

Third Circuit Civil Appeals: Appellee's Brief, Reply Brief, and Cross-Appeals

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WITH PRACTICAL LAW LITIGATION

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A Practice Note explaining how to prepare and submit the appellee's brief and the appellant's reply brief in civil appeals to the United States Court of Appeals for the Third Circuit from a federal district court's order or judgment. This Note also explains how to brief cross-appeals, and how to submit supplemental authorities using so-called Rule 28(j) letters.

After the appellant files its opening brief, the appellee responds with a brief of its own. The appellant then has an opportunity to reply. If both parties appeal, the appellee has an opportunity to reply in support of its cross-appeal. Whether the briefing ends after the third or fourth brief, the parties can submit any significant legal authority of which they become aware after briefing and before argument. This Note explains briefing schedules in the Third Circuit, how to compile and format the appellee's brief and reply brief, cross-appeals, and Rule 28(j) letters alerting the court to supplemental authorities.

BRIEFING SCHEDULES

The parties must serve and file their briefs according to the Federal Rules of Appellate Procedure (FRAP) and the local rules for the Third Circuit (3d Cir. L.A.R.) or, if ordered otherwise, according to a briefing schedule set by the Third Circuit. The parties may request an extension if they have good reasons for being unable to meet the court's deadlines. Attorneys should be aware of the:

- Time to file and serve briefs (see Timing).
- Ways to extend the briefing schedule (see Extensions of the Briefing Schedule).
- Consequences of failing to comply with the briefing schedule (see Failure to Comply with Briefing Schedule).

TIMING

The Third Circuit clerk typically issues a briefing and scheduling order shortly after an appeal is docketed. Unless the court orders otherwise:

- The appellant must serve and file its opening brief within 40 days after the date on which the record is filed.
- The appellee must serve and file its brief within 30 days after the appellant serves its brief.
- The appellant may serve and file a reply brief within 14 days after the appellee serves its brief, but at least seven days before argument, unless the court orders otherwise.

(FRAP 31(a)(1), (2).)

A party receiving service by US mail or commercial carrier may add three days to the time otherwise available to respond. However, parties receiving a brief by electronic service may not add three days to a response time. (FRAP 26(c).)

If the case is referred to mediation, the court defers establishing a briefing schedule, unless the Chief Circuit Mediator or the court determines otherwise (3d Cir. L.A.R. 33.3).

EXTENSIONS OF THE BRIEFING SCHEDULE

A party that cannot meet a deadline to file its brief may ask the court for an extension. The parties may not agree or stipulate to change the briefing schedule on their own. The court does not automatically grant a request for an extension, even where the request is unopposed.

A party may make its first request for an extension of 14 days or less by telephone or in writing. The clerk may grant extensions on a showing of good cause. The requesting party should notify opposing counsel before requesting an extension. A party must request an extension at least three days before the brief's due date. If less than three days remain before the due date, the requesting party must make the request by written motion and demonstrate that good cause for the extension either:

- Did not exist earlier.
- Could not with due diligence have been known or communicated to the court earlier.

(3d Cir. L.A.R. 31.4.)

The Third Circuit greatly disfavors second requests for an extension of time to file a brief. The court grants second extension requests only on a showing of good cause that was not foreseeable when the first request was made. A party must make a second extension request by written motion. (3d Cir. L.A.R. 31.4.)

FAILURE TO COMPLY WITH BRIEFING SCHEDULE

If an appellee fails to timely file its brief, it is not permitted to participate at oral argument unless the court grants permission (FRAP 31(c)).

THE APPELLEE'S BRIEF

The appellee's brief is the primary vehicle for the appellee to explain to the Third Circuit why it should affirm the district court's order or judgment and why the appellant's arguments are wrong.

CONTENTS OF THE APPELLEE'S BRIEF

The appellee's brief must contain, in order:

- A cover (see Cover).
- A corporate disclosure statement and statement of financial interest (see Disclosure Statement).
- A table of contents (see Table of Contents).
- A table of authorities (see Table of Authorities).
- A statement of subject-matter and appellate jurisdiction, where appropriate (see Jurisdictional Statement).
- A statement of the issues, if desired (see Statement of the Issues).
- A statement of related cases and proceedings (see Statement of Related Cases and Proceedings).
- A statement of the relevant facts, if desired (see Statement of the Case).
- A summary of the argument (see Summary of the Argument).
- An argument (see Argument).
- A conclusion, if desired (see Conclusion).
- A signature (see Signature).
- A certificate of compliance (see Certificate of Compliance).
- An electronic document certificate (see Electronic Document Certificate).
- A certificate of bar admission (see Certificate of Bar Admission).
- Proof of service (see Certificate of Service).

(FRAP 25(d), 26.1, 28(a), (b), and 32(a)(2), (d), and (g); 3d Cir. L.A.R. 28.1; 3d Cir. L.A.R. 28.2; 3d Cir. L.A.R. 28.3(d); 3d Cir. L.A.R. 28.4.)

Unlike in some other federal courts of appeals, in the Third Circuit, the appellee does not request oral argument in its brief. Instead, the appellee must file a separate oral argument statement within seven days after filing its brief, explaining why the court should hear oral argument and setting out the amount of argument time sought. (3d Cir. L.A.R. 34.1(b).)

Cover

The cover page must list:

- The court of appeals docket number centered at the top of the page.
- The name of the court (United States Court of Appeals for the Third Circuit).

- The title or caption of the case, including the parties to the appeal and their appellate designations (for example, Plaintiff-Appellee).
- The nature of the proceeding and the name of the court below (for example, On Appeal from the United States District Court for the District of New Jersey).
- The title of the brief, which must indicate the name of the party for whom the brief is filed (for example, Appellee's Brief).
- The name, office address, and telephone number of counsel representing the party for whom the brief is filed.

(FRAP 32(a)(2).)

Except for filings by unrepresented parties, paper copies of the appellee's brief must have a red cover (FRAP 32(a)(2)). If the appellee uses a transparent cover, the underlying cover sheet must be red (3d Cir. L.A.R. 32.2(b)).

If the full official caption does not fit on the cover, counsel may continue it on the inside of the cover.

Disclosure Statement

The appellee's brief must include a disclosure statement immediately after the cover (FRAP 26.1(b) and 28(a)(1)). The statement must:

- Appear before the table of contents.
- For corporate parties, identify any parent corporation and any publicly held corporation that owns 10% or more of the party's stock.
- For all parties, identify any publicly owned corporation that has a financial interest in the outcome of the litigation and the nature of the interest.

(FRAP 26.1(a); 3d Cir. L.A.R. 26.1.1; see Practice Note, Third Circuit Civil Appeals: Post-Initiation Filings and Mediation: Corporate Disclosure Statement and Statement of Financial Interest ([W-010-8497](#))).

Counsel must use the Corporate Disclosure and Statement of Financial Interest form on the court's website.

The appellee's brief must include the disclosure statement even if the appellee previously submitted one to the court. Counsel must immediately supplement the statement if any of the relevant information changes. (FRAP 26.1(b).)

For more information about drafting, formatting, and updating the corporate disclosure statement, see Practice Note, Third Circuit Civil Appeals: Post-Initiation Filings and Mediation: Corporate Disclosure Statement and Statement of Financial Interest ([W-010-8497](#)).

Table of Contents

The appellee's brief must include a table of contents indicating the page on which each section of the brief begins. The table also must include specific page references to each heading or subheading of each issue to be argued. (FRAP 28(a)(2), (b).)

Table of Authorities

The appellee's brief must include a table of authorities listing the cases, statutes, and other authorities cited in the brief, along with

page references to where the appellee cited each authority. Cases must appear in the table in alphabetical order. (FRAP 28(a)(3), (b).) Some attorneys use *passim* when an authority appears on several pages of the brief (usually more than five) rather than providing a lengthy list of pages.

Jurisdictional Statement

The appellee's brief may include a statement of subject matter and appellate jurisdiction if either:

- The appellee disagrees with the appellant about the existence of jurisdiction.
- The appellant incorrectly identified the basis for jurisdiction.

(FRAP 28(a)(4), (b).)

If the appellee includes a jurisdictional statement, it must state:

- The basis for the district court's subject matter jurisdiction (for example, federal question jurisdiction or diversity jurisdiction), with any relevant facts establishing jurisdiction and citations to the appropriate statutes.
- The basis for appellate jurisdiction (for example, an appeal from a final judgment), with any relevant facts establishing jurisdiction and citations to the appropriate statutes.
- The filing dates necessary to establish the timeliness of the appeal. These typically include:
 - the date the district court issued the order or judgment appealed from; and
 - the date the appellant filed the notice of appeal or petition for permission to appeal.
- A statement that the appeal is either:
 - from a final order or judgment disposing of all claims; or
 - premised on some other proper basis for appellate jurisdiction.

(FRAP 28(a)(4), (b).)

If the second and fourth items are duplicative, the jurisdictional statement may recite the relevant information once. For example, counsel need not state twice that the appeal is taken from a final order or judgment.

If the appellee disputes the existence of jurisdiction, either in the district court or in the Third Circuit, its jurisdictional statement should explain why jurisdiction does not exist. For example, an appellee may state that although the appeal is from a final judgment, the district court lacked subject matter jurisdiction to enter that final judgment because there is no federal question and the parties were not diverse.

The jurisdictional statement is often a single paragraph.

Statement of the Issues

The appellee's brief may include a statement of the issues presented for appellate review after the jurisdictional statement (FRAP 28(a)(5), (b)).

An appellee may include a statement of the issues to re-frame an issue presented in the appellant's brief or to present bases for affirmance that the appellant did not address. For example,

a defendant-appellee may have argued in the district court that the plaintiff's complaint should be dismissed because it:

- Is barred by the applicable statute of limitations.
- Fails to state a claim on which relief may be granted.

Even if the district court dismisses the action on limitations grounds without addressing the merits of the plaintiff's claims, the defendant-appellee's brief on appeal may argue that the merits provide an alternative ground for affirmance. In this example, the defendant-appellee should include both limitations and the merits in its statement of the issues presented for review.

Even if the appellee does not intend to present alternative grounds for affirmance, the appellee usually wants to rephrase the issues in a way that frames them more favorable for the appellee.

The rules do not specify any particular format for the issues presented. Most attorneys phrase their issues as either:

- A question (for example, "Does a plaintiff need to plead with particularity a claim of negligent misrepresentation?").
- A declaratory statement beginning with "whether" (for example, "Whether a plaintiff must plead with particularity a claim of negligent misrepresentation.>").

If an issue involves some facts, attorneys often include a generic description of them. There is no need to present the specific facts of the appeal in the statement of issues presented for review. An issue in a negligence case may be, for example, "Whether a driver violates his duty of due care to others when he accelerates through a yellow light."

Each issue can be multiple sentences. For example, the negligence issue above could alternatively be phrased as: "A driver accelerated while driving through a yellow light. Did he violate his duty of care to others?"

The rules do not specify how many issues a brief may present or what makes something significant enough to constitute an issue presented for review. Some attorneys present as many issues as there are main sections of the argument (see Argument). For example, if the argument section of a brief has three main points, some attorneys have three issues presented, even if some of the points have sub-points.

Attorneys commonly place each issue presented in a separate, numbered paragraph.

Statement of Related Cases and Proceedings

Following the statement of the issues, the appellee's brief must contain a statement of related cases and proceedings stating whether:

- This case was previously before the Third Circuit.
- Any other related case or proceeding is completed, pending, or about to be presented to any state or federal court or agency.
- Any previous or pending appeal before the Third Circuit arose out of the same case or proceeding.

(3d Cir. L.A.R. 28.1(a)(2); 3d Cir. L.A.R. 28.2.)

Statement of the Case

The appellee's brief may include a statement of the case after the statement of the related cases and proceedings (FRAP 28(a)(6), (b)).

An appellee may include a statement of the case to add events that the appellant omitted or to present its own narrative.

If the appellee includes a statement of the case, the beginning of the statement must:

- Set out the facts relevant to the issues presented on appeal.
- Describe the relevant procedural history.
- Identify the rulings on review.

(FRAP 28(a)(6), (b).)

Counsel must support all statements of fact and procedural history with citations to the record on appeal (FRAP 28(a)(6), (e); 3d Cir. L.A.R. 28.3(c)). Counsel must support all references to portions of the record contained in the appendix by a citation to the appendix followed by a parenthetical description of the document, unless it is otherwise apparent from the context of the sentence (FRAP 30(c)(2); 3d Cir. L.A.R. 28.3(c)). Counsel may include hyperlinks to the electronic appendix in addition to the citation to the page in the paper appendix (3d Cir. L.A.R. 28.3(c)). Counsel must seek and obtain permission before including hyperlinks to audio and video files (3d Cir. L.A.R. 28.3(c)). Counsel may not include hyperlinks to sealed or otherwise restricted documents (3d Cir. L.A.R. 28.3(c)).

The statement of the case should be written as a persuasive (but not argumentative) narrative and not as a bullet point string of relevant facts. In describing the facts and procedural history, counsel should set out only the material events and dates. Superfluous information may distract or confuse readers.

When providing all of the relevant facts, counsel should disclose all material facts, even those that do not favor the appellant's argument. Counsel may seek to minimize those "bad facts" but should not conceal them. These facts may look substantially worse when revealed for the first time in the reply brief and the appellee's counsel may lose credibility with the court.

Although not required, counsel often divide the statement of the case into separate sections with headings. For example, a heading in a breach of contract action may be, "The Parties Enter into a Contract." Counsel need not number these headings.

Counsel should refer to the parties by their names or by descriptive terms that identify them clearly, as opposed to "appellant" and "appellee" (FRAP 28(d)). For example, a brief may describe the parties as the employer and the employee, the buyer and the seller, or the plaintiff and defendant.

Summary of the Argument

The appellee's brief must include a summary of its argument. The summary should provide a brief narrative overview of the argument. The summary should not merely restate the headings in the argument section (FRAP 28(a)(7), (b)). Counsel may, for example, provide a single-paragraph synopsis of each point in the argument section.

Argument

After presenting a summary of its argument on appeal, the appellee's brief must set out in full its argument for why the Third

Circuit should affirm the district court's order or judgment. The argument section must include:

- A concise statement of the applicable standard of review before the discussion of each issue.
- The appellee's contentions and the legal reasons supporting them.
- Citations to legal authorities and materials in the record relied on by the appellee.

(FRAP 28(a)(8), (b); 3d Cir. L.A.R. 28.1(b); 3d Cir. L.A.R. 28.2.)

The statement of the applicable standard should appear under a separate heading placed before the discussion of each issue (3d Cir. L.A.R. 28.1(b); 3d Cir. L.A.R. 28.2).

The appellee's brief should present the legal argument in a narrative form with proper headings. The argument should be organized in a concise and logical way free of irrelevant information. It may or may not follow the organization of the appellant's argument depending on the particulars of the case. Counsel should not make any personal attacks against opposing counsel or parties (3d Cir. L.A.R. 28.1(d)).

Counsel often divide the argument section into points, with each point addressing one of the appellee's main arguments. Each point may contain sub-points. For example:

- Point I may argue that the district court had diversity jurisdiction over the action.
- Point II may argue that the complaint stated a claim for negligence, and may contain sub-points II.A, II.B, II.C, and II.D, arguing, for example, that the plaintiff adequately alleged duty, breach, causation, and damages, respectively.

Just as in the statement of the case, counsel must support every statement in the argument section which concerns matters in the record, including factual assertions, with a citation to the record (FRAP 28(a)(6), (e); see Statement of the Case).

Counsel must identify the proper reporter or source when citing legal authorities:

- **Published federal decisions.** For citations to federal opinions reported in the United States Reports, Federal Reporter, Federal Supplement, or Federal Rules Decisions, counsel must cite to those reporters. Counsel may cite to the Supreme Court Reporter, Lawyer's Edition, or United States Law Week, in that order, for United States Supreme Court decisions that have not yet been published in the United States Reports.
- **Unpublished federal decisions.** For citations to federal opinions not formally reported in one of the above-listed reporters, counsel must identify the court, docket number, the full date of decision, and a citation to a publicly available electronic database, such as Westlaw.
- **State court decisions.** For citations to state court decisions, counsel should include the West Reporter citation whenever possible, and identify the state court.

(3d Cir. L.A.R. 28.3(a).)

Counsel may include hyperlinks to all cited decisions if counsel also includes the standard citation to the reporter (3d Cir. L.A.R. 28.3(a)). If the appellee cites a federal judicial opinion, order,

judgment, or other written disposition not available in a publicly accessible electronic database, the party must file and serve a copy of that opinion, order, judgment, or disposition with the brief (FRAP 32.1(b)).

If disposition of the appeal “requires the study” of statutes, rules, regulations, or other legal authorities (for example, because the appeals turn on a question of statutory interpretation), an appellee must set out the relevant parts of these authorities in one of the following:

- The appellee’s brief.
- An addendum at the end of the brief.
- A separate volume provided to the court.

(FRAP 28(f).)

Counsel typically quote the relevant portions of a statute, regulation, rule, or other authority in the appellee’s brief itself. If the relevant portion is lengthy or if an authority is not easily accessible (for example, a local law not published online), counsel may include a copy of it in an addendum at the end of a brief.

Conclusion

The appellee’s brief may contain a short conclusion, stating the precise relief sought in the appeal (FRAP 28(a)(9), (b)). For example, the conclusion may read, “For all of the foregoing reasons, this Court should affirm the district court’s judgment.”

Signature

The appellee’s brief must include a signature from one of the attorneys representing the appellee (FRAP 32(d); 3d Cir. L.A.R. 28.4; 3d Cir. L.A.R. 46.4). For electronically filed documents, the filing attorney’s case management/electronic case filing (CM/ECF) system log-in and password constitute the required signature for all purposes. A manual signature is unnecessary (3d Cir. L.A.R. 28.4; 3d Cir. L.A.R. 46.4; 3d Cir. L.A.R. 113.9(a)). The filing attorney must type “s/[ATTORNEY’S NAME]” on the signature line to signify that the document is signed. The Third Circuit also allows counsel to apply an electronic signature, but the use of an “s/” is the more common method of signing documents. (3d Cir. L.A.R. 28.4; 3d Cir. L.A.R. 113.9(b).)

Counsel also must include a signature block directly below the signature line, including the filing attorney’s:

- Name.
- State bar number.
- Business address.
- Telephone number.

(3d Cir. L.A.R. 28.4.)

If a brief is submitted jointly on behalf of two or more separately represented parties, the filing attorney must include a separate signature line and block for each attorney. If so, counsel must file the document:

- Containing a scanned image with all necessary signatures.
- Containing a statement representing the consent of the non-filing signatories.

- Identifying the parties whose signatures are required and submitting a notice of endorsement by the other parties within three business days of filing.
- In any other manner approved by the court.

(3d Cir. L.A.R. 113.9(c).)

Certificate of Compliance

An appellee’s brief must contain a certificate by the appellee’s attorney stating that the brief complies with the type-volume limitations (FRAP 28(a)(10), (b) and 32(g)(1); 3d Cir. L.A.R. 31.1(c); see Length or Type-Volume). When preparing the certificate, counsel may rely on the word or line count provided by the word processing software used when drafting the brief (FRAP 32(g)(1)). The certificate must state either the number of:

- Words in the brief.
- Lines of monospaced type in the brief.

(FRAP 32(g)(1); see Font.)

Counsel may use Form 6 in the Appendix of Forms to the FRAP (FRAP 32(g)(2)).

Electronic Document Certificate

Counsel must certify that:

- The text of the electronic brief is identical to the text in the paper copies.
- A virus detection program was run on the electronic brief and no virus was detected. Counsel must identify the version of the virus detection program.

(3d Cir. L.A.R. 31.1(c).)

The court may impose sanctions if a filing contains a computer virus or worm (3d Cir. L.A.R. 31.1(c)).

Certificate of Bar Admission

The appellee’s brief must include a certification that at least one of the attorneys whose names appear on the brief is a member of the Third Circuit bar or has filed an application for admission to the Third Circuit (3d Cir. L.A.R. 28.3(d)).

Certificate of Service

Counsel must include a certificate of service in the appellee’s brief, even if all parties receive service via CM/ECF (FRAP 25(d); 3d Cir. L.A.R. 113.4(c)). The Notice of Docket Activity (NDA) generated by CM/ECF is service of the brief on all counsel registered to use Third Circuit CM/ECF (3d Cir. L.A.R. 113.3(a)).

The certificate must state that:

- Counsel for the other parties are registered to use Third Circuit CM/ECF and receive service by the NDA.
- If one or more parties are exempt from using CM/ECF, that the appellee effects service by:
 - personal delivery;
 - first-class mail; or
 - third-party commercial carrier for delivery within three days.

(FRAP 25(c)(1), (d); 3d Cir. L.A.R. 113.4(b); 3d Cir. L.A.R. 113.4(c).)

FORMATTING THE APPELLEE'S BRIEF

The appellee's brief must comply with formatting requirements regarding:

- Page size, line spacing, and margins (see Page Size, Line Spacing, and Margins).
- Font (see Font).
- Length or type-volume (see Length or Type-Volume).
- File format for electronic briefs (see File Format).
- Paper copies of briefs (see Paper Briefs).

Page Size, Line Spacing, and Margins

Counsel must prepare the appellee's brief using 8.5 by 11 inch pages (FRAP 32(a)(4)).

Brief pages must have margins of at least:

- One inch on the left and right sides of the page.
- Three-quarters of an inch on the top and bottom of each page.

(FRAP 32(a)(4); 3d Cir. L.A.R. 32.1(b).)

Except for page numbers, the appellee's brief may not include any text in the margins (FRAP 32(a)(4)).

The text of the appellee's brief must be double-spaced. However, a brief may use single-spacing for:

- Headings.
- Footnotes.
- Quotations more than two lines long (which should be indented on both sides).

(FRAP 32(a)(4).)

Font

Briefs must use black type (FRAP 32(a)(1)(A)). The appellee's brief must use a plain, roman style font. However, appellees may occasionally use italics or boldface for emphasis. Case names must be italicized or underlined. (FRAP 32(a)(6).)

The appellee's brief may be written in either a proportionally spaced font (for example, Times New Roman) or a monospaced font (for example, Courier) (FRAP 32(a)(5); Third Circuit Font and Page Length Requirements for Filing Briefs).

The required font size depends on which type of font the appellee uses:

- **Proportionally spaced font.** An appellee's brief written in a proportionally spaced font must use at least a 14-point font size. This font must include serifs (for example, Times New Roman). However, headings and captions may appear in sans-serif type (that is, a font without serifs, like Arial or Helvetica).
- **Monospaced font.** An appellee's brief printed in a monospaced font may not contain more than 10.5 characters per inch. This roughly translates to 12-point Courier font.

(FRAP 32(a)(5); Third Circuit Font and Page Length Requirements for Filing Briefs.)

Length or Type-Volume

The appellee's brief may not exceed 30 pages without prior approval from the court, unless it either:

- Contains no more than 13,000 words.
- Uses a monospaced font and contains no more than 1,300 lines of text.

(FRAP 32(a)(7).)

Counsel may rely on the word or line count provided by the word processing software used to draft the brief (FRAP 32(g)(1)). An appellee's brief must contain a certificate by the appellee's attorney stating that the brief complies with these "type-volume" limitations (FRAP 28(a)(10), (b) and 32(g)(1); 3d Cir. L.A.R. 31.1(c); see Certificate of Compliance).

In determining the word or line count of a brief, counsel must include the headings, text, footnotes, and quotations. Counsel may exclude:

- The cover page.
- The corporate disclosure statement and statement of financial interest.
- The table of contents.
- The table of authorities.
- The signature block.
- Any addendum containing statutes, rules, or regulations.
- The certificates of counsel.

(FRAP 32(f).)

File Format

When serving and filing a brief using CM/ECF, the appellee must prepare its brief in PDF format. Counsel should create the PDF document by converting a word processing document, not by scanning. (3d Cir. L.A.R. 31.1(b) and committee comments.) Converting the brief from the word processing software file directly to PDF produces the smallest document and ensures the text is easily searchable.

Paper Briefs

Paper copies of the appellee's brief must include a red cover of durable quality (FRAP 32(a)(2); see Cover). Briefs must be printed single-sided (FRAP 32(a)(1)(A)). The print quality must be at least as good as that of a laser printer (FRAP 32(a)(1)(B)).

Counsel must bind paper copies of the appellee's brief along the left margin, in a way that:

- Is secure.
- Does not obscure the text.
- Permits the brief to lie reasonably flat when open.

(FRAP 32(a)(3).) Counsel may use velo or spiral binding, but may not use backbones or spines. Any metal fasteners or staples must have smooth edges and be covered. (3d Cir. L.A.R. 32.1(a).)

FILING AND SERVING THE APPELLEE'S BRIEF

Counsel must use CM/ECF to serve and file the appellee's brief (3d Cir. L.A.R. 31.1(b)(1)). Counsel also must serve one paper copy of

the appellee's brief on any party exempt from CM/ECF and any *pro se* party, unless opposing counsel has consented to electronic service (FRAP 25(b); 3d Cir. L.A.R. 31.1(a); 3d Cir. L.A.R. 31.1(d)). Acceptable methods of paper service include:

- Personal delivery.
- First-class mail.
- Third-party commercial carrier for delivery within three days.

(FRAP 25(c)(1).)

On the same day the appellee electronically files its brief, the appellee must send one originally signed brief and six paper copies to the clerk of the court by either:

- First-class mail.
- Third-party commercial carrier for delivery within three days.

(FRAP 25(a)(2)(B); 3d Cir. L.A.R. 25.1(a); 3d Cir. L.A.R. 31.1(a); 3d Cir. L.A.R. 31.1(b)(3); see Standing Order: Reduced Number of Copies of Briefs Required (Apr. 29, 2013).)

In appeals from the District Court for the District of the Virgin Islands, counsel must file one additional paper copy of the brief with the clerk of the district court in the location from which the appeal is taken (St. Thomas or St. Croix) (3d Cir. L.A.R. 31.1(a)). The court may order additional paper copies to be filed if the court orders hearing or rehearing *en banc* (3d Cir. L.A.R. 31.1(a)).

The paper copies must be identical to the electronic copies except that they must have a red cover (FRAP 32(a)(2); 3d Cir. L.A.R. 31.1(c)). The brief is considered filed on the date counsel files the electronic version via CM/ECF if the paper copies are mailed to the clerk on the same day (3d Cir. L.A.R. 31.1(b)(3)).

THE REPLY BRIEF

The reply brief provides the appellant with an opportunity to answer the appellee's brief and explain why the Third Circuit should grant the appellant relief. A reply brief is optional (FRAP 28(c)).

CONTENTS OF THE REPLY BRIEF

The appellant's reply brief must include:

- A cover (see Cover).
- A corporate disclosure statement and statement of financial interest, where appropriate (see Disclosure Statement).
- A table of contents (see Table of Contents).
- A table of authorities (see Table of Authorities).
- An argument (see Argument).
- A signature (see Signature).
- A certificate of compliance (see Certificate of Compliance).
- An electronic document certificate (see Electronic Document Certificate).
- Proof of service (see Certificate of Service).

(FRAP 25(d), 26.1, 28(c), and 32(a)(2), (d), and (g); 3d Cir. L.A.R. 28.4.)

Many attorneys also include a brief conclusion after the argument (see Conclusion).

Cover

The cover page must list:

- The court of appeals docket number centered at the top of the page.
- The name of the court (United States Court of Appeals for the Third Circuit).
- The title or caption of the case, including the parties to the appeal and their appellate designations (for example, Plaintiff-Appellee).
- The nature of the proceeding and the name of the court below (for example, On Appeal from the United States District Court for the District of New Jersey).
- The title of the brief, which must indicate the name of the party for whom the brief is filed (for example, Appellant's Reply Brief).
- The name, office address, and telephone number of counsel representing the party for whom the brief is filed.

(FRAP 32(a)(2).)

Except for filings by unrepresented parties, paper copies of the reply brief must have a grey cover (FRAP 32(a)(2)). If the appellant uses a transparent cover, the underlying cover sheet must be grey (3d Cir. L.A.R. 32.2(b)).

Disclosure Statement

The appellant does not need to include a disclosure statement or statement of financial interest in its reply brief unless the statement included in its principal brief is outdated. Any disclosure statement contained in the reply briefs may include only persons and entities omitted from the statement contained in the principal brief. (FRAP 26.1(b) and 28(c).)

Table of Contents

The reply brief must include a table of contents indicating the page on which each section of the brief begins. The table also must include specific page references to each heading or subheading of each issue to be argued. (FRAP 28(a)(2), (c).)

Table of Authorities

The reply brief must include a table of authorities listing the cases, statutes, and other authorities cited in the brief along with page references to where the appellant cited each authority. Cases must appear in the table in alphabetical order. (FRAP 28(a)(3), (c).) Some attorneys use *passim* when an authority appears on several pages of the brief rather than providing a lengthy list of pages.

Argument

The appellant's reply brief must set out in full its argument for rejecting the appellee's contentions and granting relief from the district court's order or judgment. The argument section must include:

- The appellant's reply arguments and the legal reasons supporting them.
- Citations to legal authorities and record materials the appellant relied on.

(FRAP 28(a)(8).)

The reply brief should present the legal argument in a narrative form with proper headings. The argument should be organized in a concise and logical way free of irrelevant information. It may or may not follow the organization of the prior briefs depending on the particular circumstances of a given case.

Counsel often divide the argument section into points using descriptive headings, with each point addressing one of the appellant's main reply arguments. Each point may contain subpoints addressing subsidiary arguments.

Counsel must support every statement in the argument section which concerns matters in the record, including factual assertions, with a citation to the record (FRAP 28(a)(6), (e)).

Counsel must identify the proper reporter or source when citing legal authorities:

- **Published federal decisions.** For citations to federal opinions reported in the United States Reports, Federal Reporter, Federal Supplement, or Federal Rules Decisions, counsel must cite to those reporters. Counsel may cite to the Supreme Court Reporter, Lawyer's Edition, or United States Law Week, in that order, for United States Supreme Court decisions that have not yet been published in the United States Reports.
- **Unpublished federal decisions.** For citations to federal opinions not formally reported in one of the above-listed reporters, counsel must identify the court, docket number, the full date of decision, and a citation to a publicly available electronic database, such as Westlaw.
- **State court decisions.** For citations to state court decisions, counsel should include the West Reporter citation whenever possible, and identify the state court.

(3d Cir. L.A.R. 28.3(a).)

Counsel may include hyperlinks to all cited decisions if counsel also includes the standard citation to the reporter (3d Cir. L.A.R. 28.3(a)). If the appellant cites a federal judicial opinion, order, judgment, or other written disposition not available in a publicly accessible electronic database, the party must file and serve a copy of that opinion, order, judgment, or disposition with the brief (FRAP 32.1(b)).

If disposition of the appeal "requires the study" of statutes, rules, regulations, or other legal authorities (for example, because the appeals turn on a question of statutory interpretation), an appellant must set out the relevant parts of these authorities in one of the following:

- The reply brief.
- An addendum at the end of the brief.
- A separate volume provided to the court.

(FRAP 28(f).)

Counsel typically quote the relevant portions of a statute, regulation, rule, or other authority in the reply brief itself. If the relevant portion is lengthy or if an authority is not easily accessible (for example, a local law not published online), counsel may include a copy of it in an addendum at the end of a brief.

Conclusion

The reply brief does not need a conclusion (FRAP 28(c)). Still, appellants commonly include a short conclusion reiterating their request for relief.

Signature

The appellant's reply brief must include a signature from one of the attorneys representing the appellant (FRAP 32(d); 3d Cir. L.A.R. 28.4; 3d Cir. L.A.R. 46.4). For electronically filed documents, the filing attorney's CM/ECF system log-in and password constitute the required signature for all purposes. A manual signature is unnecessary (3d Cir. L.A.R. 28.4; 3d Cir. L.A.R. 46.4; 3d Cir. L.A.R. 113.9(a)). The filing attorney must type "s/[ATTORNEY'S NAME]" on the signature line to signify that the document is signed. The Third Circuit also allows counsel to apply an electronic signature, but the use of an "s/" is the more common method of signing documents. (3d Cir. L.A.R. 28.4; 3d Cir. L.A.R. 113.9(b).)

Counsel also must include a signature block directly below the signature line, including the filing attorney's:

- Name.
- State bar number.
- Business address.
- Telephone number.

(3d Cir. L.A.R. 28.4.)

If a brief is submitted jointly on behalf of two or more separately represented parties, the filing attorney must include a separate signature line and block for each attorney. If so, counsel must file the document:

- Containing a scanned image with all necessary signatures.
- Containing a statement representing the consent of the non-filing signatories.
- Identifying the parties whose signatures are required and submitting a notice of endorsement by the other parties within three business days of filing.
- In any other manner approved by the court.

(3d Cir. L.A.R. 113.9(c).)

Certificate of Compliance

A reply brief must contain a certificate by the appellant's attorney stating that the brief complies with the type-volume limitations (FRAP 32(g)(1); 3d Cir. L.A.R. 31.1(c); see Length or Type-Volume). When preparing the certificate, counsel may rely on the word or line count provided by the word processing software used when drafting the brief (FRAP 32(g)(1)). The certificate must state either the number of:

- Words in the brief.
- Lines of monospaced type in the brief.

(FRAP 32(g)(1); see Font.)

Counsel may use Form 6 in the Appendix of Forms to the FRAP (FRAP 32(g)(2)).

Electronic Document Certificate

Counsel must certify that:

- The text of the electronic brief is identical to the text in the paper copies.
- A virus detection program was run on the electronic brief and no virus was detected. Counsel must identify the version of the virus detection program.

(3d Cir. L.A.R. 31.1(c).)

The court may impose sanctions if a filing contains a computer virus or worm (3d Cir. L.A.R. 31.1(c)).

Certificate of Service

Counsel must include a certificate of service in the reply brief, even if all parties receive service via CM/ECF (FRAP 25(d); 3d Cir. L.A.R. 113.4(c)). The NDA generated by CM/ECF is service of the brief on all counsel registered to use Third Circuit CM/ECF (3d Cir. L.A.R. 113.3(a)).

The certificate must state that:

- Counsel for the other parties are registered to use Third Circuit CM/ECF and receive service by the NDA.
- If one or more parties are exempt from using CM/EF, that the appellant effects service by:
 - personal delivery;
 - first-class mail; or
 - third-party commercial carrier for delivery within three days.

(FRAP 25(c)(1), (d); 3d Cir. L.A.R. 113.4(b); 3d Cir. L.A.R. 113.4(c).)

FORMATTING THE REPLY BRIEF

The appellant's reply brief must comply with formatting requirements regarding:

- Page size, line spacing, and margins (see Page Size, Line Spacing, and Margins).
- Font (see Font).
- Length or type-volume (see Length or Type-Volume).
- File format for electronic briefs (see File Format).
- Paper copies of briefs (see Paper Briefs).

Page Size, Line Spacing, and Margins

Counsel must prepare the reply brief using 8.5 by 11 inch pages (FRAP 32(a)(4)).

Brief pages must have margins of at least:

- One inch on the left and right sides of the page.
- Three-quarters of an inch on the top and bottom of each page.

(FRAP 32(a)(4); 3d Cir. L.A.R. 32.1(b).)

Except for page numbers, the reply brief may not include any text in the margins (FRAP 32(a)(4)).

The text of the reply brief must be double-spaced. However, a brief may use single-spacing for:

- Headings.

- Footnotes.
- Quotations more than two lines long (which should be indented on both sides).

(FRAP 32(a)(4).)

Font

Briefs must use black type (FRAP 32(a)(1)(A)). The reply brief must use a plain, roman style font. However, appellants may occasionally use italics or boldface for emphasis. Case names must be italicized or underlined. (FRAP 32(a)(6).)

The reply brief may be written in either a proportionally spaced font (for example, Times New Roman) or a monospaced font (for example, Courier) (FRAP 32(a)(5); Third Circuit Font and Page Length Requirements for Filing Briefs).

The required font size depends on which type of font the appellant uses:

- **Proportionally spaced font.** A reply brief written in a proportionally spaced font must use at least a 14-point font size. This font must include serifs (for example, Times New Roman). However, headings and captions may appear in sans-serif type (that is, a font without serifs, like Arial or Helvetica).
- **Monospaced font.** A reply brief printed in a monospaced font may not contain more than 10.5 characters per inch. This roughly translates to 12-point Courier font.

(FRAP 32(a)(5); Third Circuit Font and Page Length Requirements for Filing Briefs.)

Length or Type-Volume

The reply brief may not exceed 15 pages without prior approval from the court, unless it either:

- Contains no more than 6,500 words.
- Uses a monospaced font and contains no more than 650 lines of text.

(FRAP 32(a)(7).)

Counsel may rely on the word or line count provided by the word processing software used to draft the brief (FRAP 32(g)(1)). A reply brief must contain a certificate by the appellant's attorney stating that the brief complies with these "type-volume" limitations (FRAP 32(g)(1); 3d Cir. L.A.R. 31.1(c); see Certificate of Compliance).

In determining the word or line count of a brief, counsel must include the headings, text, footnotes, and quotations. Counsel may exclude:

- The cover page.
- Any corporate disclosure statement and statement of financial interest.
- The table of contents.
- The table of authorities.
- The signature block.
- Any addendum containing statutes, rules, or regulations.
- The certificates of counsel.

(FRAP 32(f).)

File Format

When serving and filing a brief using CM/ECF, the appellant must prepare its brief in PDF format. Counsel should create the PDF document by converting a word processing document, not by scanning. (3d Cir. L.A.R. 31.1(b) and committee comments.) Converting the brief from the word processing software file directly to PDF produces the smallest document and ensures the text is easily searchable.

Paper Briefs

Paper copies of the reply brief must include a grey cover of durable quality (FRAP 32(a)(2); see Cover). Briefs must be printed single-sided (FRAP 32(a)(1)(A)). The print quality must be at least as good as that of a laser printer (FRAP 32(a)(1)(B)).

Counsel must bind paper copies of the reply brief along the left margin, in a way that:

- Is secure.
- Does not obscure the text.
- Permits the brief to lie reasonably flat when open.

(FRAP 32(a)(3).) Counsel may use velo or spiral binding, but may not use backbones or spines. Any metal fasteners or staples must have smooth edges and be covered. (3d Cir. L.A.R. 32.1(a).)

FILING AND SERVING THE REPLY BRIEF

Counsel must use CM/ECF to serve and file the reply brief (3d Cir. L.A.R. 31.1(b)(1)). Counsel also must serve one paper copy of the reply brief on any party exempt from CM/ECF and any *pro se* party, unless opposing counsel has consented to electronic service (FRAP 25(b); 3d Cir. L.A.R. 31.1(a); 3d Cir. L.A.R. 31.1(d)). Acceptable methods of paper service include:

- Personal delivery.
- First-class mail.
- Third-party commercial carrier for delivery within three days.

(FRAP 25(c)(1).)

On the same day the appellant electronically files its reply brief, the appellant must send one originally signed brief and six paper copies to the clerk of the court by either:

- First-class mail.
- Third-party commercial carrier for delivery within three days.

(FRAP 25(a)(2)(B); 3d Cir. L.A.R. 25.1(a); 3d Cir. L.A.R. 31.1(a); 3d Cir. L.A.R. 31.1(b)(3); see Standing Order: Reduced Number of Copies of Briefs Required (Apr. 29, 2013).)

In appeals from the District Court for the District of the Virgin Islands, counsel must file one additional paper copy of the brief with the clerk of the district court in the location from which the appeal is taken (St. Thomas or St. Croix) (3d Cir. L.A.R. 31.1(a)). The court may order additional paper copies to be filed if the court orders hearing or rehearing *en banc* (3d Cir. L.A.R. 31.1(a)).

The paper copies must be identical to the electronic copies except that they must have a grey cover (FRAP 32(a)(2); 3d Cir. L.A.R. 31.1(c)). The brief is considered filed on the date counsel files the electronic version via CM/ECF if the paper copies are mailed to the clerk on the same day (3d Cir. L.A.R. 31.1(b)(3)).

CROSS-APPEALS

If the appellee is aggrieved by the order or judgment from which the appellant appeals, the appellee may cross-appeal. For example, if the plaintiff prevails at trial on one of its two claims and then appeals from the judgment as relates to the second claim, the defendant may cross-appeal from the judgment as relates to the first claim.

PARTY NAMES ON CROSS-APPEAL

The court deems the first party to file a notice of appeal the appellant. If both parties file notices of appeal on the same day, the court deems the plaintiff the appellant. However, these default designations may be altered by stipulation or court order (FRAP 28.1(b)).

A party taking a cross-appeal is called a cross-appellant. A party defending against a cross-appeal is called a cross-appellee.

Therefore, if the defendant appeals from a district court judgment and the plaintiff then cross-appeals from the same judgment, the Third Circuit designates the parties as the "Defendant-Appellant/Cross-Appellee" and the "Plaintiff-Appellee/Cross-Appellant."

BRIEFS ON CROSS-APPEAL

A cross-appeal has a total of four briefs, rather than the three filed in an ordinary appeal. The parties brief a cross-appeal as follows:

- The appellant/cross-appellee files its principal brief stating its arguments supporting the appeal (the "Appellant's Principal Brief" or the "Blue Brief").
- The appellee/cross-appellant files a brief stating its arguments opposing the appellant's appeal and supporting the cross-appeal (the "Appellee's Principal and Response Brief" or the "Red Brief").
- The appellant/cross-appellee files a brief stating its reply arguments supporting the appeal and its arguments opposing the cross-appeal (the "Appellant's Response and Reply Brief" or the "Yellow Brief").
- The appellee/cross-appellant files a brief stating its reply arguments supporting the cross-appeal (the "Appellee's Reply Brief" or the "Grey Brief").

(FRAP 28.1(c).)

BRIEFING SCHEDULES FOR CROSS-APPEALS

Unless the court orders otherwise:

- The appellant/cross-appellee must serve and file the Blue Brief within 40 days after the record is filed.
- The appellee/cross-appellant must serve and file the Red Brief within 30 days after service of the Blue Brief.
- The appellant/cross-appellee must serve and file the Yellow Brief within 30 days after service of the Red Brief.
- The appellee/cross-appellant must serve and file the Grey Brief within 14 days after service of the Yellow Brief, but in any case at least seven days before argument.

(FRAP 28.1(f).)

CONTENT, FORMATTING, FILING, AND SERVICE RULES FOR CROSS-APPEALS

The briefs for a cross-appeal follow the rules generally applicable to briefs in an ordinary appeal, with a few exceptions (FRAP 28.1(c)).

The Blue Brief follows the same rules as any other appellant's brief (FRAP 28(a), 28.1(c)(1), (d) and (e), and 32(a); see Practice Note, Third Circuit Civil Appeals: Appellant's Brief and Appendix (W-011-2754)).

The Red Brief follows the rules for the appellant's brief, except:

- The statement of the case is optional.
- Paper copies of the brief must have a red cover.
- The brief may satisfy any of the following length or type-volume requirements:
 - be no more than 35 pages long;
 - contain no more than 15,300 words; or
 - contain no more than 1,500 lines of monospaced typeface text.

(FRAP 28.1(c)(2), (d), and (e).)

The Yellow Brief follows the rules for the appellee's brief, except paper copies of the brief must have a yellow cover (FRAP 28.1(c)(3), (d), and (e); see The Appellee's Brief). The appellant-cross-appellee may choose how many pages it devotes to reply arguments supporting the appeal and how many pages it devotes to arguments in opposition to the cross-appeal.

The Grey Brief follows the rules for the reply brief (FRAP 28.1(c)(4), (d) and (e); see The Reply Brief). The Grey Brief may address only the cross-appeal and may not serve as a sur-reply on the principal appeal (FRAP 28.1(c)(4)).

SUBMITTING SUPPLEMENTAL AUTHORITIES

A party may bring to the Third Circuit's attention "pertinent and significant authorities" that it learns of either:

- After filing its last brief but before oral argument.
- After oral argument but before the Court enters a decision.

(FRAP 28(j).)

A party does this by sending a letter to the clerk, with copy to all other parties, setting forth the citations to the supplemental authorities (FRAP 28(j)). The body of the letter may not exceed 350 words, including footnotes (FRAP 28(j)). If a new case is not reported, counsel should attach a copy to the letter.

The requirement that authority be "significant" means that a party should not submit a Rule 28(j) letter every time there is a new decision reiterating or applying existing law. Appropriate grounds for a Rule 28(j) letter may include any of the following:

- A Supreme Court decision.
- A Third Circuit opinion (but not a summary order).
- A novel opinion by:
 - another federal court of appeals; or
 - a state high court, if the appeal involves a question of state law.

Any other party may respond to the letter "promptly" by submitting a letter of its own, addressed to the clerk of the court. The body of the response letter cannot exceed 350 words (FRAP 28(j)).

Counsel must use CM/ECF to serve and file Rule 28(j) letters and responses.

Counsel must serve any parties exempt from CM/ECF by paper means and file proof of service with the response. Acceptable methods of paper service include:

- Personal delivery.
- First-class mail.
- Third-party commercial carrier for delivery within three days.

(FRAP 25(b)-(d).)

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