(1) the appeal is frivolous; or

(2) the dispositive issue or set of issues has been authoritatively decided; or

(3) the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument. Fed. R. App. P. 34(a)(2).

As a practical matter, however, the inclusion of a Rule 34(f) statement in one's brief, discussing these reasons, is neither necessary nor helpful; the court schedules oral argument in all cases that are counselled on both sides and also sets oral argument in a handful of appeals each year in which one side proceeds *pro se*.

B. Scheduling Oral Argument

The time between the filing of the appellee's brief and oral argument will vary, depending on the type of case and the size of the court's docket. Criminal cases and other matters entitled to priority by statute or by their nature are given precedence. Cir. R. 34(b)(1). Appeals will usually be scheduled for oral argument shortly after the last brief is due. In criminal cases the setting of oral argument often occurs as soon as the appellant's brief is filed, and in civil cases normally after the appellee's or respondent's brief is filed.

Counsel for the parties, or the parties themselves if they are without counsel, are sent a "Notice of Oral Argument" approximately 20-30 days before the scheduled date of oral argument. All oral arguments scheduled for a certain day will be heard on that day even if the court has to sit beyond its usual time. Court

regularly convenes at 9:30 AM, and generally six appeals are scheduled for oral argument.

Since the court generally hears six appeals each day, it screens appeals in advance to determine how much time should be sufficient in each case, and limits the time in many to 10 to 20 minutes per side. (The "Notice of Oral Argument" will specify the time allocation.) This does not mean the court will not give the case its full attention, but only that the court believes the issues should be capable of full presentation within that allotted time. On occasion, more than 30 minutes per side is allowed, usually in a complex case. Sometimes, after a review of the issues presented in the briefs, the panel assigned to hear the case may reduce (or increase) the previously determined allocation of time for oral argument. Counsel are informed of this change shortly before the scheduled date.

Multiple appellants or appellees with a common interest constitute a single "side" for purposes of oral argument. Thus, there are only two "sides" to an appeal unless the court rules that a particular appeal is an exception. If more than one attorney on a side will present argument (as is common in multiple defendant criminal appeals), the attorneys must decide among themselves how to split up the time allocated.

Any request for waiver or postponement of a scheduled oral argument must be made by formal motion. Cir. R. 34(e). Because of its heavy caseload, the court denies practically all motions for postponement of a scheduled oral argument. A postponement will be granted to a lawyer with no associate counsel who is scheduled to argue a case before the Supreme Court of the United States on the same day his appeal is scheduled in the Seventh Circuit. In almost all other situations, except that of serious illness, motions for continuance are denied. The reasons for doing so include the following: The panel of three judges assigned to hear a particular oral argument may not be available to sit together again for some time, and it would be extremely wasteful of judicial time to have to assign other judges after the briefs have been read by the assigned panel. Further, the court's calendar may be booked solid for months in advance and it might be difficult to reschedule the oral argument for the near future.

If counsel will be unavailable at some date in the future, counsel should advise the clerk of the specific facts by letter, which must be filed electronically, far enough in advance so that, if feasible, the unavailability may be taken into account in the original scheduling of the argument. Cir. R. 34(b)(3). Usually this means after the filing of the appellant's brief in a criminal case and after the filing of the appellee's brief in a civil case. Counsel, of course, may supplement an earlier notification of unavailability should additional conflicts arise. It is fine to send multiple notices of unavailability to the court.

If an unforeseen event, such as inclement weather, prevents an attorney from appearing in-person, the court's technology allows the attorney to either call or video-conference.

Consideration will also be given to requests addressed to the clerk by out-of-town counsel to schedule more than one appeal for oral argument on the same or successive days so as to minimize travel time and expenses. Cir. R. 34(b)(2). Like a request to avoid scheduling an oral argument on a certain day or certain days, a request to set cases on the same or successive days should be made before the appeal is scheduled for oral argument.

In the court's "Notice of Oral Argument," counsel are directed to notify the clerk, at least five business days in advance of the scheduled oral argument date, of the name of counsel who will be appearing in court to present the oral arguments. Cir. R. 34(a). A hyperlink to the oral argument confirmation form has been added to the "Notice of Oral Argument". The form is also available on the court's website and must be filed electronically. Note that the form requires counsel for appellant to allocate the time reserved for the rebuttal. And remember, every attorney who will present oral argument must be admitted to practice in this court. *See* Cir. R. 46(a).

C. Video-Recording of Oral Argument

The Seventh Circuit for years has made audio recordings of all arguments. In 2018, the court established a policy permitting, in the sole discretion of the assigned panel, the video-recording of oral arguments. The policy can be found in Seventh Circuit Operating Procedure 11, which outlines the procedure for handling a request. Note that any request for video-recording must be made not later than one week before oral argument.

D. Courtroom Procedures

When the court is sitting, oral arguments are generally scheduled for 9:30 AM. The panel of judges and the order of cases to be argued that day is posted at 9:00 AM each morning that the court is in session.

Counsel presenting argument must sign in at the clerk's office at least 15 minutes before the scheduled time. It is important that counsel arrive EARLY to the courthouse, due to security screening. Counsel will be required to present photo identification to court security personnel upon entering the lobby of the building.

Topcoats, packages and other outerwear garments are not allowed in the courtroom and should be left in the attorneys' room closet adjacent to the main courtroom. No food or beverages are allowed in the courtroom. The use of cell phones and paging devices is prohibited in the courtroom. Counsel may use laptops

or tablet devices in the courtroom but must make sure all sounds are silenced. Also, use of laptops or other devices at the lectern can interfere with the sound system, so they have to be shut off or removed from the lectern.

Because oral arguments occasionally end before their allotted time expires, counsel are expected to be in the courtroom during the case immediately preceding theirs. To allow a prompt transition between arguments, counsel for the next scheduled case should be seated in the front row of the public gallery, if possible, and move to the appropriate counsel table upon conclusion of the preceding case.

Counsel presenting argument shall sit at the appropriate table in the courtroom. As you enter the courtroom, appellant's table is located to the left and appellee's table is to the right. Do not approach the lectern from the gallery. Be seated at the appropriate counsel's table and wait for the presiding judge to call your case. Counsel should remain at counsel table during their opponent's entire argument and leave promptly when the case is taken under advisement or otherwise concluded.

The "Notice of Oral Argument" states the scheduled date and time and advises how many minutes of argument per side will be allowed. Counsel must advise the court's calendar clerk at least five business days prior to the scheduled argument who will be presenting oral argument. Only appellants and appellants in the main appeal of a cross-appeal are allowed to present rebuttal argument and counsel wishing to reserve time for rebuttal must advise the calendar clerk in advance how many minutes of their allotted time they wish to reserve for rebuttal. This information is provided to the panel of judges prior to the oral argument.

Divided arguments are not favored by the court. Cir. R. 34(c). However, if more than one attorney must share the total time allotted for a "side," the sequence of argument and the amount of time each attorney is to speak (to be arrived at by consensus between counsel prior to argument) must also be provided to the calendar clerk. Do not initiate your argument with a recitation of who will be splitting time with whom and/or how much time you have decided to reserve for rebuttal. The judges will already have this information.

A small device on the lectern displays the total argument time. When argument begins a green light goes on and the timer begins counting down the remaining argument time. When one minute remains, a yellow light goes on. A red light illuminates when counsel's time has expired. Note that a separate white light no longer displays when counsel enters rebuttal time. Appellant's counsel must keep track of the allotted time and notify the panel when counsel wants to reserve the remaining time for rebuttal.

When time expires, counsel should quickly finish their thought, but not continue argument beyond the allotted time unless instructed to do so by the court. But if counsel is responding to a question posed by the court when time expires,

counsel need not, *indeed should not*, request permission to complete his or her answer.

Note that when multiple attorneys argue for the same side, the lighting sequence detailed above starts anew for each attorney.

E. Preparation for Argument

Counsel who will argue the appeal should study the case again even though counsel has worked on the brief and tried the case in the court below. It does not necessarily follow that counsel who tried the case below is best equipped to handle the appeal. Only counsel who will take the time to become thoroughly familiar with the record will be able to do justice to the argument. Counsel should consider having a mock oral argument in order to prepare for the real thing.

The oral argument and brief complement each other. For counsel, the oral argument provides an opportunity to point out the key facts and to summarize the principal contentions and supporting reasoning, with all the advantages of face-to-face communication. For the judges, the oral argument provides not only the benefits of this kind of presentation but also an opportunity to seek answers to questions remaining in their minds after they have read the briefs and cited authorities, and looked at the record.

The oral argument is ordinarily not a suitable medium for a detailed recital of the facts or a painstaking analysis and dissection of authorities. These are matters best left to the brief, where a detailed and documented statement of facts and a complete argument with supporting reasoning and precedent may more effectively be made. In preparing and presenting an oral argument, counsel should be mindful of the limitations inherent in an oral communication of short duration.

If possible, counsel should become familiar with the court, and courtroom procedures, by watching and listening to other arguments. Counsel should know the names (and correct pronunciation) of the judges. A card on the rostrum that day will list the names of the panel and their respective positions on the bench. The clerk's office supplies the judges on the panel with cards naming the attorneys (or parties *pro se*) who are going to appear that day.

F. The Opening Statement

Counsel should introduce themselves in their opening statements. Appellant's counsel should normally tell the court in the first few words how the case got to the court of appeals, the nature of the case, the issues, and the relief requested. A statement that counsel intends to save a portion of the allotted time for rebuttal is unnecessary and inappropriate. Whether time for rebuttal is saved depends entirely on how much time the opening consumes. It is counsel's own

responsibility to watch the time. Counsel should address members of the court as "judge" not "justice."

G. The Statement of Facts

Because the judges will have already read the briefs before oral argument, it is unnecessary for counsel to state the facts in detail. The oral argument should, however, cover facts which bear specifically upon the issues to be argued, omitting extraneous and immaterial matter. Usually a chronological statement is easiest for the court to follow. But sometimes the facts on each point should be incorporated into the discussion of that point instead of being placed at the beginning. The court will not wish to hear a reading of any testimony unless counsel first explains the necessity for doing so. The facts pertaining to a point should be fairly stated from the record and, of course, unfavorable but relevant facts should not be omitted.

H. The Argument

1. *The Applicable Law*.

   Counsel should state the applicable rules of law relied upon. If any precedents are discussed, enough should be said about them so that the court may see at once that they are on point. These rules of law should be stated in general terms. A minute dissection of precedents should be avoided except where one or a few cases clearly would control the outcome. Quotations from cases should be avoided and citation of cases is better left to the brief.

2. *Emphasis*.

   While the brief may cover several points for the sake of completeness, counsel's oral argument should be limited to the major points that can be adequately handled in the time allowed. At the same time, counsel must be prepared to answer questions that may be asked about any point. By rehearsing the argument aloud, counsel will learn how best to allocate the time among the points to be covered, leaving ample time for questioning. Trivia and unnecessary complexity must be avoided. Through preparation and rehearsal of the argument, counsel will be better able to separate the important from the unimportant.

3. *Answering Questions*.

   Counsel should listen and answer questions as directly and as categorically as possible. Do not interrupt or talk over a judge while he or she is asking a question and do not postpone an answer until later in the argument. If counsel does not know the answer, counsel should not hesitate to say so.

Occasionally, the court may ask counsel to address an issue or point which was not covered in the briefs and arises for the first time at oral argument. Counsel should respond as directly as possible. If counsel does not know the answer to a question or is not prepared to address a particular point, he or she should clearly state that he or she is not prepared to address it and ask for leave to file a short post-argument memorandum. Often, the panel will direct the filing of post-argument memoranda on their own if the briefs or counsel fail to adequately cover a matter of importance.

If, during questioning by the panel, one states a position or makes a concession which, after reflection, proves to be wrong or ill advised, counsel may send a letter to the panel "taking back" the concession or restating their position on a particular point. The letter must be filed with the clerk and served on all parties.

Also, if the questioning has been extensive, the presiding judge in his or her discretion may allow additional time upon request, depending on such factors as whether the main issues have been covered and the state of the day's calendar. Counsel may be besieged by numerous questions, allowing insufficient time to complete the planned argument. This should not disturb counsel since the main purpose of oral argument is to answer the court's questions. Counsel may be assured that the court will have studied all points made in the written briefs even if all are not discussed orally.

4. *Delivery*.

Never read your argument; points are more forcefully made by speech that has at least the appearance of spontaneity. When counsel reads the argument, a veil is created between the court and the advocate. Moreover, counsel is likely to be unable to deal effectively with questions from the court. Questions from the bench should be answered promptly, and counsel should never tell the judge asking the question that it will be answered later. Notes, an outline, or key words may be used to remind counsel of the points to be covered. Of course, where the precise wording is important, as in statutes or contracts, they may have to be read. The reading of a few short significant quotations from cases or the record may occasionally be justifiable.

A memorized argument, like one that is read, will probably sound mechanical, and may disintegrate when counsel is interrupted. Seldom does an oral argument ever follow an exact, prepared pattern. The advocate must be so well-prepared that the argument can be reworked according to the questions asked, the court's interest, and what

adversary counsel has said, leaving off at any point and picking up the threads again.

In delivering the argument, the techniques of good public speaking should be kept in mind. Counsel should speak clearly and loudly enough to be heard. Counsel should avoid speaking in a monotone and should not race through the argument so rapidly as to make it unintelligible. A well-presented oral argument should be clearly understandable.

There is a remote control on top of the lectern that raises or lowers the lectern to an appropriate height. The microphone should never be touched or moved to accommodate counsel's presentation as its purpose is to record, not amplify.

5. *Avoid Personalities.*

Do not speak disparagingly of opposing counsel or the trial court — although you may criticize their reasoning.

6. *Know the Record.*

Counsel should know the record from cover to cover. There are very few arguments which do not produce some question regarding the record. Yet all too often counsel does not know whether something is in the record or the appendix or where it may be found. Nothing wins the confidence of the court more than an ability to answer accurately and immediately questions from the bench about the record.

7. *Guidelines for the Appellee.*

Although the above suggestions have been mainly concerned with the appellant's presentation, most of them also apply to the appellee. Appellant's counsel knows in advance what ground he must cover. Appellee's counsel can never be sure how much will need to be said in reply as it cannot be known what appellant will say and the court's reaction to the appellant's argument cannot be foretold. As to facts, usually the appellee should be content with correcting or adding to the appellant's statement.

Frequently the appellee must change the order of the response to meet, at the outset, points which have been raised in the court's questions. If the judges have asked questions and the appellee disagrees with appellant's answer, it is advisable for the appellee to answer those questions before proceeding with the planned argument. Occasionally a particular point, or even an entire appeal, is in such a posture, by

reason of the court's questions and the attitudes of the judges, that appellee's counsel is well-advised to say as little as possible. Above all the appellee must be flexible, with sufficient mastery of the case to know how much or how little to say.

8. *Access to Oral Arguments.*

All oral arguments in the Seventh Circuit are audio recorded and are available on the court's website. The recordings are generally available the same day, and many times the court will listen to a recording in the preparation of the court's opinion.

I. No Oral Reference to Cases Which Have Not Already Been Cited to the Court in Writing

Circuit Rule 34(g) prohibits citing a case at oral argument that was not cited in one of the briefs or in a Fed. R. App. P. 28(j) letter of supplemental authority.

J. Order of Oral Argument in NLRB Proceedings

Fed. R. App. P. 15.1 requires that parties adverse to the National Labor Relations Board, even in enforcement proceedings in which such parties are designated as respondents, proceed first at oral argument. The rationale is that a party challenging a Board decision should logically proceed first and carry the burden of stating the reasons why the order should not be enforced. The Board attorney, like the appellee in a district court appeal, will then defend the Board's order.

XXVIII. DECIDING AN APPEAL

Although the court will occasionally decide the case from the bench, it usually reserves judgment at the conclusion of the oral argument. A conference of the panel is held promptly after oral arguments. Normally a tentative decision is reached at this conference. Additional conferences sometimes are necessary. The presiding judge of the panel assigns the cases for preparation of the signed opinions, per curiam opinions, or orders. *See Hicklin Engineering, L.C. v. Bartell*, 439 F.3d 346, 348 (7th Cir. 2006) ("Judges deliberate in private but issue public decisions … .").

Copies of a proposed opinion or order are circulated to members of the panel, who may approve, offer suggestions, or circulate a concurring or dissenting opinion. *See Highway J Citizens Group v. U.S. Dept. of Transportation*, 891 F.3d 697, 700 (7th Cir. 2018) ("all members of the [panel] read the materials carefully and ensure that each decision is sound before they approve it"). When a proposed opinion or order has the approval of at least two judges and the third judge has had an opportunity, if he or she so desires, to prepare a separate opinion, the decision is ready for release.

On occasion, a proposed opinion approved by a majority of the panel will overrule a prior Seventh Circuit decision or create a conflict between or among the other circuits. Circuit Rule 40(e) prohibits the opinion's public release unless the opinion is first circulated among the judges of the court in regular active service. The judges then vote on whether the matter is important enough to warrant plenary consideration by the en banc court.

If a majority of judges do not vote to rehear en banc, the panel's opinion is published. The opinion will contain a footnote along the lines of the following statement: This opinion has been circulated among all judges of this court in regular active service. [No judge favored, or, A majority did not favor] a rehearing en banc on the question of [inserting here language pertaining to the case to be overruled, or issue not warranting en banc review]. Cir. R. 40(e). *See*, *e.g.*, *Fed'l Trade Commission v. Credit Bureau Center, LLC*, 937 F.3d 764 (7th Cir. 2019). Importantly, this same procedure, in the panel's discretion, may be used if the proposed opinion would establish "a new rule or procedure." Cir. R. 40(e).

Whether the decision will be by published opinion or unpublished order is determined by a majority of the panel. The use of the word unpublished here is somewhat a misnomer. None of the court's decisions are sealed or inaccessible for review by the public. *See Mitze v. Saul*, 968 F.3d 689, 692 (7th Cir. 2020) (per curiam) (the federal courts have a long-standing tradition of granting public access to the court's decisions). What is meant by an unpublished order is simply that some court decisions are unsigned and not reported (or published) in the Official Reports, and they also have little or no precedential value; still they are released in photocopy form, Cir. R. 32.1(b), and searchable. *See* "A Librarian's Guide to

Unpublished Judicial Opinions," Joseph L. Gerken, 96 Law Library Journal 475 (2004).

Unpublished orders are issued in frivolous appeals and in appeals which involve only factual issues or concern the application of recognized rules of law. An order will include a summary statement of the reasoning on which the court's decision is based. Any person may request by motion that an unpublished order be reissued as a published opinion, stating why this change would be appropriate. Cir. R. 32.1(c).

Orders issued on or after January 1, 2007 may be cited in any federal court, Fed. R. App. P. 32.1(a), but are not treated as precedents. Cir. Rule 32.1(b). Citation of older orders is not permitted except to support a claim of res judicata, collateral estoppel, or law of the case. Cir. R. 32.1(d).

The decisions of the court are prepared and released in electronic form. They are uploaded to the court's website, and copies may be reproduced as needed. Upon release of each decision, counsel of record and the legal publishers receive electronic notification via the court's ECF system.

XXIX. REMANDS

A. Remands for Revision of Judgment

Once an appeal from a final judgment is docketed in this court, the district court can deny motions to modify the judgment but lacks authority to grant the motion and modify the judgment. "A party who during the pendency of an appeal has filed a motion under Fed. R. Civ. P. 60(a) or 60 (b), Fed. R. Crim. P. 35(b), or any rule that permits the modification of a final judgment, should request the district court to indicate whether it is inclined to grant the motion. If the district court so indicates, this court will remand the case for the purpose of modifying the judgment. Any party dissatisfied with the judgment as modified must file a fresh notice of appeal." Cir. R. 57. *See also* this Handbook, "G. Revision of Judgment During Pendency of Appeal" at Chapter VI, *supra* at 70-71.

Rule 12.1 of the Federal Rules of Appellate Procedure provides similar relief, stating that the court of appeals may remand if the district court states that "it would grant the motion or that the motion raised a substantial issue." Fed. R. App. P. 12.1(b). The rule goes on to state that the court of appeals "retains jurisdiction unless it expressly dismisses the appeal." See corresponding Rule 62.1 of the Federal Rules of Civil Procedure. Both the national rule and the circuit rule apply only when the district court lacks authority to grant relief without the appellate court's permission and allow for coordination of proceedings between a district court and a court of appeals. *See In re Central Energy Cooperative*, 847 F.3d 873, 874 (7th Cir. 2017) (Ripple, J., in chambers). As a practical matter, this court usually follows the procedure of Circuit Rule 57, not retaining jurisdiction, and noting that a new notice of appeal must be filed if "[a]ny party [is] dissatisfied with the judgment as modified." *But see Mosley v. Atchison*, 689 F.3d 838, 842-44 (7th Cir. 2012).

NOTE: Parties seeking a remand pursuant to these rules should be clear whether they believe this court should retain jurisdiction.

B. Remands for a New Trial

A judge other than the original trial judge will try a case remanded for a new trial unless the remand order provides, or all parties request, that the original judge retry the case. The court may apply this rule to remanded cases which do not literally come under its terms. Cir. R. 36.

C. Limited Remands

In order for the court of appeals to effectively review the actions of a district court, it must know the reasoning of the district court. Circuit Rule 50 requires that "[w]henever a district court resolves any claim or counterclaim on the merits, terminates the litigation in its court (as by remanding or transferring the case, or denying leave to proceed *in forma pauperis* with or without prejudice), or enters an

interlocutory order that may be appealed to the court of appeals, the judge shall give his or her reasons, either orally on the record or by written statement. The court urges the parties to bring to this court's attention as soon as possible any failure to comply with this rule." The rule requires that the judge provide reasons but also puts the burden on the parties to alert the court of the district court's failure to do so.

Circuit Rule 50 serves three functions: (1) to create the mental discipline that an obligation to state reasons produces, (2) to assure the parties that the court has considered the important arguments, and (3) to enable the reviewing court to know the reasons for the judgment. *DiLeo v. Ernst & Young*, 901 F.2d 624, 626 (7th Cir. 1990).

If reasons for an appealable ruling are not provided, this court will normally, on its own initiative or upon motion of a party, remand the case to the district court for the limited purpose of providing reasons. Note that such a remand is "limited," and the court of appeals retains jurisdiction of the action. Normally appellate proceedings are suspended during the remand and the parties are directed to file periodic status reports until the district court enters the necessary findings.

Not every failure to meet the standard set out in Circuit Rule 50, however, requires a remand. The district court's reasoning may be evident, if not abundantly clear, from both the record and the court's brief statement. *See United States v. Forman,* 553 F.3d 585, 590-91 (7th Cir. 2009)*; Stoller v. Pure Fishing, Inc.*, 528 F.3d 478, 480 (7th Cir. 2008).

Limited remands may also be entered on a party's motion or the court's own initiative for other purposes. Generally, these involve matters in aid of the court's jurisdiction, or fact-finding that would assist this court in the resolution of a pending motion or matter but that fall outside the scope of Circuit Rule 50. *See, e.g., Caterpillar, Inc. v. NLRB*, 138 F.3d 1105 (7th Cir. 1998). In such a case, a new notice of appeal is not necessary. *See Mosley v. Atchison*, 689 F.3d 838, 842-44 (7th Cir. 2012) (limited remand for purpose of modifying the judgment *nunc pro tunc* to bring it in line with the district court's opinion).

D. General Remand

As distinguished from a limited remand, a general remand returns the case to the trial court for further proceedings consistent with the appellate court's decision. Consistency with that decision is the only limitation imposed by the appellate court. *United States v. Simms*, 721 F.3d 850, 852 (7th Cir. 2013). *See also United States v. Uriarte*, _____ F.3d _____, _____ fn.2 2020 WL 5525119, at *2 (7th Cir. 2020), distinguishing the types of remand.

E. Subsequent Appeal Following Remand

When a case is remanded to the district court following a full merits review, an appeal taken from the judgment entered on remand is limited to issues that could not have been raised in the first visit to the appellate court. *United States v. Peel*, 668 F.3d 506, 507 (7th Cir. 2012).

F. Cases Remanded from the Supreme Court

"When the Supreme Court remands a case to this court for further proceedings, counsel for the parties shall, within 21 days after the issuance of a certified copy of the Supreme Court's judgment pursuant to its Rule 45.3, file statements of their positions as to the action which ought to be taken by this court on remand." Cir. R. 54. The court then will issue an appropriate order, resolving the case or directing what further proceedings are to take place.

XXX. PETITION FOR REHEARING

A party may file a petition for rehearing within 14 days after entry of the court's judgment. In all civil cases in which the United States or an officer or agency of the United States is a party, the time within which any party may seek rehearing is 45 days after entry of judgment unless the time is shortened or enlarged by order. Fed. R. App. P. 40(a).

The petition must be electronically filed with the clerk by the due date. In appeals decided from the bench, the 14-day time limit runs from the entry of the court's written order. Cir. R. 40(d). (The written order in such cases is usually entered within a week of the oral argument and is sent to all parties to the appeal.)

Note that in the case of a decision enforcing an administrative agency order, "[t]he date on which the court enters a final order or files a dispositive opinion is the date of the 'entry of judgment' for the purpose of commencing the period for filing a petition for rehearing in accordance with Rule 40, notwithstanding the fact that a formal detailed judgment is entered at a later date." Cir. R. 40(c).

A motion to extend the time for filing a petition for rehearing may be made only during the 14-day period. Because of the interest in expediting the ultimate resolution of appeals, such motions are not viewed with favor.

As Rule 40 points out, petitions for rehearing should alert the panel to specific factual or legal matters that the party raised, but that the panel may have failed to address or may have misunderstood. It goes without saying that the panel cannot have "overlooked or misapprehended" an issue that was not presented to it; panel rehearing is not a vehicle for presenting new arguments. *Easley v. Reuss*, 532 F.3d 592, 593-94 (7th Cir. 2008) (per curiam). *See generally Shields v. Ill. Dept. of Corrections*, 746 F.3d782, 800-01 (7th Cir. 2014) (Tinder, J., concurring) (collecting cases where issue raised for first time in a petition for rehearing).

Petitions for rehearing are filed in many cases, usually without good reason or much chance of success. Few are granted. The filing of such a petition is not a prerequisite to the filing of a petition for writ of certiorari in the Supreme Court of the United States. However, the time for such filing in the Supreme Court is tolled by the timely filing of a petition for rehearing in the court of appeals. The time for filing a petition for writ of certiorari does not begin to run until the court of appeals has disposed of the petition for rehearing. S. Ct. Rule 13.3.

Counsel must file a petition for rehearing electronically using the ECF system. Within 3 days of electronic filing, counsel must also file 15 paper copies of a petition for rehearing, except that 30 copies must be filed if the petitioner suggests a rehearing en banc. Cir. R. 40(b). And, just as with all briefs submitted for filing, the clerk's office undertakes a review of the petition (or any answer) for compliance

with the applicable rules before it is made publicly available. *See Courthouse News Service v. Brown*, 908 F.3d 1063, 1065 fn.1 (7th Cir. 2018).

The petition may be no longer than 3,900 words if produced on a computer. If the document is handwritten or typed on a typewriter, the limit is 15 pages. Fed. R. App. P. 40(b). The cover to the petition should be white. Fed. R. App. P. 32(c)(2)(A). No answer may be filed to a petition for rehearing unless the court calls for one, in which event the clerk will so notify counsel. Fed. R. App. P. 40(a). A 10-day time limit for the answer is usually set. In the absence of such a request, a petition for rehearing will "ordinarily not be granted." Fed. R. App. P. 40(a)(3).

The court handles petitions for rehearing with dispatch. Upon filing, the petition is circulated to the same panel of judges that decided the appeal originally. These judges vote on the petition; a majority rules. There is no oral argument in connection with a petition for rehearing. *See, e.g., Fry v. Exelon Corporation Cash Balance Pension Plan,* 576 F.3d 723, 725 (7th Cir. 2009) (Easterbrook, J., in chambers).

In the relatively rare instance in which a petition for rehearing is granted, the procedure is discretionary with the court and parties will be directed by court order how to proceed.

Relatedly, there is no bar to a court of appeals deciding on its own initiative to review a case. *Hill v. United* States, 827 F.3d 560 (7th Cir. 2016).

XXXI. EN BANC PROCEDURE

En banc hearings or rehearings — hearings by all the judges currently in regular active service on the court, *see* 28 U.S.C. § 46(c) — are infrequent. "An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless (1) en banc consideration is necessary to secure or maintain uniformity of the court's decision, or (2) the proceeding involves a question of exceptional importance." Fed. R. App. P. 35(a).

Such a hearing or rehearing will be held only if a majority of the circuit judges who are in regular active service vote to do so. Although the judges may order a hearing en banc on their own initiative before the oral argument, this rarely occurs in the Seventh Circuit. A more frequent occurrence is for the panel after oral argument to circulate a proposed opinion, which would establish a new rule of procedure or overrule a prior decision of the court, to all the active judges under Circuit Rule 40(e). *See Federal Trade Commission v. Credit Bureau Center, LLC*, 937 F.3d 764, 786 (7th Cir. 2019) (Wood, C.J., dissenting). Chapter XXVIII of this Handbook contains a fuller discussion of Rule 40(e).

A request for a hearing en banc is to be made by the filing date of the appellee's brief. Fed. R. App. P. 35(c). En banc hearings are even rarer than en banc rehearings.

En banc rehearing has a different focus than a petition for rehearing. Petitions for rehearing are designed as a mechanism for the panel to correct its own errors in the factual record or the law; rehearings en banc are designed to address issues that affect the integrity of the circuit's law (intra-circuit conflicts) and the development of the law (questions of exceptional importance). *Easley v. Reuss*, 532 F.3d 592, 594 (7th Cir. 2008) (per curiam).

A petition for rehearing en banc must be made within the time allowed by Rule 40(a) for the filing of a petition for rehearing, Fed. R. App. P. 35(c), and must be filed electronically. Thirty duplicate paper copies must be filed with the clerk within 3 days of the Notice of Docket Activity (NDA) generated upon acceptance of the electronic petition.

The title page and cover should reflect that a petition for rehearing en banc is being made in order to facilitate its distribution. The length of the petition for en banc rehearing is the same as a petition for panel rehearing — 3,900 words if the petition is produced on a computer and 15 pages if the petition is handwritten or typewritten. Fed. R. App. P. 35(b)(2). For purposes of the limits in the Rule 35(b)(2), if a party files both a petition for panel rehearing and a petition for rehearing en banc, they are considered a single document even if the petitions are separately filed. Fed. R. App. P. 35(b)(3). Like a petition for rehearing, the clerk's office undertakes certain administrative processing before the petition for rehearing en

banc (or any answer) is made publicly available. Until then, only counsel of record is able to readily access the petition. *See Courthouse News Service v. Brown*, 908 F.3d 1063, 1065 fn.1 (7th Cir. 2018).

A party who petitions that an appeal be reheard en banc must state in a concise sentence at the beginning of the petition why the appeal is of exceptional importance or with what decision of the United States Supreme Court, this court, or another court of appeals the panel decision is claimed to be in conflict. Fed. R. App. P. 35(b). A party who files a petition for rehearing en banc without complying with this provision runs a serious risk of sanctions. *See H M Holdings v. Rankin, Inc.*, 72 F.3d 562, 563 (7th Cir. 1995).

When a petition for rehearing en banc is made, the petition is distributed to each active judge on the court, including the panel that originally heard and decided the appeal. Unless a judge in regular active service or a judge who was a member of the initial panel requests that a vote be taken on the en banc request, no vote will be taken. Fed. R. App. P. 35(f). If no vote is requested, the panel's order acting on the petition will bear the notation that no member of the court requested a vote on the en banc request. Only active circuit judges are authorized to vote. Rehearing en banc will be granted only if a majority of the voting active judges vote to grant such a rehearing. 28 U.S.C. § 46(c); Fed. R. App. P. 35(a); 7th Cir. Oper. Proc. 940 F.3d 381 5(d)(1).

Additionally, en banc rehearing is authorized without a party's invitation. Any member of the court may ask for a vote, without the filing of a motion, on whether to rehear a case en banc. Such judge-initiated requests have been rare in this court. *United States v. Blagojevich*, 614 F.3d 287, 288 (7th Cir. 2010) (Posner, J., dissenting from denial of rehearing en banc).

Only active Seventh Circuit judges and senior circuit judges who were members of the original panel are authorized to sit on a rehearing en banc. 28 U.S.C. § 46(c). The order granting rehearing en banc vacates the panel decision. Thus, if the court en banc should be equally divided, the judgment of the district court and not the judgment of the panel will be affirmed.

It bears repeating that hearings and rehearings en banc are very rare. *See Roberts v. Sears, Roebuck & Co.*, 723 F.2d 1324, 1328 (7th Cir. 1983) (en banc) (separate opinion of Posner, J.). In fact, it is more likely to have a petition for writ of certiorari granted by the Supreme Court than to have a request for en banc consideration granted.

XXXII. COSTS

A bill of costs must be filed within 14 days after entry of the judgment. If there is a reversal, the docket fee may be taxed against the losing party. *Winniczek v. Nagelberg*, 400 F.3d 503 (7th Cir. 2005) (per curiam). The cost of printing or otherwise reproducing the briefs and appendix is also ordinarily recoverable by the successful party on appeal. Fed. R. App. P. 39(c); Cir. R. 39. So also is the cost of reproducing parts of the record pursuant to Fed. R. App. P. 30(f) and that of reproducing exhibits pursuant to Rule 30(e). However, costs for a lengthy appendix will not be awarded. Cir. R. 30(e).

The bill of costs must contain an affidavit itemizing allowable costs. The affidavit may be made by a party, counsel, or the printer with proof of service upon opposing counsel. A bill of costs filed after the 14 days will rarely be allowed and it must be accompanied by an affidavit showing that extraordinary circumstances prevented the filing of the bill on time. *See In re Gallo*, 585 F.3d 304 (7th Cir. 2009) (Ripple, J., in chambers) (court may extend the time to file a bill of costs after the 14-day period if the party shows "good cause" for the delay).

No court action is necessary on a timely filed bill of costs unless it is objected to by opposing counsel. The reasonableness of the charges contained in the affidavit is about the only reason for objection. Fed. R. App. P. 39(c); Cir. R. 39. The court must determine whether the costs are reasonable. Usually, the matter of costs in the court of appeals is settled before issuance of the mandate; but, if not, the clerk may send a supplemental "bill of costs" to the district court for inclusion in the mandate at a later date. The clerk prepares an itemized statement of costs for insertion in the mandate. Fed. R. App. P. 39(d).

Although taxable in the court of appeals, the costs are actually recoverable only in the district court after issuance of the mandate with its attached "bill of costs." The money involved never physically changes hands at the court of appeals level.

Various costs incidental to appeal must be settled at the district court level. Among such items are: (1) the cost of the reporter's transcript; (2) the fee for filing the notice of appeal; and (3) the premiums paid for any required appeal bond. Fed. R. App. P. 39(e). Application for recovery of these expenses by the successful party on appeal must be made in the district court after the mandate issues.

XXXIII. APPELLATE SANCTIONS

Rule 38 of the Federal Rules of Appellate Procedure authorizes an appellate court — on its own initiative or on motion of a party — to award sanctions if it determines that an appeal is frivolous.

The rule requires parties who ask for sanctions to do so in a "separately filed motion." A request for sanctions contained in a party's brief is procedurally improper and will be denied. *Jackson County Bank v. DuSablon*, 915 F.3d 422, 425 n.1 (7th Cir. 2019); *Bell v. Vacuforce, LLC*, 908 F.3d 1075, 1082 (7th Cir. 2018); *Kennedy v. Schneider Electric*, 893 F.3d 414, 421 (7th Cir. 2018); *Vexol, S.A. de C.V. v. Berry Plastics Corp.*, 882 F.3d 633, 638 (7th Cir. 2018). Importantly, the rule requires that the target of the motion must be given a "reasonable opportunity to respond."

As indicated, Rule 38 also authorizes the court on its own initiative to impose sanctions. The court will not do so, however, until after giving the potential target an opportunity to respond. *Kennedy v. Schneider Electric*, 893 F.3d at 422.

Next, the court must determine if the appeal is frivolous. In *Jaworski v. Master Hand Contractors, Inc.*, 882 F.3d 686 (7th Cir. 2018), the court listed a number of characteristics that mark a frivolous appeal: (1) the arguments made are merely cursory; (2) the arguments are wholly undeveloped; (3) the arguments simply re-assert a previously rejected version of the facts; (4) the arguments rehash positions that the district court properly rejected; or (5) the arguments are lacking in substance and foreordained to lose. *Id.* at 691. *See also Quincy Bioscience, LLC v. Ellishbrooks*, 961 F.3d 938, 941 (7th Cir. 2020) (per curiam) (award of sanctions warranted because "appellate arguments had virtually no likelihood of success," noting also the relevancy of appellant's "conduct during the course of the appeal").

Add to the list bad writing. In *McCurry v. Kenco Logistics Services, LLC*, 942 F.3d 783, 792 (7th Cir. 2019), the court noted that "[b]ad writing does not normally warrant sanctions, but we draw the line at gibberish," remarking that the appellate brief, signed and submitted by counsel, fell "far below the reasonable standards of practice" for a number of reasons. Not only was it overly long, "span[ning] 86 interminable pages," and "chock-full of impenetrable arguments and unsupported assertions," but is was also "organized in ways that escape … understanding" and was "a typographical nightmare." *Id.* at 791. The court recently imposed sanctions in an analogous case, *Allen-Noll v. Madison Area Technical College*, 969 F.3d 343 (7th Cir. 2020), where counsel for appellant engaged in similar conduct.

Importantly, frivolous is not a synonym for "unsuccessful" or "unlikely to succeed." *Dolin v. GlaxoSmithKline LLC*, 951 F.3d 882, 887 (7th Cir. 2020). Too, Rule 38 sanctions are not mandatory even if an appeal is found to be frivolous. Rather, the imposition of sanctions is left to the sound discretion of the court of

appeals — and the exercise of that discretion may turn the court's perception whether an appellant acted in bad faith. *Id.* at 888.

Rule 38 sanctions are designed to compensate the appellee for the time and resources wasted in defending against a plainly baseless appeal. *See Harris N.A. v. Hershey*, 711 F.3d 794, 801 (7th Cir. 2013); *see also Quincy Bioscience, LLC v. Ellishbrooks*, 967 F.3d 613, 616 (7th Cir. 2020) (per curiam) ("fees awarded as a sanction should be limited to the time spent defending the appeal and should not include time spent after the litigant has won in this court"). A promise "not to do it again" does not excuse the harm already inflicted. *Brotherhood of Locomotive Engineers and Trainmen v. Union Pacific Railroad Co.*, 905 F.3d 537, 544-45 (7th Cir. 2018); *see also H.A.L. NY Holdings, LLC v. Guinan*, 958 F.3d 627, 636 (7th Cir. 2020) (an appellant's reply brief does not salvage an otherwise frivolous appeal).

If an appeal is appropriate for Rule 38 sanctions, the court may award "just damages and single or double costs." The court usually requires the party awarded sanctions to provide an accounting of its costs and fees. *See In re Lisse*, 921 F.3d 629 (7th Cir. 2019).

The court of appeals also may base an award of sanctions on 28 U.S.C. § 1912 (which deals with unnecessary "delay") or 28 U.S.C. § 1927 (which deals with "unreasonably and vexatiously" multiplying proceedings). *See*, *e.g.*, *Beam v. IPCO Corp.*, 838 F.2d 242, 248 (7th Cir. 1988).

These statutes and Rule 38 do not provide the only authority to award sanctions. "It has long been understood that federal judges have a common-law power (sometimes called inherent power) to impose sanctions on parties that needlessly run up the costs of litigation." *Cooke v. Jackson Nat'l Life Ins. Co.*, 919 F.3d 1024, 1027 (7th Cir. 2019), citing *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991).

For more on appellate sanctions, *see* this Handbook, "E. Requirement that all Appeals and Arguments be Well Grounded; Sanctions for Frivolous Appeals under Fed. R. App. P. 38" at Chapter XV, *supra* at 124-26.

XXXIV. ISSUANCE OF MANDATE

The obligation to follow the judgment of a reviewing court is called the mandate rule. For example, "[u]nder the mandate rule, when a court of appeals has reversed a final judgment and remanded the case, the district court is required to comply with the express or implied rulings of the appellate court." *In re A.F. Moore & Assoc., Inc.*, _____ F.3d _____, _____ 2020 WL 5422791, at *2 (7th Cir. 2020) (per curiam) (internal quotation marks and citation omitted).

The mandate of the court of appeals will ordinarily issue 21 days after entry of judgment or seven days after denial of a petition for rehearing. Fed. R. App. P. 41(b). The mandate issues immediately when an appeal is dismissed voluntarily, for failure to pay a docketing fee, for failure to file a docketing statement under Cir. R. 3(c), or for failure by appellant to file a brief. Cir. R. 41.

Notably, the issuance of the mandate by the court of appeals does not affect the right to apply for a writ of certiorari or the power of the Supreme Court to grant the writ. In any case, civil or criminal, a party has 90 days from the date of the judgment or, if a petition for rehearing was filed, from the date of the denial of rehearing, within which to file a petition for writ of certiorari in the United States Supreme Court. The court of appeals has no authority to enlarge the time, but the Supreme Court may, on application, showing good cause, allow up to 60 additional days. 28 U.S.C. § 2101(c) and S. Ct. Rule 13.5.

It is also important to note that the successful party on appeal cannot enforce its judgment in the district court until the issuance of the mandate has formally reinvested jurisdiction in that district court.

A. Stay of Mandate

A stay of mandate may be sought pending the filing of a petition for certiorari in the Supreme Court, but a motion for such a stay must be filed before the regularly scheduled date for issuance of the mandate, Fed. R. App. P. 41(d)(2), and must show that the petition for a writ of certiorari will present a substantial question and that there is good cause for a stay. *McBride v. CSX Transportation, Inc.*, 611 F.3d 316 (7th Cir. 2010) (Ripple, J., in chambers); *Bricklayers Local 21 v. Banner Restoration, Inc.*, 384 F.3d 911 (7th Cir. 2004) (Ripple, J., in chambers). To show a reasonable probability of success, the party must demonstrate a reasonable probability that four justices will vote to grant certiorari, as well as a reasonable possibility that five justices would vote to reverse the court's judgment. *In re Jepson*, 821 F.3d 805, 807 (7th Cir. 2016) (Ripple, J., in chambers).

These stays are not automatic. *See* Fed. R. App. P. 41(d)(2)(A); *Books v City of Elkhart*, 239 F.3d 826 (7th Cir. 2001) (Ripple, J., in chambers). The mere fact that the court decided to hear the case en banc does not demonstrate that the court's

final disposition of the case is worthy of review on certiorari. *Senne v. Village of Palatine*, 695 F.3d 617, 621-22 (7th Cir. 2012) (Ripple, J., in chambers). Further, the procedural posture of the litigation itself may make the case a poor candidate for a grant of certiorari. *Id*.

The standards that govern the disposition of a motion to stay this court's mandate are set out in *Senne v. Village of Palatine*, 695 F.3d at 619. The movant must demonstrate (1) a reasonable probability of succeeding on the merits (meaning both that the Supreme Court will grant certiorari and that it will reverse) and (2) irreparable injury absent a stay. *Id.*; *see also In re A.F. Moore & Assoc., Inc.*, _____ F.3d _____, _____ 2020 WL 5422791, at *3 (7th Cir. 2020) (per curiam).

If, during the period of the stay, the party who obtained the stay files a petition for writ of certiorari, the stay continues until final disposition by the Supreme Court. Fed. R. App. P. 41(d)(2)(B). The attorney, however, must notify the clerk of the court of appeals by electronically docketing a notice of the filing of a petition for a writ of certiorari on the date that the petition for certiorari was filed or mailed. This is necessary to keep the mandate from being issued before the court of appeals receives notice of docketing in the Supreme Court from the clerk of that court. If the petition is denied, the mandate issues immediately upon the filing of the order of denial. Fed. R. App. P. 41(d)(2)(D).

No mandate will be stayed except upon a specific motion substantiated by a showing, or an independent determination by the court, of probable cause to believe that the petition for certiorari will not be frivolous or filed merely for delay. Additionally, the motion for stay must include a certification of counsel that a petition for certiorari to the Supreme Court is being filed and is not merely for delay, a statement of the specific issues to be raised in the petition for certiorari, and a substantial showing that the petition for certiorari raises an important question meriting review by the Supreme Court. Fed. R. App. P. 41(d)(2)(A).

Mandates are generally not issued in administrative proceedings. An attorney who wishes to stay the enforcement of an administrative agency decision in order to file a petition for certiorari should file a motion to stay the judgment pending a ruling on the petition for a writ of certiorari.

B. Recall of Mandate

It is well settled that the court has the inherent power to recall its mandate in order to protect the integrity of its own processes — for instance, when it is discovered that it has misread the record, dismissing an appeal erroneously on jurisdictional grounds, thus depriving the parties of the right to an appeal. *United States v. Holland*, 1 F.3d 454, 455-56 (7th Cir. 1993) (Ripple, J., in chambers). This power must be counterbalanced with the importance of finality in judicial proceedings. *McGeshick v. Choucair*, 72 F.3d 62, 63-64 (7th Cir. 1995). "[T]he power

should be used only in extraordinary circumstances when inaction would lead to an injustice." *United States v. Reyes-Sanchez*, 509 F.3d 837, 838-39 (7th Cir. 2007); *see also In re A.F. Moore & Assoc., Inc.*, _____ F.3d _____, _____ 2020 WL 5422791, at *1 (7th Cir. 2020) (per curiam); *Calderon v. Thompson*, 523 U.S. 538 (1998); *Lambert v. Buss*, 489 F.3d 779, 780 (7th Cir. 2007).

At the same time, the court routinely is asked to recall the mandate of appeals that have been dismissed for procedural missteps — failure to file the Circuit Rule 3(c) docketing statement, Cir. R. 3(c)(2), failure to pay the filing fee, Cir. R. 3(b), or failure to file the brief, Cir. R. 31(c)(2). Many of these requests are granted — so long as the requests are filed proximately to the appeal's dismissal and the appellant simultaneously assures compliance with the pertinent rule violation — since the court's dismissals were not on the merits.

It is also important to note that the court possesses the power to recall the mandate on its own initiative — in effect reopening the case, without limit of time — but would be inclined to do so "only in exceptional circumstances." *Patterson v. Crabb*, 904 F.2d 1179, 1180 (7th Cir. 1990); *see also In re Southwest Airlines Voucher Litigation*, 898 F.3d 740, 747 (7th Cir. 2018); *Webb v. Clyde L. Choate Mental Health & Development Center*, 230 F.3d 991, 997 (7th Cir. 2000).

XXXV. ADVISORY COMMITTEE

Circuit Rule 47 provides for an advisory committee to be composed of federal trial judges, private attorneys, law professors and court personnel. The committee studies the procedures and rules of the court, and suggests changes where they are considered necessary or desirable. Suggestions for consideration by the advisory committee may be filed with the clerk of this court. The advisory committee also arranges for notice of proposed rules changes, and considers the comments received.

XXXVI. OTHER RESOURCES

The Seventh Circuit website contains a Media Library containing video segments on various appellate topics. You will be able to listen to Seventh Circuit judges and court personnel and experienced appellate practitioners, explaining how to handle an appeal in the Seventh Circuit. One series of programs, posted in 2018, was prepared by the Seventh Circuit Bar Association and contains the following segments:

- Is Your Judgment Final and Appealable
- Post Judgment Motions
- Appellate Jurisdiction
- Initiating an Appeal in the Seventh Circuit — Notice of Appeal, Docketing Statement and Record
- Appellate Standards of Review
- Tour of Seventh Circuit Clerk's Office Website and Electronic Filing System
- Rule 33 Settlement Conference
- Motion Practice
- Good Brief Writing
- Effective Oral Argument
- Post Brief and Oral Argument Submissions of Clarifications or Supplemental Authority
- Petitions for Rehearing and Rehearing En Banc
- Recruitment and Appointment of Counsel in the Seventh Circuit

Another series of programs consists of the video of a day-long appellate practice seminar presented in 2015. The court designed the seminar for the attorney who wishes to learn more about handling appeals in the Seventh Circuit. Experienced appellate practitioners, court personnel and judges cover topics that the practitioner needs to know in representing litigants in appeals before the court.

Individuals who want to learn more about the Seventh Circuit's Staff Attorney Office should view the segment on the Staff Law Clerkship Program.

Senior Staff Attorney Michael Fridkin interviews then Chief Judge Diane Wood as she describes how the program operates in the Seventh Circuit.

Apart from this Handbook, the State Bar of Wisconsin publishes a guide to Seventh Circuit practice. It's titled "The Attorney's Guide to the Seventh Circuit Court of Appeals" and generally is updated annually. Like the court's own Practitioner's Handbook, the State Bar of Wisconsin publication walks the practitioner through the process of handling an appeal in the Seventh Circuit.