

For Use of Administrative Officer

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UNITED STATES ATTORNEYS' MANUAL

APPEALS

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1976

UNITED STATES ATTORNEYS' MANUAL
TITLE 2--APPEALS

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2-1.000 APPEALS IN GENERAL

Procedures to be followed in civil and criminal appeals of United States courts of appeals from United States district courts are set forth in 28 U.S.C., Federal Rules of Appellate Procedure. Each court of appeals may from time to time amend rules governing its practice not inconsistent with the Federal Rules of Appellate Procedure, 28 U.S.C., Rule 47, F.R.App.P.; thus it is imperative that attorneys handling appeals be familiar with local appellate rules.

Procedures governing appeals to the United States Supreme Court from all courts are published in 28 U.S.C. App., Rules of the Supreme Court of the United States.

Subject to the general supervision and direction of the Attorney General, the Solicitor General has responsibility, in consultation with each agency or official concerned, for the following: (a) conducting, or assigning and supervising, all Supreme Court cases, including appeals, petitions for and briefs in opposition to certiorari, briefs and arguments; (b) determining whether, and to what extent, appeals will be taken by the government to all appellate courts (including petitions for rehearing en banc and petitions to such courts for the issuance of extraordinary writs); and (c) determining whether a brief amicus curie will be filed by the government, or whether the Government will intervene, in any appellate court. See USAM 1-3.103, on the Solicitor General's responsibilities in general.

United States Attorneys have the responsibility for handling most criminal appeals and a large number of civil appeals in the courts of appeals arising out of cases tried by them. The various divisions of the Department are responsible for a significant number of civil appeals and render substantial assistance relative to many appeals handled by United States Attorneys. The responsibilities of Department divisions and United States Attorneys and an outline of steps to be taken with respect to criminal and civil cases in the courts of appeal are discussed in USAM 2-3.000. Regardless of whether the United States Attorneys or the divisions handle a case (28 U.S.C. 516, 519 and 547), each takes appropriate and complementary steps to protect fully the interest of the United States and to assure the successful prosecution of all litigation. General procedures with respect to appeals, particularly with respect to decisions adverse to the Government, Supreme Court review, interlocutory appeals and state court proceedings are discussed in USAM 2-2.000. Time to appeal or petition for review or certiorari is discussed in USAM 2-4.000.

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2-2.000 PROCEDURE WITH RESPECT TO APPEALS GENERALLY

2-2.100 PROCEDURE WHEN A DECISION OF A DISTRICT COURT OR COURT OF APPEALS IS AGAINST THE GOVERNMENT

2-2.110 Prompt Report of Adverse Decision

In any civil or criminal action before a United States District Court or a United States Court of Appeals, in which the United States is a litigant, and a decision is rendered adverse to the government's position, the U.S. Attorney must immediately transmit a copy of the decision to the Solicitor General's office as well as to the appellate section of the division responsible for the case.

Appeal recommendations should be submitted within a reasonable time following the entry of the judgment in accordance with the procedures set forth in USAM 2-2.111 below.

2-2.111 Cases Handled by a U.S. Attorney

In any case being handled by a U.S. Attorney in which the decision is adverse to the government in whole or in part, and is or may be reviewable, the U.S. Attorney must promptly make a report to the appropriate division of the Department (preferably within two days after receipt of the opinion). The report should be in the following format: The first heading should contain the name of the case, designation of the court entering the ruling, e.g., U.S.D.C. S.D.N.Y., the court number of the case, and the date of the order to be reviewed.

TIME LIMIT: There should be an initial sentence in capital letters indicating when the time expires for seeking the appropriate review.

RECOMMENDATION: This paragraph should state whether the U.S. Attorney recommends for or against review, the type of review sought, i.e., rehearing en banc, appeal or certiorari, and the name of the court to which the review should go. In addition, in civil cases, if there are contrary views of an agency, they should be noted.

QUESTIONS PRESENTED: This should consist of a clear and succinct presentation of the issues presented for review.

STATEMENT: This should summarize the facts necessary for resolution of the question presented and should be as brief as possible.

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DISCUSSION: This should include the arguments for or against seeking review and should marshal the citations of relevant authorities.

The U.S. Attorney should attach appropriate documents, including copies of opinions, findings of fact, conclusions of law, judgments, briefs and memoranda. Transcripts of the testimony should not be specially ordered for this purpose unless specially requested by the appropriate division or Solicitor General.

Reference is made to USAM 2-3.210 in which the factors generally used by the appropriate Assistant Attorney General to determine who will handle a civil appeal are stated. Thus, the U.S. Attorney should indicate as part of his report his preference, if any, for the handling of the appeal.

Your attention is called to the jurisdictional time limits of USAM 2-4.000.

2-2.112 Cases Handled By Division Of Department

In any case being handled by a division of the Department in which the decision is adverse to the Government, in whole or in part, the U.S. Attorney should immediately notify the appropriate division of the Department and forward a copy of the adverse decision, unless the U.S. Attorney is unmistakably advised by the court rendering the decision that service of a copy of the decision has been made upon the division of the Department, or the Departmental attorney, handling the case.

2-2.113 With Respect to Interlocutory Appeals

Because of the short period of time (10 days) allowed by the statute for making application for interlocutory appeals, the appropriate division of the Department should immediately be advised by telephone or telegraph in every case in which the U.S. Attorney believes that the government should seek certification for such an interlocutory appeal or in which the district judge has stated in his order that a controlling question of law is involved. See 28 U.S.C. §1292(b). All the necessary papers should immediately be transmitted to the appropriate division of the Department. See Procedure In Interlocutory Appeals, at USAM 2-2.300.

2-2.120 Necessity of Authorization by Solicitor General

A. Appeals or Petitions on Behalf of United States

All appeals to the lower appellate courts in cases handled by divisions of the Department and U.S. Attorneys, and all petitions for certiorari and direct appeals to the Supreme Court must be authorized by

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the Solicitor General. This includes interlocutory appeals under 28 U.S.C. §1292(b) and litigation in state courts subject to review by a higher state court or by the U.S. Supreme Court.

B. Rehearings En Banc

The prior authorization of the Solicitor General (through the appropriate division of the Department) must be obtained for the filing of a suggestion for rehearing en banc in a court of appeals. The prior authorization of the Solicitor General is not required for a petition for rehearing by the same panel which heard the case; however, such a petition should not be filed until the Solicitor General has been notified and is given the opportunity to decide whether the case merits en banc review. The advice and counsel of the appropriate division should be sought before filing a petition for rehearing to the panel which decided the case.

In cases involving Criminal Division matters, any questions as to procedures to be followed in this regard should be directed to the Appellate Section at FTS 633-2841 or FTS 633-2842. In other cases, the appropriate division should be contacted.

C. Brief Amicus

The authorization of the Solicitor General is required for the filing of any brief amicus in all appellate courts. 28 CFR §0.20(c).

D. Petitions Seeking Mandamus or other Extraordinary Relief

The authorization of the Solicitor General is required for the filing of petitions in appellate courts for the issuance of extraordinary writs.

2-2.130 Serving and Filing Notice of Appeal

A. Upon Decision to Appeal or Cross-Appeal

When a decision has been made to appeal or cross-appeal, the U.S. Attorney is responsible for serving and filing a notice of appeal or cross-appeal on behalf of the United States or any officer or agency thereof in any case in his/her district in which the United States or any officer or agency thereof is a party. This applies to appeals to the Supreme Court (see, Rule 10 of Rules of Supreme Court) as well as to the courts of appeals.

With respect to notices of appeal to the Supreme Court, attention is directed to the requirements that (1) service by mail on a person residing 500 miles or more from the office of the U.S. Attorney be by airmail, and

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(2) if proof of service is by certificate, the attorney signing the certificate be a member of the bar of the Supreme Court.

The U.S. Attorney should notify the Department promptly when he has served and filed the notice of appeal.

B. Pending Decision to Appeal or Cross-Appeal

If the time for appeal or cross-appeal is about to expire (see, time limitations, USAM 2-4.000) and the U.S. Attorney has not received notice from the appropriate division of the Department as to whether an appeal is to be taken, a notice of appeal--commonly called a "protective" notice of appeal --should be filed in order to preserve the government's right to appeal. Such action should be reported to the appropriate division of the Department. In order that the Department may have adequate time to consider the case, such notice of appeal or cross-appeal should not be filed sooner than five days before the time for appeal or cross-appeal expires. In cases handled and tried by the U.S. Attorney, authority for filing such notice of appeal is conferred by 28 U.S.C. §547. In all other cases, authority for the filing of such notice of appeal is conferred by 28 U.S.C. §§516 and 519, Hogg v. United States, 411 F. 2d 578 (C.A. 6, 1969), and 428 F. 2d 274 (C.A. 6, 1970), cert. denied, 401 U.S. 910 (1971).

NOTE: See, USAM 2-3.233 which relieves the U.S. Attorney of the responsibility for filing a notice of appeal in social security cases in which the claim is for benefits.

C. Rehearing en Banc

If rehearing en banc is desired, it is usually necessary to obtain an extension of time, as only 14 days are allowed. The appropriate division in the Department should be consulted.

2-2.140 Preserving Government's Rights Pending Review

In cases tried and being handled by U.S. Attorneys, U.S. Attorneys shall be responsible in courts other than the Supreme Court for preserving the government's rights pending review and also pending determination of the question whether review should be sought. They shall take the necessary steps to stay the issuance of mandates by the courts of appeals if the issuance of the mandate might prejudice the government's interests, and they should also seek an order to continue in force any existing stay. If a court of appeals refuses to stay the mandate or conditions its stay upon the seeking of review within a stated period, the Department shall immediately be informed of such fact. The Department shall likewise be informed if a district court refuses to stay further proceedings or

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execution of its judgment, or imposes conditions on review. In cases handled by the Department, the appropriate division will be responsible for taking any steps necessary to preserve the government's rights.

Notwithstanding the foregoing case responsibilities, the divisions and the U.S. Attorneys should cooperate in assisting each other in taking complementary steps to protect fully the interests of the United States to assure the successful prosecution of all litigation.

2-2.200 PROCEDURE WHERE APPEAL IS TAKEN BY ADVERSE PARTY TO COURT OF APPEALS

When an appeal to a court of appeals is taken in a government case by the adverse party, the U.S. Attorney shall promptly advise the appropriate division of the Department, as outlined in USAM 2-3.220.

2-2.300 PROCEDURE IN INTERLOCUTORY APPEALS

Subsection (b), 28 U.S.C. §1292, authorizes the courts of appeals to entertain appeals from certain non-final orders entered by the district court which are not appealable under subsection (a). Under subsection (b), such orders are appealable (1) if the district court has stated in writing, in the order, that it involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from it may materially advance the ultimate termination of the litigation, and (2) if permission to appeal is granted by the court of appeals. Upon application within 10 days after entry of the order, the court of appeals may, in its discretion, allow an appeal to be taken. The provisions of subsection (b) are intended to apply only in exceptional cases. See, e.g., *Milbert v. Bison Laboratories*, 260 F.2d 431 (3d Cir. 1958); *In re Heddendorf*, 263 F.2d 887 (1st Cir. 1959); *United States v. Woodbury*, 263 F.2d 784 (9th Cir. 1959). Examples of orders which may be appropriate for appeal under 28 U.S.C. §1292(b) are orders overruling a defense going to the right to maintain the action, such as a challenge to capacity or to jurisdiction; orders refusing to permit joinder of a third-party defendant; and orders transferring cases to other district courts under 28 U.S.C. §1404 in which the jurisdiction of a transferee court is in issue.

2-2.310 Where Government Is Seeking Interlocutory Appeal

A. Solicitor General Authorization

If a district court makes an interlocutory ruling adverse to the government and it is believed that a 28 U.S.C. §1292(b) appeal is appropriate, the U.S. Attorney should promptly request authorization for the

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appeal from the Solicitor General through the appropriate division. The U.S. Attorney should not ask that the district court certify any issue for a Section 1292(b) appeal until he has received the Solicitor General's authorization to proceed.

If a district court nonetheless certifies an issue for a Section 1292(b) appeal before the U.S. Attorney seeks, and/or receives, the Solicitor General's authorization, the U.S. Attorney should ask the court to instruct its clerk to delay the entry of the certification order pending instructions from the Solicitor General. Yet, even if the district court denies the request for a delay, the U.S. Attorney may later attempt to pursue a Section 1292(b) appeal if he/she can obtain an amendment to the certification order. Note that,

. . . [a]n order may be amended to include the prescribed statement at any time, and permission to appeal may still be sought at a later date upon the basis of an amended order.

Rule 5, F.R.App.P. The U.S. Attorney should make no attempt to obtain such an amendment until he/she has received the necessary authorization from the Solicitor General.

B. Division Notification

Where an interlocutory ruling adverse to the government is handed down by a district court, the U.S. Attorney should take appropriate steps as outlined above. Immediately upon notice of adverse ruling, the details should be wired or telephoned directly to the Chief of the Appellate Section of the appropriate division. Simultaneously, there should be forwarded to the Chief of the Appellate Section by mail, marked for urgent handling, a brief resume of the case, a statement of the question to be presented on appeal, the reasons why it is a controlling question which may advance termination of the case, and the ground upon which a difference of opinion is asserted to exist. If the Solicitor General authorizes an interlocutory appeal, the U.S. Attorney will be advised by direct wire. Only upon receipt of this authorization should he/she apply to the district court for inclusion in the order the certification required under 28 U.S.C. §1292(b).

If an interlocutory ruling is handed down by the district court which is adverse to the government's opponent and the latter applies for inclusion of a certification under the Interlocutory Appeals Act in the order to be entered, the Chief of the Appellate Section of the appropriate division is to be notified in the manner noted above (see USAM 2-2.320).

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The same procedure is to be followed where the district court, sua sponte, includes a certification under the Act in an order.

C. Filing of Petition with Court of Appeals

Within 10 days after a district court certifies an issue pursuant to 28 U.S.C. §1292(b), the prospective appellant must file a petition under Rule 5, F.R.App.R., with the court of appeals requesting its permission for an interlocutory appeal. This 10-day period is jurisdictional and therefore may not be extended upon stipulation of the parties. Nonetheless, the 10-day period may be enlarged if the district court amends its certification order as discussed above.

Whether or not the division has been previously notified, the Chief of the Appellate Section of the appropriate division is to be immediately informed by telephone or wire of the service of petitions to the courts of appeals for leave to appeal under the Act. A copy of the petition, marked for urgent handling, should at once be forwarded by mail to the Assistant Attorney General, attention, Chief of the Appellate Section, of the appropriate division.

2-2.320 Procedure When Adverse Party Seeks Interlocutory Appeal

Whenever opposing counsel asks that a district court certify an issue for a 1292(b) interlocutory appeal, the U.S. Attorney should promptly notify the Assistant Attorney General, attention, Chief of the Appellate Section, within the appropriate division, and ask for instructions on whether to oppose, or acquiesce in, opposing counsel's request.

2-2.400 STATE COURT PROCEEDINGS

In litigation in the state courts, the U.S. Attorney should promptly inform the appropriate division of the Department as to all decisions, including those adverse to the United States and subject to review in a higher state court. In all of these cases, he/she should follow the general procedures established for appeals from U.S. district courts to courts of appeals. If the procedural steps involved in the taking or perfecting of the appeal raise an issue which bears upon the merits of the case, the U.S. Attorney should promptly inform the Appellate Section of the appropriate division and secure its advice with respect to that issue, but in any event the necessary protective action should be timely taken. In appeals being handled by a division, the U.S. Attorney should provide any technical and procedural assistance necessary to protect the interests of the United States.

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2-2.500 U.S. SUPREME COURT REVIEW

Responsibility in Appeals or Certiorari by United States Generally

Litigation in the Supreme Court, by or against the government, is handled by the Department of Justice under the supervision of the Solicitor General. The responsibility of the U.S. Attorney goes only to filing the notice of appeal and preserving rights pending review, as set forth below. The assistance of the U.S. Attorney may also be asked to have the clerk of the appropriate court send up the record needed either on direct appeal or on petition for a writ of certiorari. If the Solicitor General has authorized an appeal to the Supreme Court from a decision by the highest court of a state, the aid of the U.S. Attorney may be sought by the Department in the filing of the appeal papers in the state court.

2-2.510 Appeal by Adverse Party

Responses to petitions for writs of certiorari and proceedings by the government in connection with an appeal by an adverse party will be handled by the Department.

When an appeal from a district court to the Supreme Court is taken by the adverse party in a case being handled by the U.S. Attorney, the U.S. Attorney should notify the Department immediately and should make sure that copies of all necessary papers and documents are transmitted at once to the Department.

When an appeal from a district court to the Supreme Court is taken by the adverse party in a case being handled by a division of the Department, the U.S. Attorney should immediately notify the appropriate division and forward a copy to the adverse decision unless the Court in its transmittal letter or memorandum forwarding the decision indicates distribution of a copy of the adverse decision to the division of the Department, or to the Departmental attorney handling the case.

2-2.520 Service of Papers Upon U.S. Attorney

If the U.S. Attorney is served with papers (other than a notice of appeal) in proceedings before the Supreme Court, he/she should inform counsel that service must be made upon the Solicitor General in Washington as required by Rule 33(2) of the Rules of the Supreme Court. The U.S. Attorney should inform the Solicitor General promptly of all attempts to make service upon him/her.

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2-2.530 Inquiries As to Status of Case

Mandates, judgments, and orders denying petitions for certiorari are sent by the Clerk of the Supreme Court to the lower courts as a matter of course. Inquiries as to status of a case should not be made by the U.S. Attorney to the Clerk of the Supreme Court, except where clearly necessary.

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2-3.000 RESPONSIBILITIES AND STEPS TO BE TAKEN IN COURTS OF APPEALS IN
CIVIL AND CRIMINAL CASES

2-3.100 RESPONSIBILITIES OF DIVISIONS OF DEPARTMENT

A. Cases Tried by Division

When a division of the Department tries a civil or criminal case, the division has the responsibility for handling of the case in the court of appeals, including all correspondence, motions, responses, briefs, oral argument and all other matters until receipt of final mandate (except for the filing of the notice of appeal or cross-appeal, USAM 2-2.130). For administrative and informational purposes in cases handled by divisions of the Department, the appropriate division should keep the U.S. Attorney advised of the progress of the case by forwarding to him/her copies of correspondence, motions, orders, record and briefs served on opposing counsel and/or filed with the court of appeals. The divisions of the Department should confer with the U.S. Attorney with respect to such an appeal, including the position to be taken, and utilize such assistance as may be agreeable between the division and the U.S. Attorney.

B. Cases Tried by U.S. Attorney

In a case tried by the U.S. Attorney and assigned to a division for appellate responsibility, after such assignment and following notification of such to the court of appeals and opposing counsel, the division shall then have the appellate responsibility for the case, and shall proceed as outlined above.

2-3.200 UNITED STATES ATTORNEY RESPONSIBILITIES

2-3.210 Assignment of Appellate Responsibility

The U.S. Attorney has the appellate responsibility for the handling of civil and criminal cases in the court of appeals that have been tried by the U.S. Attorney, unless the appropriate Assistant Attorney General elects that the divisions handle a particular category of cases or a case on appeal.

Although the U.S. Attorney will have the responsibility for handling most criminal appeals and many of the civil appeals arising out of cases tried by him, the appropriate divisions will be responsible for a significant number of civil cases and will render substantial aid and assistance relative to many cases being handled by the U.S. Attorney, both civil and criminal.

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There are no precise rules for determining when a civil appeal is to be handled by the U.S. Attorney or by the appropriate division. The decision is generally made by the appropriate Assistant Attorney General on a categorical or ad hoc basis. Some of the factors which determine who will handle a civil appeal are as follows:

Whether the case raises issues of first impression on which there is no previous appellate authority;

Whether the case raises issues which are being concurrently raised in similar cases in other circuits;

Whether the case raises issues of particular national importance, e.g., the powers of the President;

Whether the case raises issues of particular local importance;

Whether other cases involving the same or very similar issues have recently been handled by either the U.S. Attorney or the division;

Whether the case raises issues on which it is particularly important to have a uniform position taken throughout the various circuits, or within a single circuit;

Whether the case presents relatively simple issues which would make it an ideal teaching vehicle for an inexperienced attorney;

Whether there are essentially factual questions involved in the case;

Personnel shortages;

Preference, if any, of the U.S. Attorney. Mutual agreement of Appellate Section Chief and U.S. Attorney.

In all civil appeals the Assistant Attorney General shall notify the U.S. Attorney of the assignment. Regardless of whether the U.S. Attorney or Division handles an appeal, each will take appropriate and complementary steps to protect the interest of the United States and to assure successful prosecution of the appeal.

2-3.211 Appeals in Tax Cases

The Tax Division reserves to itself the authority to handle appeals in all civil tax cases without regard to whether the U.S. Attorney or a Tax Division attorney has tried the case.

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Although, as a general rule in criminal tax cases, the U.S. Attorney will prepare the brief and argue the case on appeal, a draft of the government's brief should, where possible, be submitted to the Tax Division in sufficient time for adequate review by the Tax Division.

2-3.220 Reporting Responsibilities in Cases Handled by U.S. Attorney

USAM 2-2.111 provides that when the district court enters a decision adverse to the government the U.S. Attorney shall promptly make a report to the appropriate division of the Department, and shall forward to that division his recommendation for or against appeal and all appropriate documents. USAM 2-2.200 contains similar requirements when an appeal is taken by the adverse party, except that in a criminal case the brief of the adverse party would normally be the first document forwarded. In civil cases all appropriate documents described in USAM 2-2.111 should be forwarded to the appropriate division. In order to facilitate compliance with these requirements in civil cases, it is requested that U.S. Attorneys utilize the transmittal forms set forth below to forward their report to the appropriate division. The first form is to be employed in the event of an adverse decision; the second form is to be employed when the adverse party files a notice of appeal. These forms should be reproduced locally by each U.S. Attorney's office.

A. To Concerned Agency

In the event of an adverse decision in a civil case, it is also requested that the U.S. Attorney advise the concerned agency that it should submit within 15 days its recommendation for or against appeal to the Chief, Appellate Section, of the appropriate division (see, paragraph 2 of the first form, USAM 2-3.221).

The procedures set forth above will not apply to Social Security benefits cases (see special procedures in Social Security benefits cases, USAM 2-3.233).

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2-3.221 Form of Report for Adverse Decision - Civil Case

To: Assistant Attorney General
Division
Attn: Chief, _____
[enter appropriate operating section]

From: _____
United States Attorney, _____

Subject: Report of Adverse Decision: _____
[enter case identification]

1. The district court on _____ entered an adverse decision in the above-captioned case. In accordance with Title 2 (Appeals) of the United States Attorneys' Manual the following documents are being, or have been, forwarded to the Department.

<u>Enclosed</u>	<u>Previously Forwarded</u>	<u>Will be Submitted</u>	
()	()	()	Two signed copies of the district court's findings of fact, conclusions of law, and/or opinion.
()	()	()	Two signed copies of the judgment.
()	()	()	A complete list of docket entries.
()	()	()	A complete set of pleadings.
()	()	()	A copy of all motions, memoranda, and briefs filed.
()	()	()	Summary of evidence necessary for resolution of issue(s).
()	()	()	My recommendation for or against appeal.*

2. By letter of _____ the concerned agency has been notified of the district court's decision and requested

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to submit within 15 days its recommendation for or against an appeal to the Chief, Appellate Section, _____ Division, U.S. Department of Justice, Washington, D.C. 20530.

cc: Chief, Appellate Section
_____ Division

*Format for recommendation for or against appeal is outlined at USAM 2-2.111.

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2-3.222 Form of Report for Notice of Appeal - Civil Case

To: Assistant Attorney General Date:
Division
Attn: Chief, Appellate Section

From: _____,
United States Attorney, _____

Subject: Filing of Notice of Appeal by Adverse Party

[enter case identification]

The adverse party on _____ filed a notice of appeal in the above-captioned case. In accordance with Title 2 (Appeals) of the United States Attorneys' Manual the following documents are being, or have been, forwarded to the Department:

<u>Enclosed</u>	<u>Previously Forwarded</u>	<u>Will be Submitted</u>	
()	()	()	The notice of appeal.
()	()	()	Two signed copies of the district court's findings of fact, conclusions of law, and/or opinion.
()	()	()	Two signed copies of the judgment.
()	()	()	A complete list of docket entries.
()	()	()	A complete set of pleadings.
()	()	()	A copy of all motions, memoranda, and briefs filed.

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2-3.230 Other U.S. Attorney Reporting Responsibilities

2-3.231 Applications in the Courts of Appeals for Stays or Injunctions
Pending Appeal

When an appeal to a court of appeals is taken in a civil case by the adverse party, the U.S. Attorney shall advise the chief of the appropriate appellate section by wire or telephone of any motion filed by the appellant for a stay or injunction pending appeal or for any other emergency relief.

2-3.232 Appeals Under Interlocutory Appeals Act

The U.S. Attorneys' responsibilities under the Interlocutory Appeals Procedure are set forth in USAM 2-2.300, et seq.

2-3.233 Appeals in Social Security Benefits Cases

In any Social Security Act case involving a claim for benefits in which the district court renders a decision adverse to the government, the U.S. Attorney handling the case shall forward copies of the adverse decision, including both the opinion and judgment, promptly upon receipt of that decision to the following three offices:

- (A) Appellate Section
Civil Division
Department of Justice
P. O. Box 978
Washington, D.C. 20044
- (B) Office of the General Counsel
Social Security Division
Department of Health and Human Services
P. O. Box 1040
Baltimore, Maryland 21203
- (C) HHS Regional Attorney

The above addresses are to be used only for transmission of decisions in cases seeking benefits under the Social Security Act. The U.S. Attorney should send, with the decision, his recommendation as to whether or not an appeal should be prosecuted.

In all Social Security Act cases in which the claim is for benefits, the U.S. Attorney is relieved of the responsibility for filing a notice of appeal unless he is specifically requested to file such a notice of appeal by the Department in Washington.

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2-3.300 OUTLINE OF STEPS TO BE TAKEN IN COURTS OF APPEALS IN CASES HANDLED BY THE UNITED STATES ATTORNEY

2-3.310 Preparation and Transmission of Record on Appeal

Preparation and the transmission of the record on appeal should be made by the clerk of the district court to the court of appeals, in accordance with the provisions of Rule 10 and Rule 11, F.R.APP.P.

The U.S. Attorney should order from the reporter the necessary portions of the transcript to be included in the record on appeal, in accordance with Rule 10(b), F.R.APP.P. In addition, he/she should also prepare, file and serve any necessary designation of the parts of the record to be transmitted on appeal, and a statement of the issues to be presented on appeal, in accordance with any applicable Rule of the particular district court or court of appeals, and he/she should do anything else necessary to cause the record on appeal to be prepared and transmitted by the clerk of the district court to the court of appeals, in keeping with the provisions of Rule 10(a) and (b) and Rule 11(a) and (b), F.R.APP.P.

If the Government is the appellee, the U.S. Attorney should file and serve any necessary counter-designation of additional portions of the transcript of trial proceedings to be included in the record on appeal, or any necessary counter-designation of other parts of the record to be included in the record on appeal.

2-3.320 Reproduction of Record on Appeal

After the record has been transmitted to, and filed in, the court of appeals, the necessary steps should be taken to bring about the preparation of the record appendix in compliance with F.R.APP.P. and with any applicable local circuit rules--except in the Ninth Circuit where the entire record on appeal is generally reproduced under direct supervision of the clerk of the court of appeals.

2-3.330 Preparation of Briefs and Oral Arguments

Briefs should be prepared in accordance with the F.R.APP.P. and with applicable local circuit rules.

In cases where the U.S. Attorney has the appellate responsibility in the court of appeals, the appropriate division of the Department should from time to time advise the U.S. Attorney with respect to positions that should be taken in the court of appeals, as well as any cases that may not have been cited in the government's briefs that the division believes to be of such importance as to be brought to the attention of the court of appeals.

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Two copies of all briefs filed by either side should be forwarded to the Assistant Attorney General, attention, chief of the appellate section of the appropriate division, as promptly as possible after receipt.

Oral argument, if any, should be presented in accordance with applicable local circuit rules.

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2-4.000 TIME TO APPEAL OR PETITION FOR REVIEW OR CERTIORARI

2-4.100 CRIMINAL CASES AND COLLATERAL RELIEF

2-4.110 Criminal Cases

A. Appeal by Government

Criminal appeals by the government under 18 U.S.C. §3731 must be taken within 30 days after entry of the judgment or order appealed from. Follow the provisions in Section 3731 in preparing the appropriate notice.

B. Appeal by Defendant

Appeals by a convicted defendant must be taken within 10 days after entry of the judgment appealed from, unless a timely motion for new trial has been made--in which case an appeal may be taken within 10 days after entry of an order denying the motion. This time may be extended up to 30 days on a showing of excusable neglect.

C. Rehearing In Court of Appeals

Time to petition for rehearing in courts of appeals is 14 days. If it is desired to seek a rehearing en banc, a 30-day extension beyond the 14-day period should be requested in order for the request to be considered in the Department and for the Solicitor General to authorize the seeking of a rehearing en banc.

D. Petitions For Writs of Certiorari

Petitions for writs of certiorari to the Supreme Court by either party must be filed within 60 days after entry of judgment, but this time may be extended for an additional 30 days for cause shown, provided the extension is requested within the first 50-day period following the judgment of the court of appeals.

2-4.120 Collateral Relief

A. 28 U.S.C. §2255 and Habeas Corpus

Proceedings under 28 U.S.C. §2255 and habeas corpus are treated as independent proceedings subject to the rules for civil cases for the purpose of computing time to appeal under the rules. This means that the time to appeal from the district court to the court of appeals is 60 days and the time to petition for a writ of certiorari is 90 days, with possibility of extension for another 60 days.

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B. Other

Other forms of relief such as an application for a writ of error coram nobis, a motion to correct an illegal sentence, or a motion for a new trial based on newly discovered evidence, are deemed to be made in the criminal case, and are therefore subject to the time limitations of criminal cases set forth above.

C. Mandamus

While there are no statutory time limits on filing a petition for mandamus authorized by the Solicitor General, such petition should be filed within a 30-day period from the entry of the order from which relief is sought. The timeliness of mandamus is usually measured under the doctrine of laches.

2-4.200 CIVIL CASES

2-4.210 Supreme Court

In all civil cases, petitions for writs of certiorari in cases to be taken to the Supreme Court from courts of appeals or from state courts must be filed within 90 days after the entry of judgment, but this time may be extended not to exceed 60 days if the extension is obtained within the initial 90-day period. 28 U.S.C. §§1254, 1257(3), 2101(c). The application for extension must be filed at least ten days before the expiration of the period sought to be extended. Rule 29.2, Rules of the Supreme Court.

Appeals from state courts to the Supreme Court must be taken within 90 days after the entry of the judgment or decree; this time cannot be extended. 28 U.S.C. §1257 (1, 2), 2101(c).

2-4.220 Appeals to Courts of Appeals

Appeals generally in civil actions, in which the United States or an officer or agency thereof is a party, from judgments of the district courts to the courts of appeals, must be taken within 60 days after entry of the judgment or decree appealed from. 28 U.S.C. §2107; Rule 4, F.R.App.P. In cases in which an officer of the United States is sued in his individual capacity, or both in his individual and official capacity, the 30-day time for appeal applies or should be followed. In cases where the government is representing a non-government individual, such as a veteran, the 30-day time for appeal applies.

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2-4.230 Constitutionality of Acts of Congress

In cases pending in U.S. courts in which the United States or any officer or employee, as such officer or employee, is a party, or in which the United States has intervened and become a party, and the decision is against the constitutionality of an act of Congress, an appeal may be taken by any party directly to the Supreme Court within 30 days after entry of a final or interlocutory judgment, decree or order, and the case must be docketed in the Supreme Court within 60 days after the notice of appeal is filed; these times cannot be extended. 28 U.S.C. §2101. Where an act of Congress is held unconstitutional, the appeal lies only to the Supreme Court and the 30-day appeal period and the 60-day docketing period must be complied with.

In cases where an injunction is sought against the enforcement of an Act of Congress upon the ground that such act is unconstitutional, which cases are heard by a three-judge court, and there is a judgment, order, or decree denying or granting an interlocutory or permanent injunction, an appeal may be taken directly to the Supreme Court within 30 days after entry of the order, judgment, or decree, and the case must be docketed in the Supreme Court within 60 days after the notice of appeal is filed; these times cannot be extended. 28 U.S.C. §§1252, 2101. The separate injunction rule precludes appealing where there has been no separate order.

2-4.240 Special Cases

It should be noted that there are special rules that apply in particular cases, e.g., bankruptcy cases (11 U.S.C. §§48, 67); infringement of patents (28 U.S.C. §§1292, 2107); receiverships (28 U.S.C. §1292; Rule 4(a), FED.R.APP.P.); Packers and Stockyards Act (7 U.S.C. §194; but see, Capitol Packing Co. v. United States, 350 F.2d 67 (10th Cir. 1967)).

2-4.250 Cross-Appeals

In all civil cases in which the United States or an officer or agency thereof is a party, if a timely notice of appeal is filed by any other party in the case, a notice of appeal (cross-appeal) by the United States, or officer or agency thereof may be filed within 14 days of the filing of the first notice of appeal or within the time otherwise prescribed for appeal (60 days from the entry of the judgment), whichever expires last (Rule 4(a), FED.R.APP.P.).

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