

# Third Circuit Civil Appeals: Post-Initiation Filings and Mediation

STEPHEN M. ORLOFSKY AND ADRIENNE C. ROGOVE, BLANK ROME LLP,  
WITH PRACTICAL LAW LITIGATION

Search the [Resource ID numbers in blue](#) on Westlaw for more.

A Practice Note explaining the process between initiation and briefing in a civil appeal to the US Court of Appeals for the Third Circuit from a federal district court's order or judgment. This Note discusses using the Third Circuit's case management/electronic case filing (CM/ECF) system, ordering transcripts, preparing the record on appeal, and filing notices of appearance. It also explains the Third Circuit's mediation program.

This Note explains the following steps in the process for appealing a civil order or judgment to the United States Court of Appeals for the Third Circuit:

- Electronic service and filing.
- The documents parties must file after the appeal begins.
- The record on appeal.
- Third Circuit mediation.

## ELECTRONIC FILING IN THE THIRD CIRCUIT

After initiating an appeal in the Third Circuit, parties typically must file and serve all documents using the Third Circuit's case management/electronic case filing (CM/ECF) system (3d Cir. L.A.R. 113.1(a)).

When filing in the Third Circuit, counsel must consider:

- The scope of the Third Circuit's CM/ECF (see Applicability of Third Circuit CM/ECF).
- The formatting requirements for electronic documents (see Formatting Requirements).
- How to file documents using CM/ECF (see Filing Documents Using CM/ECF).

- How documents are served when using CM/ECF (see Service Considerations).
- How to calculate time when using CM/ECF (see Calculating Time When Using CM/ECF).
- Privacy protection requirements for using CM/ECF, including filing documents under seal (see Privacy Protection).

## APPLICABILITY OF THIRD CIRCUIT CM/ECF

After initiating the appeal (see Practice Note, Third Circuit Civil Appeals: Initiating an Appeal ([W-010-7599](#))), parties must serve and file almost all documents using CM/ECF (3d Cir. L.A.R. 113.1(a)). Where applicable, counsel should check the individual rules for the assigned appellate judge or judges to determine whether counsel also must send courtesy copies to the court in paper form. Exemptions from using CM/ECF exist for:

- Petitions for permission to appeal, extraordinary writ petitions, and any other document initiating an original action in the Third Circuit (3d Cir. L.A.R. 113.1(a) and see Practice Note, Third Circuit Civil Appeals: Initiating an Appeal: Serving and Filing the Petition for Permission to Appeal ([W-010-7599](#))).
- Pro se filings (3d Cir. L.A.R. 113.2(b) and see Serving Pro Se Parties and Exempt Attorneys ([W-010-8497](#))).
- Attorneys demonstrating good cause on motion (3d Cir. L.A.R. 113.1(e) and see Serving Pro Se Parties and Exempt Attorneys ([W-010-8497](#))).
- Certain sealed documents with the clerk's permission (3d Cir. L.A.R. 113.7(c) and see Serving and Filing Documents Under Seal ([W-010-8497](#))).
- Ex parte motions (3d Cir. L.A.R. 113.7(d)).
- The appendix, if certain conditions are met (see Order of March 17, 2009).

(See also Third Circuit Summary of Electronic Filing Requirements.)

## FORMATTING REQUIREMENTS

Before filing a document using CM/ECF, counsel should ensure that the document complies with the court's technical formatting requirements, which appear in the Third Circuit's local rules and CM/ECF instructions.

Attorneys can only upload PDF files to CM/ECF. Whenever possible, documents must be in text-searchable PDF format and not created by scanning (3d Cir. L.A.R. 113.3(b)). Attorneys should convert documents in an electronic format directly to PDF because this produces the smallest document and best image (see also 3d Cir. L.A.R. 113.3(b)). Attorneys may, but are not required to, include hyperlinks to:

- Other portions of the same document.
- A website or to parts of the electronic docket (for example, the appendix that contains a source document for a citation). If counsel uses hyperlinks in a brief, counsel also must include a reference to the appendix page immediately before the hyperlink.

(3d Cir. L.A.R. 113.13.)

Documents uploaded to CM/ECF may not exceed 50 megabytes (MB) in size. Counsel must split documents larger than 50 MB into separate smaller documents that do not exceed 50 MB. Multiple documents may be filed and associated with a single filing event (see Summary of Electronic Filing Requirements; Third Circuit NextGen CM/ECF Frequently Asked Questions).

The filing attorney's use of an assigned log-in and password for the Third Circuit's CM/ECF to submit a document electronically is the equivalent of a signature (3d Cir. L.A.R. 113.9(a)). The filing attorney must type "s/[ATTORNEY'S NAME]" on the signature line. The Third Circuit also allows graphic signatures, but attorneys more commonly use an "s/" (3d Cir. L.A.R. 113.9(b)).

If a filing requires multiple signatures, counsel must sign the document using one of the following methods:

- Including a scanned image with all necessary signatures.
- Including 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))

### FILING DOCUMENTS USING CM/ECF

Registered CM/ECF users file documents with the court by:

- Logging on to the Third Circuit's CM/ECF system.
- Selecting "Filing" and then "File a Document" from the tool bar at the top of the page.
- Entering information about the appeal and the filing, including:
  - the docket number;
  - the document type; and
  - the filing party.
- Uploading an electronic version of the filing in the appropriate format (see Formatting Requirements).

(3d Cir. L.A.R. 113.3(b) and see Summary of Electronic Filing Requirements; Third Circuit NextGen CM/ECF Frequently Asked Questions.)

After counsel electronically files a document, CM/ECF produces a Notice of Docket Activity (NDA). The NDA is an email containing a

hyperlink to the filed document. The electronic transmission and the Third Circuit's NDA constitute:

- Filing the document under the FRAP and the Third Circuit Local Rules.
- Entry of the document onto the official court docket.

(3d Cir. L.A.R. 113.3(a).)

Counsel always should ensure that all documents are properly formatted and filed in the correct case. If counsel later discovers an error after electronically filing, counsel should immediately contact the case manager for instructions on how to correct the error and ensure that the court considers the filing timely.

### SERVICE CONSIDERATIONS

Service typically is completed using CM/ECF. However, additional service issues may arise if the court granted an exemption to CM/ECF or the appeal involves a *pro se* party not registered for CM/ECF.

#### Serving Documents Using CM/ECF

After a user electronically files a document, all attorneys appearing in the appeal automatically receive an NDA email. CM/ECF registration constitutes consent to receive electronic service and electronic notice of correspondence, orders, and opinions (3d Cir. L.A.R. 113.2(c)). The NDA constitutes service of the document on each registered CM/ECF user receiving the notice (3d Cir. L.A.R. 113.3(a)). Counsel still must file a certificate of service certifying that the other parties have been served via CM/ECF (FRAP 25(d) and 3d Cir. L.A.R. 113.4(c)). The NDA contains a hyperlink providing one free view of the filed document.

#### Serving Pro Se Parties and Exempt Attorneys

If a party appears *pro se* or an attorney successfully moves for an exemption from electronic filing, a filing attorney must serve paper copies of all filings on the *pro se* or exempt party using any of the following traditional means:

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

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

After serving exempt parties with paper copies, attorneys must use CM/ECF to serve non-exempt parties and to file with the Third Circuit. The electronically filed document must include a certificate of service proving proper service on each party, whether they were served by traditional or electronic means. (FRAP 25(d) and 3d Cir. L.A.R. 113.4(c).)

### CALCULATING TIME WHEN USING CM/ECF

Electronic filing does not alter filing deadlines in the Third Circuit. When a court order or stipulation sets a specific time of day for filing, counsel must complete the electronic filing by that time. Otherwise, counsel must complete electronic filing by 11:59 p.m. EST or EDT (3d Cir. L.A.R. 113.3(c)).

A party served by US mail or commercial carrier may add three days to the time otherwise available to respond.

For example, the time to respond to a motion in federal court of appeals is normally ten days after service (FRAP 27(a)(3)(A)). If a party serves a motion on a Wednesday, the tenth day after service is a Saturday. This gives the opposing party until the following Monday, the twelfth day after service, to respond (FRAP 26(a)(1)(C)). If the movant served the motion by US mail, the opposing party adds three days to the otherwise applicable deadline (Monday, not Saturday). This gives the opposing party until Thursday, the fifteenth day after service, to respond. (See FRAP 26(c) (2009 advisory committee notes).)

The three extra days are available only if the time to act is calculated from service of another document. No extra days are added to the deadline if:

- The deadline is a particular date.
- The time to act is calculated from any act other than service, including the filing of a document or the entry of an order or judgment.

(FRAP 26(c).)

Parties receiving a document by electronic service no longer may add three days to a response time calculated from the date of service (FRAP 26(c)).

## PRIVACY PROTECTION

Electronic filing has made it easier to access court filings, but also has heightened certain privacy considerations. Attorneys must be aware of redaction requirements and the procedure for filing documents under seal.

### Redacting or Omitting Personal Identifiers

Attorneys must redact or omit certain personal information to protect the privacy of individuals referenced in filed materials, whether filing those documents using CM/ECF or in paper format (3d Cir. L.A.R. 25.3 and 3d Cir. L.A.R. 113.12).

Unless the Court orders otherwise, attorneys may only:

- Use the last four digits of a Social Security number or taxpayer identification number.
- Refer to the year of an individual's birth rather than the full birth date.
- Refer to a minor by initials rather than the full name.
- Use the last four digits of a financial account number.

(FRAP 25(a)(5), FRCP 5.2 and 3d Cir. L.A.R. 113.12(a).)

Although the Third Circuit's redaction rules for home addresses only apply to criminal cases (see 3d Cir. L.A.R. 113.12(a)(5)), attorneys also should redact home addresses in civil cases, using only the city and state.

If private information appears in a pre-existing document that a party wants to file with the court, the attorney should redact the document to comply with these requirements (3d Cir. L.A.R. 113.12). If the information appears in a document that an attorney drafts (for example, a brief or motion), the attorney should draft the document to conform to the rule.

If a party wants to file a document containing any of the personal identifiers listed above, the party may file an un-redacted version of the document under seal or file a reference list under seal. A reference list is a document specifying what "redacted identifier" counsel uses in place of the "complete identifier." For example, the reference list may state that counsel uses "J.S." in place of "John Smith" (3d Cir. L.A.R. 113.12(b)).

For more information about privacy protection requirements, see Practice Note, Filing Documents in Federal District Court: Redact Personal Identifiers Before Filing ([2-519-0032](#)).

## Serving and Filing Documents Under Seal

Counsel may file a motion to file documents under seal using CM/ECF unless prohibited by law, circuit rule, or court order (3d Cir. L.A.R. 113.7(a)). If the court grants the motion, counsel may electronically file the documents subject to the seal using CM/ECF. When filing, counsel should select an event from the "sealed" category or use an event with a title beginning with "SEALED." The docketing system automatically locks sealed documents, preventing non-parties from viewing them (3d Cir. L.A.R. 113.7 and see Third Circuit Summary of Electronic Filing Requirements, and Third Circuit CM/ECF Frequently Asked Questions). If the clerk grants permission, counsel may file documents placed under seal in paper form instead of using CM/ECF (3d Cir. L.A.R. 113.7(c)).

A motion to seal must explain the basis for sealing and specify how long counsel requests the documents to remain sealed. If the motion must discuss confidential information to explain why the seal is needed, counsel may provisionally file the motion under seal. If so, the court prefers counsel to include any necessary confidential information in a separate sealed brief, motion, or filing (3d Cir. L.A.R. 106.1).

## POST-INITIATION FILINGS

After receiving the notice of appeal and the docket sheet from the district court, the Third Circuit clerk:

- Dockets the appeal under the title of the district court action (FRAP 3(d), 12(a)).
- Assigns a Third Circuit docket number to the appeal.
- Sends a docketing notice to counsel and any *pro se* parties.

After the clerk docket the appeal, the parties and the district court must make several preliminary filings with the Third Circuit before the parties can address the merits of the appeal. These filings include:

- The Civil Appeal Information Statement (FRAP 12(b) and see Civil Appeal Information Statement).
- A Concise Summary of the Case, if the case is eligible for mediation (3d Cir. L.A.R. 33.2 and see Concise Summary of the Case).
- If applicable, the Corporate Disclosure Statement and Statement of Financial Interest (FRAP 26.1 and 3d Cir. L.A.R. 26.1.1 and see Corporate Disclosure Statement and Statement of Financial Interest).
- If applicable, a notice of possible judicial disqualification (3d Cir. L.A.R. 26.1.2 and see Notice of Possible Judicial Disqualification).
- The Transcript Purchase Order form, even if the appellant does not order transcripts (FRAP 10(b) and 3d Cir. L.A.R. 11.1 and see Transcript Purchase Order Form).

- The record on appeal (FRAP 11(a) and see Record on Appeal).
- If applicable, a notice of a constitutional challenge to a statute (FRAP 44 and see Notice of Constitutional Challenges).
- The Entry of Appearance form (3d Cir. L.A.R. 46.2 and see Entry of Appearance).
- If desired, a motion to expedite (3d Cir. L.A.R. 4.1 and see Motion to Expedite).

### CIVIL APPEAL INFORMATION STATEMENT

The appellant must file a Civil Appeal Information Statement within either:

- 14 days after the clerk docket the notice of appeal.
- 10 days after the clerk docket the notice of appeal, if the appeal is eligible for the Appellate Mediation Program.

(3d Cir. L.A.R. 33.2 and see Eligibility for Mediation.) The Civil Appeal Information Statement is available on the Court's website. The appellee does not need to file a response. If the appellant fails to timely file the Civil Appeal Information Statement, the clerk may dismiss the appeal for failure to prosecute after appropriate notice (3d Cir. L.A.R. 107.2; see *Ucciardi v. E.I. Dupont De Nemours & Co.*, 2017 WL 3123286, at \*1 (3d Cir. Mar. 6, 2017)).

### Contents of the Civil Appeal Information Statement

The Civil Appeal Information Statement is a two-page form that provides the Third Circuit with basic information about the appeal, including:

- The parties' names.
- The name, address, telephone number, fax number, and email of counsel for each party to the appeal.
- The bases for district court and Third Circuit jurisdiction.
- Information about any ongoing judicial or administrative proceedings relating to the appeal.
- Information about the proposed issues on appeal, including jurisdictional challenges.
- Whether there is a cross-appeal or a previous appeal in the case.

If any necessary information does not fit in the space provided on the form, counsel should include it on a separate sheet following the form. For example, if there are too many attorneys to list in the space provided, counsel should list them on a separate sheet.

The statement complies with FRAP 12(b), which requires the appellant's attorney to file a statement naming the parties the attorney represents on appeal within 14 days after filing the notice of appeal.

### SERVING AND FILING THE CIVIL APPEAL INFORMATION STATEMENT

Attorneys must use CM/ECF to serve and file the Civil Appeal Information Statement. Attorneys must serve any exempt parties or attorneys by paper means and electronically file a certificate of service (see *Serving Pro Se Parties and Exempt Attorneys*).

### CONCISE SUMMARY OF THE CASE

If the appeal is eligible for mediation, the appellant must file a Concise Summary of the Case within ten days after the clerk docket the appeal (3d Cir. L.A.R. 33.2 and see Eligibility for Mediation).

The Concise Summary of the Case form is available on the Third Circuit's website. The form requires the appellant to identify:

- The nature of the action.
- The parties to the appeal.
- The amount in controversy or other relief involved.
- The issues on appeal.

The appellant must attach to the form a copy of the order or judgment being appealed and any accompanying opinion.

The appellant must file and serve the Concise Summary of the Case using CM/ECF.

### CORPORATE DISCLOSURE STATEMENT AND STATEMENT OF FINANCIAL INTEREST

Shortly after initiating an appeal:

- Any corporation that is a party to the appeal must serve and file a Corporate Disclosure Statement.
- All parties may need to serve and file a Statement of Financial Interest.

A combined form that incorporates both statements is available on the court's website.

### Corporate Disclosure Statement

Any corporation that is a party to an appeal must file a Corporate Disclosure Statement promptly after initiating the appeal (and no later than when the party first files a motion, response, petition, answer, or brief). The corporation also must file the statement with its brief, even if the corporation previously submitted a statement to the court (FRAP 26.1(b)).

The statement must either:

- Identify any parent corporation and any publicly held corporation that owns 10% or more of the party's stock.
- State that the party does not have a parent corporation and no publicly held corporation owns 10% or more of its stock.

(FRAP 26.1(a) and 3d Cir. L.A.R. 26.1.1 and see *Corporate Disclosure Statement and Statement of Financial Interest*.)

Counsel must use the Corporate Disclosure Statement form on the court's website. If counsel cannot fit all required information in the form, counsel should attach additional pages with the rest of the information. If any of the information in the Corporate Disclosure Statement changes during the course of the appeal, the corporation must amend or supplement the statement (FRAP 26.1(b)).

Each corporation that is a party to the appeal must file the Corporate Disclosure Statement using CM/ECF. Attorneys must serve any exempt party or attorney by paper means and electronically file a certificate of service (see FRAP 25(c) and 25(d) and see *Serving Pro Se Parties and Exempt Attorneys*).

### Statement of Financial Interest

If a publicly owned corporation has a financial interest in the outcome of the litigation, every party (not just corporations) must file a Statement of Financial Interest. The Statement of Financial Interest

must identify the interested publicly owned corporation and the nature of the interest (3d Cir. L.A.R. 26.1.1(b)). A party does not need to file a Statement of Financial Interest if it has nothing to report (3d Cir. L.A.R. 26.1.1(b)).

If the filing party is a corporation, the Statement of Financial Interest is included on the same form as the Corporate Disclosure Statement. Counsel must file the Statement of Financial Interest with the Corporate Disclosure Statement. If the filing party is not a corporation, counsel must file any Statement of Financial Interest when it first files a motion, response, petition, answer, or brief (Corporate Disclosure Statement and Statement of Financial Interest).

#### NOTICE OF POSSIBLE JUDICIAL DISQUALIFICATION

If any Third Circuit judge participated in the case at any stage, whether in the district court or in related state court proceedings, the appellant must file a Notice of Possible Judicial Disqualification. The notice must include the name of the judge and the other action. Counsel must electronically file and serve the notice promptly after filing the Notice of Appeal. The appellee must notify the Third Circuit clerk if the appellant fails to file the notice or if the notice is deficient (3d Cir. L.A.R. 26.1.2).

#### TRANSCRIPT PURCHASE ORDER FORM

The appellant must use CM/ECF to serve and file a Transcript Purchase Order form within 14 days after either:

- Filing the notice of appeal.
- Entry of an order disposing of the last timely remaining post-trial motion (see Practice Note, Third Circuit Civil Appeals: Initiating an Appeal: Post-Judgment Motions May Extend the Time to Appeal ([W-010-7599](#))).

(FRAP 10(b).)

The appellant also must deposit the estimated transcript fees with the court reporter or ask the district court to waive the transcript fees within 14 days after filing the notice of appeal (3d Cir. L.A.R. 11.1). If post-trial motions remain pending in the district court, the Third Circuit's rules do not provide an extension of time for paying transcript fees. Counsel should contact the Third Circuit clerk to determine when a deposit is due if there are still post-trial motions pending.

The appellant must submit a Transcript Purchase Order Form whether or not it orders any transcripts (FRAP 10(b)(1)(B)). Counsel satisfies FRAP 10 and 11 by:

- Completing the Transcript Purchase Order form.
- Forwarding it to the court reporter.
- Making adequate financial arrangements.

#### Contents of the Transcript Purchase Order Form

The Transcript Purchase Order form requires the appellant to:

- Identify the case.
- State the status of the transcript (for example, being ordered, unnecessary for appeal purposes, non-existent, or already on file with the district court).

- Specify which transcripts are being ordered by:
  - describing with specificity the proceedings for which a transcript is needed; and
  - identifying which parts of the proceedings are needed (for example, *voir dire*, opening statements, closing statements, or jury instructions).
- Certify that satisfactory financial arrangements have been made for the cost of the transcript.

#### Contents of the Transcript

The appellant must order as much of the transcript as is necessary for the appeal (FRAP 10(b)(1)(A)). If the issues on appeal only relate to part of the proceedings, counsel may order only the relevant part of the transcript. For example, if the appeal only concerns the jury charge, the entire trial transcript may not be necessary.

The appellant should order only the portions of the transcript that is beneficial to the appellant. The appellant also should order the portions of the transcript advantageous to the appellee. If the appellant only orders a partial transcript:

- The appellant must file and serve the order form and a statement of the issues that the appellant intends to present on appeal within 14 days after filing the notice of appeal or the disposition of the last post-trial motion (FRAP 10(b)(3)(A)).
- The appellee then has 14 days to file and serve a designation of additional transcript portions to be ordered (FRAP 10(b)(3)(B)).
- The appellant, in turn, then has 14 days to order the additional portions of the transcript (FRAP 10(b)(3)(C)).

If the appellant fails to order the additional portions, the appellee may either order the additional portions or move the district court to compel the appellant to do so (FRAP 10(b)(3)(C)).

If the transcript is unavailable, the appellant should prepare a written statement of the evidence or the proceedings. The appellant must serve the statement on the appellee. The appellee may serve objections or proposed amendments within 14 days. The statement and any objections or amendments must then be submitted to the district court for approval. Once settled and approved, the district court submits the statement to the Third Circuit with the record (FRAP 10(c)).

#### Paying for the Transcript

The appellant must deposit the estimated transcript fees with the court reporter or ask the district court to waive the transcript fees within 14 days after filing the notice of appeal (3d Cir. L.A.R. 11.1). The appellant must make financial arrangements with the court reporter before signing and submitting the order form, unless the appellant already submitted a motion asking the district court to waive the transcript fees (FRAP 10(b)(4) and 3d Cir. L.A.R. 11.1 and see Transcript Purchase Order).

#### Court Reporter's Response to the Transcript Purchase Order Form

After receiving the appellant's Transcript Purchase Order form, the court reporter must:

- Complete and file Part II of the Transcript Purchase Order form with the Third Circuit clerk on the same day it receives the form (FRAP 11(b)(1)(A) and see Transcript Purchase Order).

- Prepare and file the transcript with the district court within 30 days after receiving the Transcript Purchase Order form (FRAP 11(b)(1)(B)-(C)).
- Complete and file Part III of the Transcript Purchase Order form with the district court on the same day the court reporter files the transcript and send a copy of the completed form to the Third Circuit clerk (FRAP 11(b)(1)(C) and see Transcript Purchase Order).

The court reporter may request an extension of time from the Third Circuit clerk if the reporter cannot complete and file the transcript within 30 days (FRAP 11(b)(1)(B)). The clerk must notify the parties if the Third Circuit clerk grants an extension.

Because the filed transcript eventually becomes publicly available on CM/ECF, attorneys must:

- Review the transcript promptly after filing.
- Notify the court reporter if there is any personal information that must be redacted.

Attorneys should check the district court's procedures, as each district has slightly different review and redaction requirements.

The appellant must ensure that any previously ordered transcripts of court proceedings have been filed with the district court. If a party ordered a transcript of in-court proceedings before the end of the district court case (for example, the transcript of a summary judgment hearing), the court reporter likely filed the transcript with the district court clerk. However, it is possible that a previously ordered transcript was not added to the district court's file.

## RECORD ON APPEAL

The federal courts of appeals are generally limited to reviewing the record as made in the district court, which is referred to as the record on appeal or simply as the record (*Acumed LLC v. Advanced Surgical Servs., Inc.*, 561 F.3d 199, 226 (3d Cir. 2009)).

### Contents of the Record on Appeal

The record consists of:

- The documents and exhibits filed in the district court.
- Any transcript of proceedings in the district court.
- A certified copy of the district court's docket sheet.

(FRAP 10(a).)

The record only includes transcripts of in-court proceedings, such as hearings, arguments, and trials. It does not include transcripts of depositions or other out-of-court proceedings unless a party filed those transcripts as exhibits to a pleading or other document in the district court.

In place of the record on appeal, the parties may prepare, sign, and submit to the district court a statement of the case showing how the issues being appealed arose and how the district court decided them. The statement must set out the facts essential to the court's resolution of the issues. If the district court is satisfied with the statement, it must certify the statement to the Third Circuit and send it to the clerk (FRAP 10(d)).

### District Court Clerk's Responsibilities for the Record

The district court clerk is responsible for determining when the record on appeal is complete for purposes of the appeal. Once the record is complete, the clerk numbers the documents constituting the record and certifies that the record (including the transcript and all necessary exhibits) is complete for purposes of appeal (FRAP 11(b)(2) and 3d Cir. L.A.R. 11.2).

The district court does not transmit the entire record to the Third Circuit when all parties are represented by counsel. The district court instead submits a certified copy of the docket entries. If the appeal involves a pro se party, the district court clerk must certify all documents and transmit them to the Third Circuit clerk (FRAP 11(e)(1) and 3d Cir. L.A.R. 11.2).

### Appellant's Responsibilities for the Record

The appellant must ensure that the record on appeal is complete and do whatever is necessary to enable the district court clerk to assemble and forward the record (FRAP 11(a)). The appellant also must deposit the estimated transcript fees within 14 days after filing the notice of appeal (3d Cir. L.A.R. 11.1 and see Transcript Purchase Order Form).

The court generally assembles the record on its own (particularly in e-filed cases). Counsel should consult the district court's appeals clerk regarding whether the district court requires anything from the appellant's counsel. For example, the court may require appellant counsel's assistance if the parties filed documents in paper form rather than by using CM/ECF or if there are other complicating factors. It is counsel's obligation to complete the record. If there are letters to the court or other unfiled documents that are relevant to the appeal, the parties should consult the district court appeals clerk as soon as possible to determine how to add those items to the record. Depending on the district court's rules and preferences, the parties may be able to complete the record by, for example:

- Making a motion.
- Asking the district court to file the documents.
- Filing a stipulation supplementing the record.
- Stating that the parties are holding certain record documents and can make them available to the Third Circuit on request.

(FRAP 10(e), 11(f).)

If any party believes that the record does not reflect what actually occurred in the district court:

- The parties may correct the record by stipulation.
- A party may move the district court for appropriate relief.

(FRAP 10(e).)

Although the Third Circuit also may correct the record under FRAP 10(e)(2)(C), the parties should make those requests to the district court in the first instance.

### NOTICE OF CONSTITUTIONAL CHALLENGES

If a party challenges the constitutionality of a state or federal statute, the party must give written notice to the Third Circuit clerk

immediately after filing the record, unless one of the following are parties to the appeal:

- The governmental entity whose statute is being challenged.
- An agency of the governmental entity whose statute is being challenged.
- An officer or employee of the governmental entity whose statute is being challenged, sued in connection with that person's official duties.

(FRAP 44(a), (b).)

If the constitutional challenge arises after the record is filed, the party challenging a statute's constitutionality must notify the Third Circuit clerk as soon as the issue arises (FRAP 44(a), (b)).

Attorneys should serve and file the notice using CM/ECF. Attorneys should serve any party exempt from using CM/ECF by paper means and electronically file a certificate of service and the notice (FRAP 25(d)).

After receiving the notice, the Third Circuit clerk must notify the attorney general of the appropriate governmental entity (FRAP 44) to provide an opportunity for intervention (28 U.S.C. § 2403).

#### ENTRY OF APPEARANCE

Attorneys for all parties must formally appear in the appeal by filing and serving the Third Circuit's Entry of Appearance within 14 days after the Third Circuit docket the appeal (3d Cir. L.A.R. 46.2). An attorney must file an appearance in the appeal even if the attorney previously filed an appearance in the district court. Attorneys not currently admitted to the Third Circuit must move for admission (see Practice Note, Third Circuit Civil Appeals: Initiating an Appeal: Third Circuit Bar Admission ([W-010-7599](http://www.thomsonreuters.com/w-010-7599))). Attorneys should use CM/ECF to serve and file their appearances and should serve any parties exempt from CM/ECF by paper means (FRAP 25(c), 25(d) and see *Serving Pro Se Parties and Exempt Attorneys*).

#### MOTION TO EXPEDITE

A party seeking to expedite the appeal must file a motion to expedite within 14 days after the appellant files the notice of appeal. If the reason requiring expedited review does not occur until after the appellant files the notice of appeal, the party must file the motion within 14 days after the event giving rise to the need for expedited review. A party opposing the motion must file its opposition within seven days after service of the motion. The moving party may reply within three days after service of the opposition. (3d Cir. L.A.R. 4.1.)

The motion to expedite must state the exceptional reason that warrants expedition. The motion also must include a proposed briefing schedule that, if possible, has been agreed on by the parties. A non-moving party may agree to a proposed briefing schedule without conceding that expedition is necessary (3d Cir. L.A.R. 4.1).

#### MEDIATION IN THE THIRD CIRCUIT

The Third Circuit's appellate mediation program aims to help parties amicably resolve the issues on appeal.

#### ELIGIBILITY FOR MEDIATION

Most civil appeals and petitions for review are eligible for mediation. All civil appeals are referred to the Chief Circuit Mediator (CCM) for review and potential selection for mediation, except for:

- Original proceedings.
- Appeals or petitions in Social Security, immigration, or "black lung" cases.
- Prisoner petitions.
- *Habeas corpus* petitions and petitions to file a second or successive *habeas corpus* petition.
- *Pro se* cases, except in limited circumstances.

(3d Cir. L.A.R. 33.2 and 3d Cir. L.A.R. 33.6.)

A party also can confidentially request mediation by telephone or letter to the CCM. Even if a party requests mediation, it is still up to the CCM to decide if it intends to refer the case for mediation (3d Cir. L.A.R. 33.1).

If an appeal is eligible for mediation, the appellant must file the Civil Appeal Information Statement and a Concise Summary of the Case within ten days after the clerk docket the appeal (3d Cir. L.A.R. 33.2 and see Civil Appeal Information Statement and Concise Summary of the Case).

#### SELECTION AND REFERRAL FOR MEDIATION

The CCM or a Third Circuit judge or panel may refer a case for mediation. If a case is referred for mediation, the court notifies counsel by sending a Notice of Assignment for Mediation using CM/ECF. If the court selects a case for mediation, mediation is mandatory. The CCM grants a party's request to remove an appeal from the mediation program only in exceptional circumstances, with good cause shown. (Third Circuit Mediation - Frequently Asked Questions.)

#### Referral by the Chief Circuit Mediator

If an appeal is eligible for mediation, the CCM reviews the order or judgment being appealed, any accompanying opinion, the Civil Appeal Information Statement, the Concise Summary of the Case, and any relevant motions. Based on this review, the CCM may refer the appeal or petition for mediation to:

- A senior Third Circuit judge.
- A senior district court judge.
- The CCM.
- A special master appointed under FRAP 48.

(3d Cir. L.A.R. 33.3.)

If the CCM refers the case for mediation, the court typically defers setting a briefing schedule, unless the CCM or the court determines otherwise. Referral for mediation does not:

- Extend or toll the time for ordering transcripts (3d Cir. L.A.R. 33.3).
- Stay any motions the parties previously filed (Third Circuit Mediation - Frequently Asked Questions).

### Referral by a Judge or a Panel

A Third Circuit judge or panel may refer an appeal or petition for mediation at any time to:

- A senior Third Circuit judge.
- A senior district court judge.
- The CCM.
- A special master appointed under FRAP 48.

(3d Cir. L.A.R. 33.4.)

A Third Circuit judge or panel also may refer any motion or procedural matter to mediation (3d Cir. L.A.R. 33.4).

### PREPARING FOR MEDIATION

Within 15 days after a case is selected for mediation, counsel for each party must submit a confidential position paper of no more than ten pages. The position paper should contain:

- The key facts and legal issues in the case.
- The key factors relating to settlement.
- A statement regarding the status of any pending motions in the Third Circuit.
- The party or party representative who will participate in the mediation with the authority to enter into a binding settlement.

(3d Cir. L.A.R. 33.5(a) and see Instructions to Counsel Regarding Confidential Position Papers.)

The position paper should emphasize the party's views on settlement, as the mediator should have read the Concise Summary of the Case, the judgment or order being appealed from, and any opinion from the district court (Instructions to Counsel Regarding Confidential Position Papers).

Each party should email the position paper directly to the mediator at [mediation\\_papers@ca3.uscourts.gov](mailto:mediation_papers@ca3.uscourts.gov) (3d Cir. L.A.R. 33.5(a) and see Instructions to Counsel Regarding Confidential Position Papers and Third Circuit Mediation - Frequently Asked Questions). To ensure that the parties frankly state their views on settlement, the parties do not serve their position papers on opposing counsel or file them with the clerk's office.

### THE MEDIATION

The mediator notifies the parties of the date, time, and place for mediation, as well as whether the session will be conducted in person or by telephone (3d Cir. L.A.R. 33.5(b)).

#### Attending the Mediation

The senior lawyer for each party and the party or party representative with the authority to negotiate a settlement must attend the mediation (3d Cir. L.A.R. 33.5(b)).

During the mediation, the mediator may ask counsel about any aspect of the case, including:

- The underlying facts.
- The parties' legal arguments.
- The procedural history.

- Any pertinent events that may have occurred since the district court's ruling.
- The possibility of narrowing the issues on appeal.
- The possibility of settling the case.

The mediator generally first hears from counsel for all parties and then meets individually with each party and their counsel. The mediator may express opinions about the appeal based on the mediator's assessment of the Third Circuit's judges, practices, and precedent. The mediator's opinions do not reflect the court's official position.

If the parties fail to reach a settlement but the mediator believes further mediation sessions or discussions would be productive, the mediator may schedule additional sessions (3d Cir. L.A.R. 33.5(b)).

### Confidentiality of the Mediation

All mediations are confidential. The mediator does not disclose any statements made or information developed during the mediation process. All attendees are prohibited from sharing information developed at the mediation, except with clients, principals, and co-counsel. Attendees also must agree to maintain the confidentiality of the information. The statements and arguments made during the mediation are considered compromise negotiations under Federal Rule of Evidence 408 and cannot be used in court (3d Cir. L.A.R. 33.5(c)).

### POST-MEDIATION DEVELOPMENTS

If the parties reach a settlement at the mediation, the agreement is reduced to writing and is binding on the parties to the agreement. The mediator confirms the settlement in writing. Counsel must file a stipulation of dismissal under FRAP 42(b) within 30 days after the parties reach a settlement. The CCM may extend this deadline for good cause shown (3d Cir. L.A.R. 33.5(d) and see Third Circuit Mediation - Frequently Asked Questions).

If the parties do not reach a settlement following mediation, the court issues a briefing schedule and the appeal proceeds in the normal course.

#### ABOUT PRACTICAL LAW

Practical Law provides legal know-how that gives lawyers a better starting point. Our expert team of attorney editors creates and maintains thousands of up-to-date, practical resources across all major practice areas. We go beyond primary law and traditional legal research to give you the resources needed to practice more efficiently, improve client service and add more value.

If you are not currently a subscriber, we invite you to take a trial of our online services at [legalsolutions.com/practical-law](https://legalsolutions.com/practical-law). For more information or to schedule training, call **1-800-733-2889** or e-mail [referenceattorneys@tr.com](mailto:referenceattorneys@tr.com).