

## **TITLE 2 APPEALS**

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- 2-1.000 Appeals in General**
- 2-2.000 Procedure With Respect to Appeals Generally**
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## 2-1.000 APPEALS IN GENERAL

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### 2-1.000 Appeals in General

Procedures to be followed in civil and criminal appeals to United States courts of appeals from United States district courts are set forth in 28 U.S.C.A., Rules, Federal Rules of Appellate Procedure, and in the local appellate rules promulgated by each circuit from time to time pursuant to Rule 47, F.R.A.P. The local rules of the various circuits are set forth at 28 U.S.C.A. Rules, United States Courts of Appeals Rules.

Procedures governing review by the United States Supreme Court from all courts are published in 28 U.S.C.A. Appellate, 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 curiae* will be filed by the government, or whether the government will intervene, in any appellate court. 28 C.F.R. 0.20. In addition, the Solicitor General must approve any settlement of a case in the Supreme Court. 28 C.F.R. 0.163. If the Solicitor General has authorized an appeal to any other court, a division may settle a case only if the Solicitor General advises "that the principles of law involved do not require appellate review in that case." *Id.* If a United States Attorney wishes to settle a case in which the Solicitor General has authorized an appeal, the United States Attorney should consult with the appropriate division as to how to secure the necessary approvals.

**2-2.000**

**PROCEDURE WITH RESPECT  
TO APPEALS GENERALLY**

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**2-2.110 Decision Against the Government -- Immediate 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 United States Attorney must immediately transmit a copy of the decision to the appellate

section of the division responsible for the case. This includes cases being handled by a division of the Department, unless the United States 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.

### **2-2.111 Prompt Recommendation Concerning Further Appellate Review**

In any case being handled by a United States Attorney in which the decision is adverse to the government in whole or in part, and is or may be reviewable, the United States 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:

**CASE HEADING:** Case name, court number, district (or circuit), and date of decision.

**TIME LIMIT:** State when time expires for seeking the appropriate review.

**RECOMMENDATION:** State whether the United States 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 civil cases, any known agency should be noted.

**QUESTIONS PRESENTED:** A brief statement of the issues presented for review.

**STATEMENT:** Summarize as briefly as practicable the facts necessary for resolution of the question presented.

**DISCUSSION:** State the arguments for or against seeking review and provide citations of relevant authorities. Also note any problems with the recommended position, flagging all issues relevant to the Solicitor General's decision whether to authorize appeal. Attach appropriate documents (only those reasonably necessary to analysis of the relevant issues), including copies of opinions, findings of fact, conclusions of law, judgments, briefs and memoranda. In general, transcripts of testimony should not be specially ordered for this purpose, unless of central importance or requested by the appropriate division or the Solicitor General. The United States Attorney should indicate his/her preference, if any, as to who should handle the appeal. *See* USAM 2-3.100.

Please note the jurisdictional time limits of USAM 2-4.000.

### **2-2.112 Recommendations Concerning Interlocutory Appeal Under 28 U.S.C. § 1292(b)**

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 in every case in which the United States Attorney believes that the government should seek certification for such an interlocutory appeal or in which the district court has stated in its 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.

### **2-2.121 Necessity of Authorization by Solicitor General -- Appeals or Petitions on Behalf of United States**

All appeals to the lower appellate courts in cases handled by divisions of the Department and United States Attorneys, and all petitions for certiorari and direct appeals to the Supreme Court must be authorized by the Solicitor General. This includes interlocutory appeals and appeals to state appellate courts.

### **2-2.122 Necessity of Authorization by Solicitor General -- Rehearing 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 appropriate division has been notified and, where the division believes it appropriate, the Solicitor General's office has been given the opportunity to decide whether the case merits en banc review.

### **2-2.123 Necessity of Authorization by Solicitor General -- Amicus Brief**

The authorization of the Solicitor General is required for the filing of any amicus brief in all appellate courts. *See* 28 C.F.R. 0.20(c).

### **2-2.124 Necessity of Authorization by Solicitor General -- 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.

### **2-2.131 Serving and Filing Notice of Appeal -- Upon Decision to Appeal or Cross-Appeal**

When a decision has been made to appeal or cross-appeal, the United States 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 which the United States or any officer or agency thereof is a party. This applies to appeals to the Supreme Court (*see* Rule 18, Rules of Supreme Court) as well as to the courts of appeals.

With respect to notices of appeal to the Supreme Court, if proof of service is by certificate, the attorney signing the certificate must be a member of the bar of the Supreme Court. Rule 29.5(b), Rules of the Supreme Court. The appropriate division should be promptly notified by the United States Attorney when the notice of appeal has been filed.

## **2-2.132 Serving and Filing Notice of Appeal -- 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 United States Attorney has not received notice from the appropriate division of the Department as to whether an appeal is to be taken, 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.

NOTE: *See* USAM 2-3.222 which relieves the United States Attorney of the responsibility for filing a notice of appeal in social security cases in which the claim is for benefits.

## **2-2.140 Rehearing En Banc**

F.R.A.P. 40 now gives the government 45 days in which to seek rehearing in a civil case. Since the time was extended to 45 days in a civil case from the former 14 day period in order to accommodate the government's need for extra time, extensions of the 45-day time period should not be sought without extraordinary cause and consultation with the appropriate division in the Department. The government has 14 days to seek rehearing in a criminal case. F.R.A.P. 40.

## **2-2.150 Preserving Government's Rights Pending Review**

In cases being handled by the United States Attorney, that office 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. In consultation with the appropriate division, steps shall be taken as necessary to stay the issuance of mandates by the courts of appeals, if the issuance of the mandate might prejudice the government's interests. 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 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.

## **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 United States Attorney shall promptly advise the appropriate division of the Department, and forward to the division a copy of the notice of appeal and the district court's opinion and judgment. The United States Attorney shall also advise of any motion filed by the appellant for a stay or injunction pending appeal or for any other emergency relief, and forward copies of those motions to the appropriate division.

## **2-2.300 Procedure in Interlocutory Appeals Under 28 U.S.C. § 1292(b) -- Generally**

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 (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. 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.

## **2-2.311 Government Seeking Interlocutory Appeal -- 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 United States Attorney should promptly request authorization for the appeal from the Solicitor General through the appropriate division. The United States Attorney should not ask that the district court certify any issue for a Section 1292(b) appeal until receiving the Solicitor General's authorization to proceed. Only upon receipt of this authorization should the United States Attorney apply to the district court for inclusion in the order the certification required under 28 U.S.C. § 1292(b).

If a district court certifies an issue for a Section 1292(b) appeal before the United States Attorney seeks, and/or receives, the Solicitor General's authorization, the United States Attorney should promptly contact the appropriate division for advice as to how to proceed. The division will consult with the Office of Solicitor General and where appropriate and feasible obtain approval to proceed with the appeal within the 10-day time period.

## **2-2.312 Filing of 1292(b) 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.A.P., 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.

## **2-2.320 Procedure for Interlocutory Appeals Available as of Right**

In some circumstances a party can appeal an interlocutory order of a district court as of right. *See, e.g.*, 28 U.S.C. § 1292(a) (which lists a number of interlocutory orders, including, in particular, orders granting or denying injunctions, which can be appealed as of right, and without the need for a certification under 28 U.S.C. § 1292(b)); F. R. Civ. P. 54(b) (which allows a district court to certify that part of a case involving multiple claims or multiple parties is immediately appealable); and *Bivens* cases (in which the denial of official immunity is immediately appealable). If a United States Attorney intends to recommend appeal from an interlocutory order which is appealable as of right, the United States Attorney should promptly forward the order and his/her recommendation to the appropriate division. While the tight time

limits of 1292(b) appeals do not apply to appeals as of right, it is nonetheless advisable to speed up the process of obtaining appeal authorization of any interlocutory appeal, to the extent feasible.

### **2-2.330 Procedure When Adverse Party Seeks Interlocutory Appeal**

Whenever opposing counsel asks that a district court certify an issue for a Section 1292(b) interlocutory appeal, the United States Attorney should promptly notify the Chief of the Appellate Section of the appropriate division, and consult with that Chief concerning whether to oppose or acquiesce in opposing counsel's request. The Chief of the Appellate Section should also be notified where the district court, sua sponte, certifies an order for interlocutory review. If the United States Attorney receives service of a petition for interlocutory appeal, the United States Attorney should immediately forward it to the appropriate division.

### **2-2.400 State Court Proceedings**

In litigation in the state courts, the United States 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, the United States Attorney should follow the general procedures established for appeals from United States 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 United States 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.

### **2-2.510 United States 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 Solicitor General. The responsibility of the United States Attorney goes only to filing the notice of appeal and preserving rights pending review, as set forth below. The United States 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 United States Attorney may be sought by the Department in the filing of the appeal papers in the state court.

### **2-2.520 United States Supreme Court Review -- Appeal/Petition for Certiorari 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 United States Attorney, the United States Attorney should notify the Appellate Section of the appropriate division 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 United States Attorney should immediately notify the

appropriate division and forward a copy of the district court decision unless the Court in its transmittal letter or memorandum forwarding the decision indicates distribution of a copy of the decision to the division of the Department, or to the Departmental attorney handling the case.

### **2-2.530 United States Supreme Court Review -- Service of Papers Upon United States Attorney**

If the United States Attorney is served with papers (other than a notice of appeal) in proceedings before the Supreme Court, the United States Attorney should inform counsel that service must be made upon the Solicitor General in Washington, D.C., as required by Rule 29.4 of the Rules of the Supreme Court. The United States Attorney should inform the Solicitor General promptly of all attempts to make service upon him/her.

### **2-2.600 Prior Approvals**

2-2.121	All appeals to the lower appellate court; all petitions for certiorari and direct appeals to the Supreme Court; filing of a suggestion for rehearing en banc in a court of appeals; filing any brief amicus in appellate court; and filing petitions in appellate courts for issuance of extraordinary writs.	Approval required by Solicitor General.	Comment -- the prior authorization is not required for rehearing by the same panel.
2-2.311	To appeal an interlocutory ruling adverse to the government when it is believed that an appeal is appropriate.	Approval required by Solicitor General	

**2-3.000**

**RESPONSIBILITIES AND STEPS  
TO BE TAKEN IN  
COURTS OF APPEALS IN  
CIVIL AND CRIMINAL CASES**

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- 2-3.100 Assignment of Appellate Responsibility**
  - 2-3.110 Appeal Authorization Process**
  - 2-3.200 Appeals in Tax Cases**
  - 2-3.210 Appeals in Civil Rights Division Cases**
  - 2-3.220 Appeals in Civil Division Cases**
  - 2-3.221 Settlement of Civil Division Cases on Appeal**
  - 2-3.222 Special Procedures for Adverse Decisions in Civil Division Cases Concerning Social Security Benefits Claims**
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**2-3.100 Assignment of Appellate Responsibility**

Except as otherwise provided by sections 2-3.200, 2-3.210 and 2-3.220, the United States Attorney has the appellate responsibility for the handling of civil and criminal cases in the court of appeals that have been handled by the United States Attorney in the district court, unless the appropriate Assistant Attorney General determines otherwise.

**2-3.110 Appeal Authorization Process**

The United States Attorney's Office (USAO), having litigated a matter in which was rendered a decision adverse to the United States, should be kept apprised by the appellate components of the Department during the appeal determination process once the matter has been referred to the Office of the Solicitor General and the appropriate litigating division within the Department.

In this regard, the Office of the Solicitor General and the appropriate appellate section will promptly communicate with the concerned United States Attorney's Office regarding its anticipated appellate recommendation where such recommendations will be contrary to that of the United States Attorney in order to allow for an exchange of views. This communication should occur within a reasonable time before the final decision by the respective office on the appellate matter is made so that the United States Attorney can make known his or her views. The Office of the Solicitor General will communicate its decision in like fashion to the concerned appellate sections of the litigating division within a reasonable period of time before the final decision on the appellate matter is made, when that decision is contrary to the recommendation of the affected appellate section.

Other communication outside of that outlined herein is recommended and encouraged to facilitate greater input from the trial attorney(s) and should include, but is not limited to, copies of internal memoranda recommending for or against some significant appellate action.

### **2-3.200 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 United States Attorney or a Tax Division attorney has tried the case.

### **2-3.210 Appeals in Civil Rights Division Cases**

The Assistant Attorney General, acting through the Chief of the Appellate Section, will determine whether appeals in civil rights cases will be handled by the United States Attorney or the Division. Factors that will be considered in assigning appellate responsibility include the complexity of the civil rights issues in the case and their importance to the Division, and the availability of resources.

### **2-3.220 Appeals in Civil Division Cases**

Where the Solicitor General has authorized an appeal in a case handled in the trial court by a United States Attorney, the Assistant Attorney General, acting through the Director of the Appellate Staff, will notify the United States Attorney of the assignment of appellate responsibility as soon as possible, but no later than receipt of notice that the Solicitor General has authorized the appeal. Where an opposing party takes an appeal from a judgment favorable to the government in a case handled by the United States Attorney in the trial court, the United States Attorney can normally assume that his/her office will handle the appeal, unless the Director of the Appellate Staff advises otherwise within 14 days after receipt from the United States Attorney of notification of the appeal. In order for the automatic assignment procedure to be operative, it is crucial that the United States Attorney notify the Appellate Staff promptly when a party files a notice of appeal, and forward to the Staff a copy of the district court opinion and any other papers that may be necessary to understand the issues in the case.

### **2-3.221 Settlement of Civil Division Cases on Appeal**

Once a notice of appeal is filed by any party in a Civil Division case, any settlement that would otherwise be within the settlement authority of the United States Attorney must be referred to the Assistant Attorney General for approval, "except as determined by the Director of the Appellate Staff." 28 C.F.R. Pt. 0, Appendix to Subpart Y, Section 1(e)(5). The United States Attorney should forward any proposed settlement to the Director of the Appellate Staff who will be responsible for securing any necessary approval of the settlement and, where necessary, obtaining advice from the Solicitor General that the settlement can go forward. *See* 28 C.F.R. 0.163.

### **2-3.222 Special Procedures for Adverse Decisions in Civil Division Cases Concerning Social Security Benefits Claims**

In any Social Security Act case involving a claim for benefits in which the district court renders a decision adverse to the government, the United States Attorney handling the case shall immediately forward copies of the adverse decision, including both the opinion and judgment, to:

- (A) Office of the General Counsel  
Social Security Administration  
Post Office Box 17054  
Baltimore, Maryland 21203
- (B) SSA Regional Chief Counsel

The United States Attorney is relieved of the responsibility of sending adverse social security benefits decisions rendered by a district court (or a magistrate) to the Civil Division unless the United States Attorney recommends appeal, or the United States Attorney is advised that SSA is recommending appeal. Please note that all court of appeals decisions in social security cases must still be sent to the Appellate Staff in the same manner as any other court of appeals decision.

The above addresses for SSA are to be used only for transmission of decisions in cases seeking benefits under the Social Security Act. In transmitting such items to SSA the United States Attorney shall use the Transmittal Form for Social Security Benefits Cases. *See Appeals Resource Manual*. In general, litigation materials which are of a non-critical nature (i.e., do not require an expeditious response from SSA), should be forwarded to the following address:

Office of the General Counsel  
Social Security Administration  
6401 Security Boulevard  
Baltimore, Maryland 21235

In all Social Security Act cases in which the claim is for benefits, the United States Attorney is relieved of the responsibility for filing a notice of appeal unless specifically requested to file such a notice of appeal by the Civil Division in Washington, D.C.

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

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- 2-4.110 Criminal Cases -- Appeal by Government**
  - 2-4.112 Criminal Cases -- Appeal by Defendant**
  - 2-4.113 Criminal Cases -- Rehearing In Court of Appeals**
  - 2-4.114 Criminal Cases -- Petitions For Writs of Certiorari**
  - 2-4.121 Criminal Cases -- Collateral Relief -- 28 U.S.C. § 2255 and Habeas Corpus**
  - 2-4.122 Criminal Cases -- Other**
  - 2-4.123 Criminal Cases -- Mandamus**
  - 2-4.211 Civil Cases -- Supreme Court Petitions for Certiorari**
  - 2-4.212 Civil Cases -- Direct Appeals to the Supreme Court**
  - 2-4.220 Civil Cases -- Appeals to Court of Appeals**
  - 2-4.221 Civil Cases -- Appeals to the Federal Circuit From District Courts**
  - 2-4.222 Civil Cases -- Cross-Appeals**
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**2-4.110 Criminal Cases -- 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. See F.R.A.P. 4(b). If the government seeks reconsideration of the adverse ruling within the 30-day period after the entry of the judgment or order, the 30-day period for filing the notice of appeals runs from the date of the entry of the order denying reconsideration. See *United States v. Dieter*, 429 U.S. 6 (1976).

**2-4.112 Criminal Cases -- 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. See F.R.A.P. 4(b).

**2-4.113 Criminal Cases -- 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. See F.R.A.P. 26(b); 35; 40(a).

#### **2-4.114 Criminal Cases -- Petitions For Writs of Certiorari**

Petitions for writs of certiorari to the Supreme Court by either party in a criminal case must be filed within 90 days after entry of judgment, but this time may be extended for a period not exceeding 60 days for good cause shown, provided the extension is requested at least 10 full days before the petition is otherwise due. *See* Rules 13.1, 13.5, Rules of the Supreme Court.

#### **2-4.121 Criminal Cases -- Collateral Relief -- 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. *See* 28 U.S.C. § 2101(c); Rule 20.2, Rules of the Supreme Court.

#### **2-4.122 Criminal Cases -- 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.

#### **2-4.123 Criminal Cases -- 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.

#### **2-4.211 Civil Cases -- Supreme Court Petitions for Certiorari**

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. *See* 28 U.S.C. §§ 1254, 1257, and 2101(c).

#### **2-4.212 Civil Cases -- Direct Appeals to the Supreme Court**

Direct appeal to the Supreme Court is the appropriate avenue of review of decisions of three-judge courts granting or denying an injunction. *See* 28 U.S.C. § 1253. The time for appealing a decision under 28 U.S.C. § 1253 holding unconstitutional an Act of Congress is 30 days. 28 U.S.C. § 2101(a). The time for the filing of other direct appeals in the Supreme Court is either 30 or 60 days. *See* 28 U.S.C. § 2101(b). However, special statutes that authorize direct appeals to the Supreme Court (*see* below) may specify shorter appeal periods.

If a United States Attorney is working on a case in which a three-judge district court is convened, it is important to maintain close contact with the appropriate division to determine how to proceed in the event of an adverse judgment, or an appeal by an opposing party from a favorable judgment.

From time to time Congress provides for direct Supreme Court review of district court judgments in a particular kind of case. *See, e.g.,* 47 U.S.C. § 555(c)(2) (Cable Act); 2 U.S.C. § 692(b) (Line Item Veto Act). If the United States Attorney is working on a case in which direct appeal to the Supreme

Court is provided for by statute, the United States Attorney should consult closely with the appropriate division as to how to proceed after judgment is entered by the district court.

#### **2-4.220 Civil Cases -- Appeals to Court 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. *See* 28 U.S.C. § 2107; Rule 4(a)(1), F.R.A.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 applicable to non-government parties, 28 U.S.C. § 2107; F.R.A.P. 4(a)(1), 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.

#### **2-4.221 Civil Cases -- Appeals to the Federal Circuit From District Courts**

In some instances, a judgment of a district court is appealable only to the United States Court of Appeals for the Federal Circuit. *See* 28 U.S.C. § 1292(c), (d)(4); 1295(a). The United States Attorney should be particularly alert to the provisions of 28 U.S.C. § 1295(a)(2), pursuant to which a case in which the district court's jurisdiction is based in whole or in part on the Little Tucker Act (28 U.S.C. § 1346(a)(2)), must be appealed to the Federal Circuit. Little Tucker Act cases are those in which there is a non-tort claim for money damages not exceeding \$10,000. If the United States Attorney has a case in which there is a claim for money damages not exceeding \$10,000, the United States Attorney should consult with the appropriate division before a notice of appeal is filed.

If a plaintiff files a suit for money damages in excess of \$10,000, the United States Attorney should consult with the appropriate division about seeking a transfer of the case to the Court of Federal Claims under 28 U.S.C. § 1631. An order granting or denying, in whole or in part, a motion to transfer to the Court of Federal Claims is immediately appealable as of right to the Federal Circuit. 28 U.S.C. § 1292(d)(4).

#### **2-4.222 Civil Cases -- 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)(3), F.R.A.P.). If the United States Attorney believes that a cross-appeal should be pursued, the United States Attorney should forward his or her recommendation to the appropriate division in the same manner as required for all other appeals.

#### **2-4.250 Petition Requesting Rehearing In Banc**

Effective December 1, 1994, Federal Rule of Appellate Procedure 40(a) has been amended to provide that "in all civil cases the time within which the United States or an agency or officer thereof may seek rehearing shall be 45 days after entry of judgment unless the time is shortened or enlarged by order." The Appellate Rules Committee proposed this amendment, which is modeled on the D.C. Circuit's and the Tenth Circuit's local rules, because it accepted the Department of Justice's argument that the Solicitor General needs longer than the 14 days otherwise provided in Rule 40 to determine whether to file a rehearing petition and to prepare and file the petition. Since the Committee accepted

the Department's argument that 45 days usually is sufficient, the Department should not request an extension of time to file a rehearing petition beyond the 45 day period without special justification.