

From: Thomas J. Dougherty
To: RulesCommittee Secretary
Subject: Proposed addition to the text of Rule 17(b)(3) of the Federal Rules of Appellate Procedure
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23-AP-H

To:
H. Thomas Byron III, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE, Room 7-300
Washington, D.C. 20544

Proposed addition to the text of Rule 17(b)(3) of the Federal Rules of Appellate Procedure

Dear Secretary Byron:

I request that the Committee consider the following amendment:

Add the following sentence after the extant text of Rule 17(b)(3):

"In any event, when the agency cites in a brief filed with the court a page of its agency record, it must file with the court the pages of the full section or titled portion thereof containing that cited page, as well as any pages of its record that are cross-referenced within that cited page whether part that section or not."

Rationale:

An agency can characterize in its brief pages of its administrative record without quoting them and without filing with the court the full contents and context thereof notwithstanding the fact that the agency has merely listed its record on the docket and has not put that section of the record before the court. This can be unhelpful to all.

Members of the public as well as the court itself in preparation for, or at, oral argument, and any party that has not requested that such material to be submitted as part of the record, are disadvantaged by that occurrence. It is avoidable.

The above-referenced addition to the rule would prompt an agency to file the section and cross-referenced pages of its administrative record that contain pages it references in its brief no later than when filing the brief. Each agency exercises its discretion when recording its actions. The manner

in which it apportioned its record by sections or titled portions should be sufficient for the purpose of determining what constitutes a requisite section or titled portion of the record to file for this purpose, and cross-referenced pages provide the same completeness to the court that the agency record itself referenced. The court or a party (or others such as amici by motion) could always ask for more. This amendment better balances requisite public court administrative record filing presentation with agency briefing record references to it.

Thank you for considering this request. Please let me know if you have any questions.

Yours truly,

Thomas J. Dougherty

Member of the Bar of Massachusetts and the Bar of New York

Admitted to practice before the First Circuit and other U S Courts