

Federal Cross-Appeals—A Guide and a Proposal

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I. INTRODUCTION

Many attorneys believe that the first appeal taken from a final judgment is the appeal and the second appeal taken the cross-appeal. Although this may be true in state appellate practice, under the Federal Rules of Appellate Procedure, the time of the filing of the notices of appeal does not determine designation. Unless otherwise agreed by the parties or ordered by the court, the appeal of the plaintiff below is the appeal and that of the defendant the cross-appeal for purposes of briefing, appendix preparation, and oral argument. These provisions are buried in Federal Rules of Appellate Procedure¹ 28(h)² and 34(d),³ and apparently go unnoticed by many attorneys, as is evidenced by the many nonconforming briefs and unnecessary motions filed each year in cases involving cross-appeals in the courts of appeals. Those aware of Rules 28(h) and 34(d) are not home free, however, because the Federal Rules of Appellate Procedure in general do not give clear guidance on how cases involving cross-appeals should be prosecuted. The end result too often is a procedural morass that counsel and the clerk's office must spend valuable time sorting out.

This Article will examine the proper procedures for prosecuting cases involving cross-appeals and will make some suggestions for keeping to a minimum the confusion that cross-appeals often generate.⁴ The procedural discussion to follow will be developed through the following hypothetical situation:

Acme filed a complaint in federal district court naming Basic and Capitol as defendants. Basic and Capitol in response filed compulsory counterclaims and, additionally, Basic asserted a permissive counterclaim against Acme. Acme obtained a summary judgment on the com-

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1. All references to the Federal Rules of Appellate Procedure in this Article will be to the Rules as amended effective August 1, 1979.

2. Rule 28(h) states, in relevant part: "If a cross appeal is filed, the plaintiff in the court below shall be deemed the appellant for purposes of this rule [Briefs] and Rules 30 [Appendix to the Briefs] and 31 [Filing and Service of the Briefs], unless the parties otherwise agree or the court otherwise orders."

3. Rule 34(d) provides, in relevant part: "If a case involves a cross-appeal, the plaintiff in the action below shall be deemed the appellant for the purpose of this rule [Oral Argument] unless the parties otherwise agree or the court otherwise directs."

4. The factors to be taken into consideration in deciding whether to cross-appeal have been treated extensively elsewhere and, therefore, are not within the scope of this article. See Stern, *When to Cross-Appeal or Cross-Petition—Certainty or Confusion?*, 87 HARV. L. REV. 763 (1974); 9 MOORE'S FED. PRAC. § 204.11[3] (2d ed. 1980).

pulsory counterclaims, but the court did not direct the entry of final judgment pursuant to Federal Rule of Civil Procedure 54(b).⁵ At trial the court granted Basic's motion for a directed verdict on the permissive counterclaim, and submitted Acme's claims against the defendants to the jury. The jury returned a verdict in Acme's favor on the complaint. All parties take appeals from the court's final judgment in the case.

II. BEFORE TRANSMISSION OF THE RECORD TO THE COURT OF APPEALS

Prior to the transmission of the record to the court of appeals, there really is no such thing as a cross-appeal. Rather, the rules speak in terms of the first and subsequent appeals taken from a judgment. Basically, each appeal taken is treated prior to the record's transmission as a separate appeal, but there are some nuances. To be consistent with the approach taken by the Federal Rules, the following discussion will refer to the first, second, and third appeals rather than to the appeal and cross-appeals.

A. *Timely Filing of the Notices of Appeal*

The timely filing of a notice of appeal by one party may extend the time in which any other party in the action may timely file a notice of appeal from the same judgment. Rule 4(a)(3) provides:

If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days after the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period last expires.⁶

Referring to the hypothetical, if a timely notice of appeal from the court's judgment may be filed through July 1, and Basic in fact files a notice of appeal on that date, Acme and Capitol have through July 15 to follow suit. The filing of a timely notice of appeal by one party, however, does not necessarily give the other parties an additional fourteen days to file. If Basic files its notice of appeal on June 10, Acme and Capitol have only until July 1 to timely file.

Also, the filing of a second notice of appeal has no impact on the time in which subsequent notices may be timely filed. Going back to the hypothetical, if the time to appeal runs through July 1, and Basic files a notice of appeal on that date, Acme and Capitol have only until July 15 to timely file additional notices. The filing of a second notice by Capitol on July 15 will not extend Acme's time to file for another fourteen days. And if Basic's notice is filed on June 10, Acme and Capitol have only until July 1 to timely file their notices.

5. If the district court directs the entry of final judgment on one of several claims asserted in an action pursuant to Federal Rule of Civil Procedure 54(b), then that judgment is immediately appealable. *E.g.* *Blake Constr. Co. v. American Vocational Ass'n*, 419 F.2d 308, 310 n.2 (D.C. Cir. 1969).

6. Rule 4(a)(3) applies only to appeals in civil cases and has no counterpart for criminal appeals. A defendant does not have the right to cross-appeal when the Government appeals under 18 U.S.C. § 3731. *United States v. Cahalane*, 560 F.2d 601, 608 (3d Cir. 1977), *cert. denied*, 434 U.S. 1045 (1978); *United States v. Swarovski*, 557 F.2d 40, 49 (3d Cir. 1977), *cert. denied*, 434 U.S. 1045 (1978).

The filing of Capitol's notice of appeal on July 1 will not give Acme, who has yet to file, an additional fourteen days to do so.

The timely filing of the notice of appeal is jurisdictional.⁷ As the preceding discussion indicates, confusion can arise concerning the period in which the second and subsequent notices of appeal may be timely filed. Therefore, if counsel decides to appeal but finds that another party in the case has beat him to the courthouse, he must read Rule 4(a)(3) carefully and accurately to identify the time remaining to file a notice of appeal.

B. *Obtaining the Transcript of Proceedings*

After the notice of appeal is filed, the party appealing must order those parts of the transcript to be included in the record on appeal,⁸ and usually must pay for the parts of the transcript ordered.⁹ In a case involving a cross-appeal, each party appealing from a judgment must order those parts of the transcript pertinent to the issues his appeal will raise.¹⁰ But, because some parts of the transcript will be germane to each of the appeals brought from a judgment, this requirement can cause mass confusion.

Preferably, the parties should avoid this confusion by agreeing upon those parts of the transcript commonly wanted and splitting the cost, with additional portions being ordered and paid for by that party considering them necessary for inclusion in the record. The ill-will occasionally generated by the adversary proceedings before the district court, however, sometimes makes this impractical.

In the absence of an agreement, the party who filed the first notice of appeal—in our hypothetical, Basic—should either order the entire transcript within ten days of the filing of his notice or, within that time, order those parts of the transcript deemed necessary to the appeal and serve upon opposing counsel a designation of the parts of the transcript ordered and of the issues he will raise on his appeal.¹¹ Counsel for the parties filing subsequent notices of appeal, Acme and Capitol, must then decide (1) whether any additional transcript is necessary to support their arguments on the issues that Basic will raise, and (2) whether any transcript not designated with reference to Basic's issues is pertinent to the issues they will raise in their respective appeals. If they want additional transcript in the record, they should serve and file their own designations within ten days of service of Basic's designation.¹² Those designations should clearly distinguish between those parts of the transcript germane to Basic's issues, which Basic will order, and those parts not already designated that are pertinent to Acme's and Capitol's appeals, which they will

7. *Browder v. Director, Dep't of Corrections*, 434 U.S. 257, 264 (1978).

8. FED. R. APP. P. 10(b)(1).

9. FED. R. APP. P. 10(b)(4).

10. FED. R. APP. P. 11(a).

11. FED. R. APP. P. 10(b)(1), (3). A copy of the order of transcript and of the designation of issues, if any, must be filed with the district court. *Id.*

12. FED. R. APP. P. 10(b)(3).

order. Basic and Capitol then may counterdesignate on Acme's appeal and Acme and Basic on Capitol's, with the end result that each party will have ordered those portions of the transcript pertinent to his appeal plus those parts counterdesignated with respect thereto by the other parties.¹³

C. *Docketing and Transmission of the Record*

At the time of the filing of the notices of appeal, each party appealing pays to the clerk of the district court the prescribed docket fee in addition to the fee for the filing of the notice of appeal.¹⁴ The clerk of the district court then forthwith transmits a copy of each notice of appeal along with a copy of the docket entries to the clerk of the court of appeals.¹⁵ The clerk of the court of appeals will docket each appeal after receiving the relevant notice and docket entries.¹⁶ Upon docketing, each appeal will be given a separate appeal number, and the appeals will ordinarily be consolidated. If, in the course of proceedings before the court of appeals, the parties discover that by oversight the appeals have not been consolidated, they should move for or stipulate to consolidation to avoid unnecessary confusion.¹⁷ The caption of each brief or motion filed in the consolidated appeals should contain the appeal number of each appeal consolidated.¹⁸

The clerk of the district court will transmit a single record to the court of appeals after receiving from the court reporter the parts of the transcript ordered by each of the appealing parties.¹⁹ The time for briefing begins to run from the date upon which that record is filed in the court of appeals, not from the date of docketing.²⁰

III. AFTER DOCKETING AND THE TRANSMISSION OF THE RECORD TO THE COURT OF APPEALS

A. *Designation of the Parties*

Pursuant to Federal Rules of Appellate Procedure 28(h) and 34(d), when more than one party has appealed from a judgment, the plaintiff below is

13. The counterdesignating party must be given notice that the parts of the transcript he has counterdesignated have been ordered. FED. R. APP. P. 10(b)(3).

14. FED. R. APP. P. 3(e). This is a change brought about by the 1979 amendments to the Federal Rules of Appellate Procedure. Prior to those amendments, only a filing fee was paid at the time of the filing of the notice of appeal. The docket fee was paid to the clerk of the court of appeals within the time allowed or fixed for transmission of the record.

15. FED. R. APP. P. 3(d).

16. FED. R. APP. P. 12(a).

17. FED. R. APP. P. 3(b). Prior to the 1979 amendments to the Federal Rules of Appellate Procedure, the clerk of the district court transmitted nothing to the court of appeals until the record was prepared. Under that procedure, all of the notices of appeal filed with respect to a single order or judgment arrived at the court of appeals at the same time, thus facilitating consolidation. Pursuant to the procedure created by the amendments, however, each notice is sent to the court of appeals forthwith after its filing and, therefore, it is probable that the court of appeals will receive at different times the notices of appeal taken from an order or judgment. This will probably increase the instances in which such appeals are not automatically consolidated, and, consequently, the need to move for or stipulate to consolidation in cases involving cross-appeals.

18. See, e.g., 7TH CIR. R. 9(f)(2).

19. FED. R. APP. P. 11(a), (b).

20. FED. R. APP. P. 31(a).

designated the appellant for purposes of briefing, appendix preparation, and oral argument, unless the parties stipulate or the court orders otherwise. As a corollary, the appeal brought by the plaintiff becomes the main appeal, whereas the appeal of the defendant is the cross-appeal.

The designation of parties and appeals provided for by the Rules will not always make sense. Returning to the hypothetical, if Basic obtained a judgment for \$15,000 on its permissive counterclaim against Acme, and the jury verdict in favor of Acme against Basic and Capitol amounted to \$150,000, Acme's appeal from the adverse directed verdict should not be the main event. In recognition of this, the Rules provide that the parties may stipulate or the court may order a different designation.²¹

The classic objective of the appellant is to avoid affirmance of the judgment of the court below. The appellant/cross-appellee, therefore, should be that party who stands to be affected most adversely if the judgment appealed from is affirmed. In the hypothetical, assuming that Acme's appeal is merely from the grant of a judgment for \$15,000, Basic and Capitol, who are on the short end of a \$150,000 jury verdict, will suffer the greatest adverse effect if the district court's judgment is affirmed. Because they were defendants below, however, they will be designated appellees/cross-appellants, pursuant to the Rules. They should seek a stipulation designating their appeals as the main appeals, or move the court to so designate them, immediately upon the docketing of the appeals. An effective motion for a change of designation will show the relative effect of an affirmance of the judgment from which appeal is taken upon the parties appealing.

B. Briefing Schemes

Having ascertained the designation of the parties appealing, counsel should then proceed, either informally or with the court's assistance, to reach a common understanding concerning the scheme of briefing—that is, what briefs will be filed by whom and when. Such an understanding at the time of docketing or shortly thereafter, preferably reduced to writing, will do much to prevent confusion and to keep the progression of the appeal toward oral argument on schedule. The prehearing conference that some of the circuits are now conducting pursuant to Rule 33 provides an excellent opportunity for counsel to sit down together under the auspices of the court for the purpose of working out a briefing scheme. The scheme that emerges from the conference can then be recited in the prehearing order required by the Rule.

The Rules provide broad guidelines, discussed in detail below, for the structure of briefing schemes in cases involving cross-appeals. Counsel should keep in mind, however, that the court may authorize a departure from those guidelines for good cause shown²² and, therefore, a scheme different

21. FED. R. APP. P. 28(h) and 34(d).

22. FED. R. APP. P. 2.

from those to be discussed may be followed if approved by the court at a prehearing conference or upon motion.

1. *Two-Party Proceedings*

The Federal Rules of Appellate Procedure contemplate four briefs in the two-party appeal/cross-appeal situation: (1) an appellant's brief, (2) an appellee's/cross-appellant's brief, (3) an appellant's reply/cross-appellee's brief, and (4) a cross-appellant's reply brief. The first brief is due forty days after the filing of the record,²³ the second brief within thirty days of the service of the first,²⁴ the third within thirty days of the service of the second,²⁵ and the fourth within fourteen days of the service of the third.²⁶ Under this scheme, the appellee/cross-appellant need not and may not file and serve a cross-appellant's brief until after he has received the appellant's brief in the main appeal. His first brief, however, must incorporate both his appellee's arguments on the main appeal and his appellant's arguments on the cross-appeal.²⁷ Likewise, the appellant/cross-appellee need not file and serve a separate reply brief in the main appeal. Rather, he should consolidate that reply brief with his appellee's brief in the cross-appeal.²⁸

Returning to the hypothetical, and assuming for simplicity's sake that only Acme and Basic appeal from the final judgment, the scheme of briefing, pursuant to Federal Rule of Appellate Procedure 28(h), will be as follows:

- (1) First Brief—Appellant's Brief:
Acme's arguments on its appeal.
- (2) Second Brief—Appellee's/Cross-Appellant's Brief:
 - (a) Basic's answer to Acme's appellant's brief; and
 - (b) Basic's arguments on its appeal.
- (3) Third Brief—Appellant's Reply/Cross Appellee's Brief:
 - (a) Acme's reply to Basic's appellee's brief; and
 - (b) Acme's answer to Basic's cross-appellant's brief.

23. FED. R. APP. P. 31(a).

24. *Id.* This period will be extended by three days if the first brief is served by mail. FED. R. APP. P. 26(c).

25. FED. R. APP. P. 31(a). This period will be extended by three days if the second brief is served by mail. FED. R. APP. P. 26(c).

26. FED. R. APP. P. 31(a). This period will be extended by three days if the third brief is served by mail. FED. R. APP. P. 26(c).

27. FED. R. APP. P. 28(h), which provides in relevant part: "The brief of the appellee shall contain the issues and argument involved in his appeal as well as the answer to the brief of the appellant."

28. Such a consolidated brief is not expressly required by FED. R. APP. P. 28(h), but is preferred. PRACTITIONERS' HANDBOOK FOR APPEALS TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT 31 (rev. ed. 1979); PRACTITIONER'S HANDBOOK FOR APPEALS TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT 35 (1973).

The Seventh Circuit Rules impose special requirements for this brief:

Appellant's Reply and Cross-Appellee's Brief. The appellant's reply brief and cross-appellee's brief shall be combined, shall not exceed the page limitation of a main brief, shall have a yellow cover, and shall be filed within 30 days after the filing of the cross appellant's brief unless otherwise ordered by this court.

7TH CIR. R. 9(f)(1).

- (4) Fourth Brief—Cross-Appellant's Reply Brief:
Basic's reply to Acme's cross-appellee's brief.

On the other hand, if by stipulation or order Basic is designated appellant in the main appeal, the briefing scheme will be as follows:

- (1) First Brief—Appellant's Brief:
Basic's argument on its appeal.
- (2) Second Brief—Appellee's/Cross-Appellant's Brief:
(a) Acme's answer to Basic's appellant's brief; and
(b) Acme's arguments on its appeal.
- (3) Third Brief—Appellant's Reply/Cross-Appellee's Brief:
(a) Basic's reply to Acme's appellee's brief; and
(b) Basic's answer to Acme's cross-appellant's brief.
- (4) Fourth Brief—Cross-Appellant's Reply Brief:
Acme's reply to Basic's cross-appellee's brief.

2. *Multiparty Proceedings*

In most instances, the same guidelines applicable in a two-party, cross-appeal proceeding will apply when more than two parties appeal from the same order or judgment. Each appellant/cross-appellee will file two briefs—an appellant's brief and an appellant's reply/cross-appellee's brief. Two briefs will also be filed by each appellee/cross-appellant—an appellee's/cross-appellant's brief and a cross-appellant's reply brief. No more than four sets²⁹ of briefs will be filed in the course of the proceeding, and total briefing time will not exceed one hundred and fourteen days.³⁰

When each party involved in the multiparty, cross-appeal proceeding asserts a position in part adverse to each other party, however, adherence to the two briefs per party guideline is not practical. This is because parties aligned on the same side of the proceeding, as co-appellants/cross-appellees or as co-appellees/cross-appellants, are in effect appealing against each other and must file an extra brief each to answer their co-party's appellant's or cross-appellant's brief against them. The proceeding can go forward toward oral argument without delay, however, if the parties adhere to the four sets of briefs and one hundred and fourteen days total briefing time guidelines.

This can be best understood by reference to the hypothetical. Consider the situation if (1) Basic and Capitol cross-claim against each other, and, in addition to appealing from the judgment against them on Acme's complaint, also appeal from the district court's disposition of their cross-claims, and (2)

29. The term "set" as used in this context means one or more briefs due to be filed and served on the same date.

30. This one hundred and fourteen day period is made up of forty days for the first set of briefs (appellants' briefs), thirty days each for the second and third sets (appellees'/cross-appellants' and appellants' reply/cross-appellees' briefs) and fourteen days for the fourth set (cross-appellants' reply briefs). FED. R. APP. P. 31(a). This period will be extended up to nine days if briefs are served by mail. FED. R. APP. P. 26(c).

Acme appeals from that part of the judgment awarding Basic damages on the permissive counterclaim. The following briefing schemes demonstrate how Basic and Capitol can file three briefs each and all briefing can still be concluded in one hundred and fourteen days.

Assuming that Acme is designated appellant/cross-appellee and Basic and Capitol appellees/cross-appellants:

(1) First Set—Appellant’s Brief:

Acme’s arguments on its appeal from the judgment on Basic’s permissive counterclaim.

This brief should be filed and served within forty days after the filing of the record.

(2) Second Set—Appellee’s Brief/Cross-Appellants’ Briefs:

(a) Basic

(i) Basic’s answer to Acme’s appellant’s brief; and

(ii) Basic’s arguments on its appeal from the judgment on the complaint, its compulsory counterclaim, and the cross-claim.

(b) Capitol

Capitol’s arguments on its appeal from the judgment on the complaint, its compulsory counterclaim, and the cross-claim.

These briefs should be filed and served within thirty days of the first set of briefs.

(3) Third Set—Appellant’s Reply Brief/Cross-Appellees’ Briefs:

(a) Acme

(i) Acme’s reply to Basic’s appellee’s brief; and

(ii) Acme’s answer to Basic’s and Capitol’s cross-appellants’ briefs (complaint and compulsory counterclaims issues).

(b) Basic

Basic’s answer to Capitol’s cross-appellant’s brief (cross-claim issues).

(c) Capitol

Capitol’s answer to Basic’s cross-appellant’s brief (cross-claim issues).

These briefs should be filed and served within thirty days of the service of the second set of briefs.

(4) Fourth Set—Cross-Appellants’ Reply Briefs:

(a) Basic

Basic’s reply to Acme’s and Capitol’s cross-appellees’ briefs.

(b) Capitol

Capitol’s reply to Acme’s and Basic’s cross-appellees’ briefs.

These briefs should be filed and served within fourteen days of the service of the third set of briefs.

If by stipulation or order Basic and Capitol are designated the appellants/cross-appellees and Acme the appellee/cross-appellant:

(1) First Set—Appellants' Briefs:

Basic's and Capitol's arguments on their appeals from the judgment on the complaint, their compulsory counterclaim, and the cross-claims.

These briefs should be filed and served within forty days after the filing of the record.

(2) Second Set—Appellees' Briefs/Cross-Appellant's Brief:

(a) Acme

(i) Acme's answer to Basic's and Capitol's appellants' briefs (complaint and compulsory counterclaims issues); and

(ii) Acme's argument on its appeal from the judgment on Basic's permissive counterclaim.

(b) Basic

Basic's answer to Capitol's appellant's brief (cross-claim issues).

(c) Capitol

Capitol's answer to Basic's appellant's brief (cross-claim issues).

These briefs should be filed and served within thirty days of service of the first set of briefs.

(3) Third Set—Appellants' Reply Briefs/Cross-Appellee's Brief:

(a) Basic

(i) Basic's reply to Acme's and Capitol's appellees' briefs; and

(ii) Basic's answer to Acme's cross-appellant's brief.

(b) Capitol

Capitol's reply to Acme's and Basic's appellees' briefs.

These briefs should be filed and served within thirty days of the service of the second set of briefs.

(4) Fourth Set—Cross-Appellant's Reply Brief:

Acme's reply to Basic's cross-appellee's brief.

This brief should be filed and served within fourteen days of the service of the third set of briefs.

C. Page Limitations on Briefs

The Rules are not clear concerning the page limitations for the second and third briefs in the briefing scheme. Arguably, since the second brief is both an appellee's brief³¹ and an appellant's brief,³² it should have a limit of 100 pages.³³ And the third brief, being both an appellee's brief³⁴ and a reply brief,³⁵ is colorably entitled to a limit of 75 pages.³⁶ However, Rule 28(g),

31. FED. R. APP. P. 28(b).

32. FED. R. APP. P. 28(a).

33. FED. R. APP. P. 28(g).

34. FED. R. APP. P. 28(b).

35. FED. R. APP. P. 28(c).

36. FED. R. APP. P. 28(g).

which sets the limit on pages in briefs, refers not to "appellees" or "appellants" briefs, but rather to "principal" briefs. The use of the broader term suggests that the limitations of subsection (g) apply to the second and third briefs in a case involving a cross appeal, and that a brief exceeding those limits may only be filed with leave of court.³⁷

D. Preparation of the Appendix

Pursuant to Rules 28(h) and 30, the appellant in the main appeal is responsible for preparing and filing a single joint appendix containing those parts of the record relevant to the determination of the issues presented by the appeal and cross-appeal. The preparation and filing of a separate appendix for each of the appeals is improper.

The appendix in a case involving a cross-appeal is prepared in the same way that an appendix in a case involving a single appeal is prepared. A word should be said, however, about designating the parts of the record to be included in the joint appendix. Rule 30 sets out two methods for designating the contents of the appendix. Pursuant to one method, that contained in Rule 30(b), the parties designate the parts of the record they want in the appendix before the appellant's brief is filed, and the appendix is filed at the same time as the appellant's brief. The second method, which is set out in Rule 30(c), provides for the serving of appendix designations with the service of each brief and for the filing of the appendix twenty-one days after the service of the appellee's brief.

The use of the Rule 30(c) method of designating the contents of the appendix has obvious advantages in the cross-appeal situation.³⁸ Because cases involving cross-appeals often involve multiple parties and often present a number of issues, it is almost impossible for the parties to know before the first briefs are filed which parts of the record are germane to the issues they will argue in their briefs. The unavoidable result of requiring early designations is a much larger appendix than is really necessary. Under Rule 30(c), however, the parties have the advantage of actually having briefed their arguments before designating, and the result most often is that the parties only designate those parts of the record specifically relied upon in their briefs. Permission must be obtained by motion to prepare the appendix pursuant to Rule 30(c), but such motions are routinely granted in cases involving cross-appeals.³⁹

37. *Id.* See also 7TH CIR. R. 9(f)(2), quoted in note 28 *supra*.

38. On the advantages of using the Rule 30(c) method of designating the contents of the joint appendix, see generally Godbold, *Twenty Pages and Twenty Minutes—Effective Advocacy on Appeal*, 30 SW. L.J. 801, 806 (1976); Strubbe, *A Lawyer's Guide to the Federal Rules of Appellate Procedure—A Practical Handbook*, 3 JOHN MARSHALL J. PRAC. & PROC. 260, 327 (1970).

39. The Seventh Circuit Rules permit a short appendix to be bound, filed, and served with each brief. 7TH CIR. R. 12. The court prefers that procedure and, therefore, Rule 30(c) motions are not favored. The Seventh Circuit appendix procedure, however, has the same advantage in the cross-appeal situation as the FED. R. APP. P. 30(c) procedure, *i.e.*, the decision on what parts of the record go into the appendix can be made after the arguments in the brief are written. See also 5TH CIR. R. 13.1 (providing for "Record Excerpts") and 8TH CIR. R. 11(a)(making appendix optional).

IV. IF THE DISTRICT COURT ENTERS MULTIPLE JUDGMENTS

Up to this point, this Article has focused exclusively upon the situation in which the district court in a case involving multiple claims and/or parties enters a single final judgment and two or more of the parties appeal therefrom. The single judgment encompassing all claims is the most common disposition in such cases, provided, of course, that the court makes no Federal Rule of Civil Procedure 54(b) certification along the way.⁴⁰ There is nothing in the Federal Rules of Civil Procedure, however, prohibiting the district court from entering separate judgments disposing of the claims of each party or of each claim asserted. Accordingly, although in the hypothetical we have assumed so far that the district court has entered a single judgment covering the complaint as well as all of the counterclaims, the court conceivably could have disposed of Acme's complaint in one judgment, Basic's counterclaims in a second, and Capitol's counterclaim in a third.

For the most part, the Rules apply to appeals from multiple judgments and to appeals from a single judgment in the same way. There are, however, two notable exceptions. The first concerns extending the time to file the notice of appeal. If there is one judgment and Acme files a notice of appeal therefrom on the thirtieth day after the judgment's entry, Basic and Capitol have, pursuant to Rule 4(a)(3), an additional fourteen days to appeal from that same judgment. If, however, the district court has entered separate judgments disposing of Acme's complaint and the defendants' counterclaims, and Acme on the thirtieth day appeals from the latter judgment, do Basic and Capitol have fourteen more days to file notices of appeal from the former? Although the language of Rule 4(a)(3) does not provide an answer to this question, and the courts have not addressed it, Acme's filing a notice of appeal from one judgment arguably does not extend Basic's and Capitol's time to appeal from a separate judgment. Out of caution, therefore, counsel should not assume that Rule 4(a)(3) applies to appeals from multiple judgments.

The second exception relates to the taxation of costs on appeal. Rule 39(a) provides:

Except as otherwise provided by law, if an appeal is dismissed, costs shall be taxed against the appellant unless otherwise agreed by the parties or ordered by the court; if a judgment is affirmed, costs shall be taxed against the appellant unless otherwise ordered; if a judgment is reversed, costs shall be taxed against the appellee unless otherwise ordered; if a judgment is affirmed or reversed in part, or is vacated, costs shall be allowed only as ordered by the court.

Accordingly, if Basic successfully attacks on the appeal the summary judgment on its compulsory counterclaim, but fails to get the award on the complaint reversed, and the directed verdict on Basic's permissive counterclaim is affirmed, the judgment is affirmed in part and reversed in part, and no costs

40. See note 5 *supra*.

are taxed. If, however, the district court entered separate judgments on the complaint, the compulsory counterclaim, and the permissive counterclaim, and the parties obtain the same results on appeal, both Acme and Basic would be entitled to some costs. The identification of costs attributable to each affirmance or reversal might be difficult, but it would not be impossible in such a situation to develop bills of costs acceptable to the court. For example, Acme's bill of costs as plaintiff-appellant/cross-appellee might be developed as follows:

	<u>Number of Pages</u>	×	<u>Number of Copies</u>	=	<u>Total Pages</u>	<u>Costs Recover- able*</u>
Appellant's Brief	25	×	31 ⁴¹	=	775	none ⁴²
Cross Appellee's/ Appellant's Reply Briefs						
Cross Appellee's Brief	30	×	31	=	930	\$ 93 ⁴⁴
Reply Brief	5	×	31	=	155	none ⁴²
Appendix						
Appeal	30	×	13 ⁴⁵	=	390	none ⁴²
Cross Appeals	50	×	13	=	650	\$ 65 ⁴⁶
TOTAL RECOVERABLE COST						<u><u>\$158</u></u>

*at \$.10 per page⁴³

41. FED. R. APP. P. 39(c) permits costs only for necessary copies of briefs. Pursuant to Rule 31(b), necessary copies of briefs are twenty-five copies for filing with the court and two copies for service upon each party separately represented. By implication, two copies for the party filing the brief should also qualify as necessary copies. Local rules may affect the number of copies of briefs deemed to be necessary pursuant to Rule 39(c). D.C. CIR. R. 15 (permitting recovery of costs for up to fifty copies of briefs); 1ST CIR. R. 11(f) (requiring that only ten copies of briefs be filed with the court); 5TH CIR. R. 13.5 (requiring seven copies of briefs to be filed with the court in all cases); 7TH CIR. R. 9(g) (requiring fifteen copies of briefs to be filed with the court); 9TH CIR. R. 13(d) (requiring the filing of an original and fifteen copies of briefs); 10TH CIR. R. 11(a) (requiring the filing with the court of ten copies of briefs in all appeals); TEMP. EMER. CT. APP. R. 21(f) (requiring that seven copies of briefs be filed with the court).

42. No costs are recoverable because the court affirmed the judgment from which Acme appealed. FED. R. APP. P. 39(a).

43. This is a hypothetical figure. Rule 39(c) permits recovery at a rate not higher than that generally charged for such work in the area where the clerk's office is located. *See also* D.C. CIR. R. 15; 4TH CIR. R. 12; 5TH CIR. R. 22; 10TH CIR. R. 18.

44. This is the cost of producing only those portions of the cross-appellee's brief urging affirmance of the judgment on Acme's complaint. FED. R. APP. P. 39(a).

45. "Necessary copies" (FED. R. APP. P. 30(c)) of the appendix are ten copies for filing with the court, one copy for service upon each party separately represented, and one copy for the appellant who prepares, files and serves the appendix. FED. R. APP. P. 30(a). The number of copies of the appendix deemed to be necessary pursuant to FED. R. APP. P. 39(c) may be controlled by local rule. *See* D.C. CIR. R. 15 (permitting the recovery of costs for producing up to twenty-five copies of the appendix); 1ST CIR. R. 11(f) (requiring five copies of the appendix to be filed with the court); 3RD CIR. R. 10(1) (requiring the filing with the court of four copies of the appendix if the appendix is prepared other than by standard typographic process); 5TH CIR. R. 13.1 (requiring four copies of "Record Excerpts" to be filed with the court).

46. This is the cost of producing only that portion of the appendix relating to the cross-appeal from the judgment on Acme's complaint, which was affirmed. FED. R. APP. P. 39(a).

V. CONCLUSION

More explicit guidance from the Federal Rules would eliminate much of the confusion that presently revolves around cross-appeals. The prospects for such guidance are not promising, however, at least for the immediate future. Effective August 1, 1979, the Federal Rules of Appellate Procedure were amended, the first substantial amendments since the adoption of the Rules in 1967. The amendments did not affect the few Rules that speak to cross-appeals, nor did they add any provisions on that subject. Further amendments are not anticipated in the near future.

Attorneys, therefore, must look to the individual circuits for relief by way of local rules.⁴⁷ The following is a proposed circuit rule on cross-appeals that should, if adopted, provide a serviceable road map through the federal cross-appeals maze.

CROSS-APPEALS⁴⁸

(a) *Designation of Parties and Appeals.* In a case involving a cross-appeal, the plaintiff in the action below shall be designated the appellant/cross-appellee and the defendant below the appellee/cross-appellant for purposes of briefing, preparation of the appendix to the briefs, and oral argument, regardless of which party filed the first notice of appeal. The appeal brought by the plaintiff below shall be designated as the appeal and the appeal of the defendant below the cross-appeal. Those designations may be changed by the stipulation of the parties or by order of the court.

(b) *Briefs of the Appellant/Cross-Appellee.* The appellant/cross-appellee shall file and serve two briefs, an appellant's brief and an appellant's reply/cross-appellee's brief. The appellant/cross-appellee may file additional briefs only with leave of the court. The appellant's brief shall be served and filed within 40 days after the date on which the record is filed. The appellant's reply/cross-appellee's brief shall be served and filed within 30 days after service of the appellee's/cross-appellant's brief. The appellant's reply/cross-appellee's brief shall be a combined brief and shall have a yellow cover. Each of the briefs of the appellant/cross-appellee shall not exceed 50 pages in length, except by permission of the court.

47. The Sixth Circuit has adopted a different approach to guide counsel on cross-appeal procedures—a memorandum from the clerk's office to counsel of record in cross-appeals on the subject of briefing schedules. A copy of that memorandum appears as an Appendix to this Article. The author expresses his appreciation to the Honorable John P. Hehman, Clerk of the United States Court of Appeals for the Sixth Circuit, for his permission to reproduce that memorandum with this Article.

48. The provisions of this proposed rule are substantially consistent with the present Federal Rules of Appellate Procedure, and, therefore, counsel can use the proposed rule as a guide in cases involving cross-appeals even if that rule is not adopted by any circuit. Two inconsistencies with the Federal Rules should be noted, however. Rule 32(a) does not authorize the yellow brief cover that subsection (b) of the proposed rule specifies. *But see* 7TH CIR. R. 9(f)(1) (yellow cover required). Also, contrary to Federal Rule 30(c), the proposed rule permits use of the alternative method of designating the contents of the appendix without leave of court.

(c) *Briefs of the Appellee/Cross-Appellant.* The appellee/cross-appellant shall be entitled to file and serve two briefs, an appellee's/cross-appellant's brief and a cross-appellant's reply brief. The appellee/cross-appellant may file additional briefs only with leave of the court. The appellee's/cross-appellant's brief shall be served and filed within 30 days after service of the appellant's brief. The cross-appellant's reply brief, if any, shall be served and filed within 14 days after service of the appellant's reply/cross-appellee's brief. The appellee/cross-appellant's brief shall be a combined brief and shall have a red cover. The appellee's/cross-appellant's brief shall not exceed 50 pages in length, and the cross-appellant's reply brief shall not exceed 25 pages, except by permission of the court.

(d) *Appendix to the Briefs.* It shall be the duty of the appellant/cross-appellee to prepare and file a single joint appendix to the briefs. Unless otherwise ordered by the court, the method for designating the contents of the appendix set forth in Federal Rule of Appellate Procedure 30(c) shall be used.

Local circuit rules provide a medium for testing innovations in federal appellate procedure, and several of the recent amendments to the Federal Rules trace their origin to circuit rules.⁴⁹ Because the drafters of the recent amendments passed over the cross-appeals problem, the individual circuits should now experiment with local rules addressed to that problem. Such rules will highlight the need for clearer procedures for cross-appeals and will create a track record upon which a future, and much needed, amendment to the Federal Rules may be based.

APPENDIX

UNITED STATES COURT OF APPEALS

SIXTH CIRCUIT

JOHN P. HEHMAN
CLERK

U.S. POST OFFICE & COURTHOUSE BUILDING
CINCINNATI, OHIO 45202

TELEPHONE
(513) 684-2953
FTS 684-2953

April 8, 1980

TO: Parties in Cross-Appeals
FROM: Clerk's Office
RE: Briefing Schedules in Cross-Appeals

This memorandum serves to clarify the procedures to be followed in the Sixth Circuit regarding cross-appeals.

49. Compare FED. R. APP. P. 28(j), with 7TH CIR. R. 11 and TEMP. EMER. CT. APP. R. 21(k). Also, amended Rule 27(b) recognizes the procedure established by various circuit rules whereby the clerk of court rules upon certain procedural motions. See, e.g., D.C. CIR. R. 6(f); 2D CIR. R. 27(g),(h); 3D CIR. R. 11(5); 4TH CIR. R. 5; 5TH CIR. R. 10.1; 6TH CIR. R. 8(c); 8TH CIR. R. 2(d); 10TH CIR. R. 13; TEMP. EMER. CT. APP. R. 33(e).

In cross-appeals each of the two adversary positions is allowed to file two briefs, or a total of four briefs.

Brief #1: Unless the parties stipulate otherwise, the plaintiff in the district court should file the first brief as appellant/cross-appellee. This brief is due forty (40) days from the filing in the U.S. Court of Appeals of the record of district court proceedings.

Brief #2: The defendant in the district court (appellee/cross-appellant) shall have thirty (30) days from service of plaintiff's brief to file its own brief which shall contain the issues and arguments in the cross-appeal as well as an answer to the brief of the district court plaintiff (appellant/cross-appellee).

Brief #3: The third brief should be filed by the district court plaintiff (appellant/cross-appellee) within 30 days of service of brief #2 by the defendant (appellee/cross-appellant). This third brief is filed as a reply brief in the principal appeal and as an answer brief in the cross-appeal.

Brief #4: The fourth brief is filed by the district court defendant (appellee/cross-appellant) only as a reply brief in the cross-appeal. It should be filed within fourteen (14) days from service of Brief #3.

If the parties agree, a writ of stipulation may be filed in this Court which exchanges the role of the adversary parties in filing the foregoing briefs.

The following chart is offered as a synopsis of the briefing schedule.

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4/80

Chart of Briefing Schedule for Cross-Appeals

Brief No.	By	Relationship of Brief to Appeal #1	Relationship of Brief to Appeal #2	Color of Cover	Time Limit	Page Limit
1	appellant/cross-appellee (plaintiff in district court)	opening		Blue	40 days from the filing of the record of district court proceedings in the U.S. Court of Appeals	50
2	appellee/cross-appellant (defendant in district court)	appellee's (answering) brief [combined	opening briefs]	Red	30 days from the service of brief #1	50
3	appellant/cross-appellee (plaintiff in district court)	reply [combined	appellee's (answering) brief briefs]	Red	30 days from the service of brief #2	50
4	appellee/cross-appellant (defendant in district court)		reply	Gray	14 days from the service of brief #3	25

