

# Beyond Briefs: Motion Practice in Civil Appeals in The Tenth Circuit

By Marcy G. Glenn, Esq.

There is no question that briefing and oral argument are the main events in any appeal. It is also generally true that far fewer motions are filed at the appellate level than in the trial court. As a result, attorneys often mistakenly underestimate the value of judiciously-filed motions and the necessity of strict compliance with relevant court rules. In fact, motions are important – and in some cases, dispositive – tools for appellate practitioners. This article summarizes the procedures that govern motion practice in civil appeals from federal district court judgments and administrative decisions to the United States Court of Appeals for the Tenth Circuit.<sup>1</sup>

The primary authorities regarding Tenth Circuit motion practice are the Federal Rules of Appellate Procedure (“FRAP”), the accompanying Tenth Circuit Rules and decisions applying and construing both the federal and local rules.<sup>2</sup> The Tenth Circuit’s Practitioner’s Guide, published and periodically updated by the court and available at no charge from the Clerk, is an additional helpful resource.<sup>3</sup>

FRAP 27 is entitled “Motions,” which might lead an attorney to believe that the rule states all there is to know about appellate motion practice. In fact,

although FRAP 27 and the corresponding local rule set forth a number of general requirements for all types of motions, other rules state additional general requirements. Both Tenth Circuit Rule 27 and other FRAP and local rules state additional or different requirements for specific types of motions.

## General Rules

### *The Motion, Response and Reply*

A motion must specifically state – in the motion itself rather than in a separate brief – the factual and legal bases for the relief sought.<sup>4</sup> The movant should attach whatever supporting documents are necessary for the court to resolve the motion, including appropriate affidavits, other factual documents and relevant pleadings and orders.<sup>5</sup> Every motion must state the opposing party’s position or why the movant was unable to learn that position.<sup>6</sup> A proposed order is not required and typically is not tendered.<sup>7</sup>

A response to a motion, beyond addressing the relief sought in the motion, may include a motion for affirmative relief.<sup>8</sup> A response is due within eight days after service of the motion.<sup>9</sup> In computing time, the rules provide for

the exclusion of intermediate weekends and legal holidays when the deadline for a particular action is less than eleven days.<sup>10</sup> Thus, the response will be due eight days from the date of service, not including intermediate weekends and holidays. Three days should be added to that deadline if the motion was served by mail.<sup>11</sup> (The deadline could be calculated by adding eight days and three days, and then including intermediate weekends and holidays because the total time allowed (eleven days) is not “less than 11 days” under FRAP 26(a)(2). However, the Tenth Circuit has not followed this approach.<sup>12</sup>)

A reply to a response should be limited to points raised in the response.<sup>13</sup> The lawyer who ignores this rule invites the filing of a motion seeking leave to file a surreply brief. The reply is due within five days after service of the response, not including intermediate weekends and holidays.<sup>14</sup> Three days are added to that deadline if the response was served by mail.<sup>15</sup>

### *Format and Mechanics of Filing*

When a motion is filed before the filing of principal briefs, a nongovernmental corporate party must include in the motion or its response a corporate disclosure statement that identifies its

parent corporation and any publicly held corporation that owns ten percent or more of its stock.<sup>16</sup> Motions, responses and replies must be double-spaced.<sup>17</sup> A motion or a response may not exceed twenty pages, exclusive of the corporate disclosure statement (if required) and attachments, and a reply may not exceed ten pages.<sup>18</sup> Unlike briefs, motions do not require cover pages or tables of contents or authorities, although they may be used; a cover, if included, must be white.<sup>19</sup> Like briefs, motions must be bound “in any manner that is secure, does not obscure the text, and permits the document to lie reasonably flat when open.”<sup>20</sup> While, as a practical matter, the length of briefs generally requires them to be spiral bound in order to meet the rule’s requirements, motions – at least those without lengthy attachments – often can be bound by a single staple in the upper left corner.

FRAP 27 generally requires the filing of an original and three copies of a motion, as well as the response and reply,<sup>21</sup> although parties must file seven copies of dispositive motions, responses and replies.<sup>22</sup> However, by an emergency order – the mandate of which is not reflected in the current Tenth Circuit Rules – effective January 1, 2005, parties must electronically file almost all papers with the Tenth Circuit.<sup>23</sup> Under the emergency order, motions must be filed both in “digital form” (submitted via e-mail or on a compact disc) and in written form.<sup>24</sup> However, only the original motion need be filed; copies are no longer required.<sup>25</sup> Litigants should be alert for amendments to the Emergency Order, which could alter the provisions discussed in this article, as the Tenth Circuit intends to observe and, if necessary, fine-tune its new electronic submission procedures.

### ***Disposition of Motions***

Unless the court orders otherwise, motions are decided without oral argument.<sup>26</sup>

FRAP 27 provides that the court may

act on a motion for a procedural order without awaiting a response, and it may authorize the clerk to act on specified types of procedural motions.<sup>27</sup> The Tenth Circuit has identified twelve types of procedural motions that the clerk may decide, subject to review by the court; these include motions for extension of time, to correct a brief or pleading, to supplement or correct records, to consolidate appeals, to substitute parties, to appear as *amicus curiae*, to expedite or continue cases, to withdraw or substitute counsel in a civil case and to dismiss an appeal by stipulation.<sup>28</sup> However, if the court or clerk acts on a procedural motion before the filing of a response, an opposing party may move to reconsider, vacate, or modify the order.<sup>29</sup> In addition, if any of the listed motions is opposed, the clerk must submit it to the court for resolution.<sup>30</sup> Subject to review by the court, a single judge may act on any motion but may not dismiss or otherwise dispose of an appeal.<sup>31</sup> A rotating motions panel of two judges rules on many motions that are ripe for decision before the assignment of an appeal to a merits panel; for those motions that require three judges (such as dispositive motions), a third judge participates on the motions panel. Other motions are decided by the panel of three judges that decides the appeal on the merits.

### **Rules Applicable to Specific Types of Motions**

There is no limit to the relief that can be sought through motions. However, the federal and local rules specifically address a number of categories of motions that are filed with frequency.

#### ***Motions for Stay.***

Although FRAP 8 and 18 separately address motions for stay or injunction of district court judgments and motions to stay administrative decisions or orders, the rules are virtually identical.<sup>32</sup> In each type of appeal, the motion for stay ordinarily must be filed first in the district court or with the administrative

agency.<sup>33</sup> A motion for stay filed with the Tenth Circuit must demonstrate that either seeking relief below would be “impracticable,” or that the movant was denied relief below.<sup>34</sup> While the FRAP rules state only that the motion must state “the reasons for granting the relief requested,” the corresponding local rules specifically require the motion to address the decision-based requirements for a stay or injunction: (1) the bases for the district court’s or agency’s subject matter jurisdiction and the court of appeals’ jurisdiction; (2) the likelihood of success on appeal; (3) the threat of irreparable harm if the stay is not granted; (4) the absence of harm to opposing parties if the stay is granted; and (5) any risk of harm to the public interest.<sup>35</sup> The motion should include necessary affidavits to establish disputable facts and relevant parts of the record.<sup>36</sup> The court may – and generally will – condition the issuance of a stay or injunction on the filing of a bond or other appropriate security in the district court.<sup>37</sup>

#### ***Motions to Intervene.***

A person who was not a party in an administrative proceeding but wishes to intervene on appeal must move to do so in the court of appeals within thirty days of the filing of the petition for review.<sup>38</sup> The motion should concisely state the moving person’s interest, the grounds for intervention and why the parties cannot protect the putative intervenor’s interest.<sup>39</sup> Unlike most motions, the response to a motion to intervene must be filed within ten days after service of the motion.<sup>40</sup> A party to the proceeding below need file only a notice of intervention – as opposed to a motion to intervene – stating whether the party wishes to support or oppose the agency action.<sup>41</sup>

There is no rule governing intervention in other appeals, but such motions may be filed under the general motions rules; movants generally should attempt to comply with the requirements for intervention in administrative appeals.

## *Motions to Dismiss or Affirm.*

By local rule, the Tenth Circuit has set forth procedures to be followed in seeking summary disposition of an appeal. A party may file a motion to dismiss the entire case for lack of appellate jurisdiction, a motion for summary disposition due to mootness or a supervening change of law, or a motion to remand for additional district court or administrative agency proceedings.<sup>42</sup> (Although the rule refers only to dismissal of “the entire case” for lack of appellate jurisdiction, the court also will accept a motion to dismiss that challenges the court’s jurisdiction over only a portion of the appeal.) A motion for summary disposition filed later than fifteen days after the notice of appeal must explain the reason for the delay.<sup>43</sup> An optional response, if filed, is due within ten days of service of the motion.<sup>44</sup> The court requires the original and seven copies of dispositive motions, which frequently bear greater resemblance to a merits brief than to a typical motion.<sup>45</sup> The court often transmits these motions to the merits panel, which, in turn, often defers decision until after briefing and argument on the merits.

## *Motions for Extensions of Time.*

The Tenth Circuit receives over a thousand motions for extensions of time annually. The rules address such motions both generally and with respect to particular filings. The general rule is that the court may extend the time “to perform any act, or may permit an act to be done after that time expires,”<sup>46</sup> with several important exceptions. *First*, the deadline for filing a notice of appeal may be extended only by the district court in conformance with FRAP 4, as summarized below.<sup>47</sup> *Second*, the deadline for filing a petition for permission to appeal may not be appealed under any circumstances.<sup>48</sup> *Third*, the court may not extend the deadline for filing a notice of appeal from or petition for review of an administrative order, unless specifically authorized by law.<sup>49</sup>

A motion to extend the deadline for filing a notice of appeal must be filed in the district court within thirty days after the original deadline for appealing and must show “excusable neglect or good cause” for the requested extension.<sup>50</sup> In determining “excusable neglect,” the Tenth Circuit considers “the danger of prejudice to [the nonmoving party], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant and whether the movant acted in good faith.”<sup>51</sup> “Good cause” may exist “in situations in which there is no fault – excusable or otherwise,” but “the need for an extension is usually occasioned by something that is not within the control of the movant.”<sup>52</sup> If granted, the extension may not exceed thirty days after the original deadline or ten days after the entry of the order granting the extension, whichever is later.<sup>53</sup>

While there is no separate FRAP rule regarding extensions of time for filing briefs, the Tenth Circuit has addressed that subject in multiple local rules. Those rules state twice that motions to extend time to file briefs are “disfavored,”<sup>54</sup> and as a result, the court imposes a number of specific requirements on such motions, including the following: (a) the motion must state the brief’s due date and the opposing party’s position and must list any prior motions for extension and the court’s action on them;<sup>55</sup> (b) the motion “must establish that it will not be possible to file the brief on time, even if the party exercises due diligence and gives priority to preparing the brief”;<sup>56</sup> and (c) the motion must be filed at least five court-business days before the brief’s due date, unless the reasons for the requested extension did not exist or were unknown earlier.<sup>57</sup> The movant must provide specific factual bases for the requested extension and may not rely on generalities.<sup>58</sup> Reasons that the Tenth Circuit will consider include that other litigation presents a scheduling conflict, that the appeal is so complex

that additional days are necessary to prepare an adequate brief, or that counsel will suffer extreme hardship if required to file the brief without an extension.<sup>59</sup> Whatever the reason, it must be supported by specific factual information. Thus, if other litigation presents a conflict, the motion should identify the other litigation by caption, number and court, describe the action taken to obtain a continuance in the other action (or why no such action was taken), state why the other litigation should receive priority, state why another attorney cannot prepare the brief for timely filing or handle the competing matter and state any other relevant circumstances.<sup>60</sup> If the motion is based on the complexity of the appeal, the motion must demonstrate the complexity through specific facts.<sup>61</sup> If the motion asserts the prospect of extreme hardship to counsel, it must state the nature of the hardship.<sup>62</sup> An extension also may be warranted where parties are coordinating to file a single brief.<sup>63</sup> In addition, if the circuit mediation office has ordered a mediation conference, that office may extend the time for filing a brief.<sup>64</sup>

Counsel who comply with the court’s specific requirements will find that the Tenth Circuit takes a reasonable approach to requests for additional time. In civil cases, the court generally will grant an initial motion that seeks up to thirty additional days to file a principal brief, so long as the motion is unopposed and provides the information contemplated by the local rules.

## *Motions to Exceed Page or Word Limits.*

Like motions for extension of time, motions to enlarge the length of briefs are “disfavored.”<sup>65</sup> The court – not the clerk – must act on those motions, and they will be denied “unless extraordinary and compelling circumstances can be shown.”<sup>66</sup> If the motion is filed within ten days of the brief’s due date – as often will be the case given the nature of the motion – it must explain why an earlier filing was not possible.<sup>67</sup>

## Motions to File Amicus Briefs.

Other than the United States or its officer or agency, or a state, territory, or the District of Columbia, putative amici curiae may file a brief only with the consent of all parties or by leave of court.<sup>68</sup> The brief must be tendered with the motion, which must state the movant's interest, why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case.<sup>69</sup>

## Motions Related to Oral Argument.

The rules do not require a party to file a separate motion for oral argument. Rather, the front cover of a party's first merits brief must state whether oral argument is requested and, if it is requested, the brief must state why argument is necessary.<sup>70</sup> A party may move to waive argument any time after the filing of the principal briefs; however, a motion filed within ten days of the scheduled argument date must explain the delay in filing.<sup>71</sup> Although the local rules state that oral argument will be postponed "[o]nly in extraordinary circumstances,"<sup>72</sup> in reality the court is reasonable about rescheduling arguments that create legitimate scheduling conflicts. A motion to postpone must be filed more than ten days before the argument date, except in an emergency.<sup>73</sup>

## Motions for Costs.

A party seeking costs must file a bill of costs within fourteen days of the court of appeals' entry of judgment.<sup>74</sup> Costs are taxed against the appellant when the appeal is dismissed or the judgment is affirmed; the appellee must pay costs if the judgment is reversed; if a judgment is affirmed in part, reversed in part, modified, or vacated, costs are taxed only as ordered by the Tenth Circuit.<sup>75</sup> The bill of costs must be verified and must itemize the requested costs; the copying costs for briefs and appendices must not exceed fifty cents per page.<sup>76</sup> The party entitled to costs may recover additional costs – including the cost of the reporter's transcript,

premiums paid for a bond or other security pending appeal and the docketing fee for the appeal – in the district court.<sup>77</sup>

## Other Motions Specifically Addressed in the Rules.

FRAP and the Tenth Circuit Rules also include specific provisions related to the following less-frequently filed motions: (a) motions to proceed in forma pauperis;<sup>78</sup> (b) motions to substitute parties in the event of death;<sup>79</sup> (c) motions to certify questions of state law;<sup>80</sup> (d) motions for voluntary dismissal;<sup>81</sup> (e) motions for sanctions for the filing of frivolous appeals;<sup>82</sup> and (f) motions to stay the mandate pending submission of the case to the Supreme Court.<sup>83</sup>

## Practice Tips

1. Provide a strong factual basis for motions for extension of time, whether for briefs or any other filing and for postponement of oral argument. *Never* rely on the "press of business" or "other professional and personal commitments." Tell the court about the conflict, including by providing competing case information and fully explaining specific competing deadlines and why they cannot be extended or should take priority. If relying on the complexity of the appeal, give the court a good reason to distinguish the burden of briefing in your case from other complicated Tenth Circuit appeals. Explain personal hardship conflicts in specific terms.

2. Avoid filing motions for enlargement of the word or page limit if at all possible. The court is already overburdened with reading. It chafes at the prospect of even longer briefs. The current word limits are adequate in the overwhelming majority of cases, even complex cases. Editing – even wholesale cutting – to comply with the word limits generally makes for a better final product. If an enlargement is necessary, be specific regarding why the normal word limit will be insufficient – and be

prepared to have the motion denied, at least in part.

3. Don't be cute when complying with Tenth Circuit Rule 27.3(C), which requires consultation with opposing counsel before filing a motion. Make the contact sufficiently early to give opposing counsel a chance to respond – not on the day of the filing.

4. In challenging an order granting a procedural motion before a response has been filed, be sure to move to reconsider, rather than simply filing a response after the entry of the order: "Timely opposition filed after the motion is granted in whole or in part does not constitute a request to reconsider, vacate, or modify the decision; a motion requesting that relief must be filed."<sup>84</sup>

5. Most important of all, follow the rules. The Tenth Circuit will be more receptive to motions that comply with FRAP and the court's local rules. Make it easy for the court to grant you relief by jumping through all the requisite hoops.

**Marcy G. Glenn is a partner at Holland & Hart, LLP, resident in the Denver office, where she chairs the firm's Appellate Practice Group.**

- 1 For additional procedures related to appeals in some bankruptcy cases, see FRAP 6; 10th Cir. R. 6. For additional procedures applicable to appeals from tax court decisions, see FRAP 13. For a discussion of motion procedures in the Colorado Court of Appeals, see Anne Whalen Gill, *Motions Practice in the Court of Appeals*, 23 *The Colorado Lawyer* 1798 (Aug. 1994).
- 2 Both sets of rules are available at [www.ck10.uscourts.gov/circuit/rules/rules2003.pdf](http://www.ck10.uscourts.gov/circuit/rules/rules2003.pdf).
- 3 Practitioners' Guide to the United States Court of Appeals for the Tenth Circuit (5th ed. 1998).
- 4 FRAP 27(a)(2)(A), -(C)(i).
- 5 FRAP 27(a)(2)(B)(i)-(iii).
- 6 10th Cir. R. 27.3(C).
- 7 FRAP 27(a)(2)(C)(iii).
- 8 FRAP 27(a)(3)(B).
- 9 FRAP 27(a)(3)(A).

- 10 FRAP 26(a)(2).  
 11 FRAP 26(c).  
 12 *See, e.g., Greathouse v. Colorado State Bank*, 73 F.3d 373 (10th Cir. 1996) (Table), 1996 WL 5552 (10th Cir. (Colo.)), at \*\*1; *United States v. Humphreys*, 968 F.2d 1224 (10th Cir. 1992) (Table), 1992 WL 163275 (10th Cir. (Okla.)), at \*\*3.  
 13 FRAP 27(a)(4).  
 14 *Id.*; *see also supra* n.10.  
 15 *See supra* n.11.  
 16 FRAP 26.1(a)-(b).  
 17 FRAP 27(d)(1)(D).  
 18 FRAP 27(d)(2).  
 19 FRAP 27(d)(1)(B).  
 20 FRAP 27(d)(1)(C); *compare* FRAP 32(a)(3) (stating same requirements for binding of briefs).  
 21 FRAP 27(d)(3).  
 22 *See infra* n.45.  
 23 *See In re Electronic Submission of Selected Documents* (10th Cir. Oct. 20, 2004, as amended Jan. 11, 2005), available at [www.ck10.uscourts.gov/electronic\\_submissions.cfm](http://www.ck10.uscourts.gov/electronic_submissions.cfm).  
 24 *Id.* at ¶ (c).  
 25 *Id.*  
 26 FRAP 27(e); *see also* 10th Cir. R. 34.1(F).  
 27 FRAP 27(b).  
 28 10th Cir. R. 27.3(A).  
 29 FRAP 27(b).  
 30 10th Cir. R. 27.3(B).  
 31 FRAP 27(c); *see also id.* at 25(a)(3) (permitting motion to be filed with an individual judge).  
 32 *Compare* FRAP 8(a) and 10th Cir. R. 8, with FRAP 18 and 10th Cir. R. 18.1.  
 33 FRAP 8(a)(1), 18(a)(1).  
 34 FRAP 8(a)(2)(A), 18(a)(2)(A).  
 35 FRAP 8(a)(2)(B)(i), 18(a)(2)(B)(i); 10th Cir. R. 8.1(A)-(E), 18.1; *see, e.g., Lim v. Ashcroft*, 375 F.3d 1011, 1012 (10th Cir. 2004) (stating elements).  
 36 8(a)(2)(B)(ii)-(iii), 18(a)(2)(B)(ii)-(iii).  
 37 FRAP 8(a)(2)(E), 18(b).  
 38 FRAP 15(d).  
 39 FRAP 15(d); 10th Cir. R. 15.2(B)(1).  
 40 10th Cir. R. 15.2(B)(2).  
 41 10th Cir. R. 15.2(A).  
 42 10th Cir. R. 27.2(A)(1)(a)-(c).  
 43 10th Cir. R. 27.2(A)(3).  
 44 10th Cir. R. 27.2(A)(4).  
 45 10th Cir. R. 27.2(A)(5); *but see supra* n.15 (Emergency Order requires filing of only original of all electronically-submitted motions).  
 46 FRAP 26(b).  
 47 FRAP 26(b)(1).  
 48 *Id.*  
 49 FRAP 26(b)(2).  
 50 FRAP 4(a)(5)(A)(i)-(ii).  
 51 *City of Chanute v. Williams Natural Gas Co.*, 31 F.3d 1041, 1046 (10th Cir. 1994) (citation omitted).  
 52 *Bishop v. Corsentino*, 371 F.3d 1203, 1207 (10th Cir. 2004) (quoting Advisory Committee's Note to 2002 Amendments to FRAP 4).  
 53 FRAP 4(a)(5)(C).  
 54 10th Cir. R. 27.4(A), 31.4.  
 55 10th Cir. R. 27.4(B)(1)-(3).  
 56 10th Cir. R. 27.4(C).  
 57 10th Cir. R. 27.4(F).  
 58 10th Cir. R. 27.4(C)(1)-(2).  
 59 10th Cir. R. 27.4(D)(1)-(3).  
 60 10th Cir. R. 27.4(D)(1)(a)-(e).  
 61 10th Cir. R. 27.4(D)(2).  
 62 10th Cir. R. 27.4(D)(3).  
 63 10th Cir. R. 31.3(C).  
 64 10th Cir. R. 33.1(F).  
 65 10th Cir. R. 28.3.  
 66 *Id.*  
 67 *Id.*  
 68 FRAP 29(a).  
 69 FRAP 29(b)(1)-(2).  
 70 10th Cir. R. 28.2(C)(4).  
 71 10th Cir. R. 34.1(A)(2).  
 72 10th Cir. R. 34.1(A)(3).  
 73 *Id.*  
 74 FRAP 39(d)(1).  
 75 FRAP 39(a)(1)-(4).  
 76 FRAP 39(d)(1); 10th Cir. R. 39.1.  
 77 FRAP 43(a)(1).

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### Rod Thacker, CFP

donald.thacker@axa-advisors.com

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### Bill N. Gammill

bill.gammill@axa-advisors.com

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