

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS
WASHINGTON, D. C. 20544

TO THE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE:

On April 23, 1985, the Advisory Committee on the Federal Appellate Rules met in Washington, D. C. to consider the comments of the bench and bar on the preliminary drafts of amendments to the Federal Rules of Appellate Procedure which had been submitted for public comment on September 6, 1984.

The Advisory Committee considered the statements made at the public hearings conducted in Washington, D. C. on February 1, 1985 and in San Francisco, California on February 21, 1985 as well as the written statements submitted by interested individuals and groups. The following paragraphs present a summary of those statements and the Advisory Committee's recommendation with respect to each preliminary draft.

Rule 3.1

A. Summary of Public Comment

The Association of the Bar of the City of New York, Committee on Federal Courts, suggests that the word "consent" be used in place of "stipulate" (line 1) and "agree" (line 5) in order to conform the language of the rule to 28 U.S.C. § 636(c) (1) and (c)(3). The Association also suggests a comma after "district court" (line 6) and to change "and thereafter" in line 6 to "which is thereafter reviewable."

The Board of Trustees of the Los Angeles County Bar Association and the Philadelphia Bar Association note their agreement with the preliminary draft.

B. Advisory Committee Recommendations

The Advisory Committee, after reviewing the comments of the bench and bar, recommends the following changes in the language of the preliminary draft:

line 1 - Change "stipulate" to "consent."

line 5 - Change "agree" to "consent."

This change conforms the language of the rule to the precise language of the statute.

Rule 5.1

A. Summary of Public Comment

While several bar associations approved of the preliminary draft, the majority of the commentators suggested that the seven day period for the filing of an answer in opposition was too short. One commentator also suggested that specific allowance for cross petitions be made.

B. Advisory Committee Recommendations

The Advisory Committee, after reviewing the comments of the bench and bar, recommends the following changes in the language of the preliminary draft:

line 1 - Change "The" to "An" and add two commas in lines 2 and 4.

These changes are purely stylistic.

line 11 - Change "seven" to "14."

This change is prompted by the concern of several who submitted statements that seven days was too short a period. The change to arabic numbers is purely stylistic.

line 12 - Add: "or a cross-petition."

This change, also suggested by a comment from the bar, will ensure that, once a petition is filed, other parties may suggest other reasons for further review of the case by the court of appeals.

line 26 - Change "ten" to "10."

This change is purely stylistic.

Rule 15.1

A. Summary of Public Comment

Only one comment was received on this proposed rule. The Philadelphia Bar Association recommends against adoption unless the rule is expanded to include enforcement proceedings other than those brought by the NLRB.

B. Advisory Committee Recommendations

The Advisory Committee recommends no changes in the language of the preliminary draft.

Rule 19

A. Summary of Public Comment

The Association of the Bar of the City of New York suggests the elimination of the language "or denied completely such enforcement" in the Committee Note. It suggests the following language be added:

"The simpler procedures permitted by this change already are applicable when the court's opinion denies completely the enforcement of an agency's order."

Several other bar associations and the Ninth Circuit Advisory Committee indicated their agreement with the preliminary draft or stated that they had no objection.

B. Advisory Committee Recommendations

The Advisory Committee recommends no changes in the language of the preliminary draft or of the Committee Note except stylistic changes in lines 6 and 8.

Rule 28

A. Summary of Public Comment

Several commentaries expressed approval of the preliminary draft. The Ninth Circuit Advisory Committee suggested that the new rule be limited to briefs over 3-4 pages. The Los Angeles Chapter of the Federal Bar Association suggests that the draft read:

"The reply briefs shall conform to the requirements of subdivision (a)(1)."

B. Advisory Committee Recommendations

The Advisory Committee recommends no changes in the language of the preliminary draft. The matters raised by the comments of the bench and bar were considered prior to the circulation of the preliminary draft. The Advisory Committee believes that the rule should provide the practitioner with guidance without reference to another subsection. It also believes that the requirement should extend to all reply briefs regardless of their length.

Rule 30(a)

A. Summary of Public Comment

Several commentators expressed agreement with the preliminary draft. The Joint Federal Courts Committee of the Bar Association of San Francisco suggested that the rule, and not just the Committee Note, should state that only pertinent sections of memoranda should be included.

B. Advisory Committee Recommendations

The Advisory Committee recommends no changes in the language of the preliminary draft except a stylistic change in line 15.

Rule 30(b)

A. Summary of Public Comment

This preliminary draft has been opposed by all those who did comment on it. The objections can be summarized as follows:

1. Present mechanisms for the allocation of costs provide adequate sanctions.
2. Courts already have the power to sanction attorneys acting in bad faith.
3. The preliminary draft fails to specify criteria for bad faith and fails to require use of procedural safeguards before imposition of sanctions.
4. Imposition of sanctions would be expensive and time consuming.

5. The preliminary draft amendment deals with only a small portion of the frivolous appeal problem.

6. Education of the bar would be the more appropriate approach.

B. Advisory Committee Recommendations

The Advisory Committee recommends only stylistic changes to the preliminary draft. On the basis of its study of the practice under Rule 30, as set forth in the report submitted to this Committee in July 1984, the Advisory Committee believes that the preliminary draft is an appropriate response. It recommends the following addition to the Committee Note:

"The local rule shall provide for notice and opportunity to respond before imposition of any sanction."

Rule 39(c)

A. Summary of Public Comment

The Board of Trustees of the Los Angeles County Bar Association expressed "no major opposition" to the preliminary draft. The Association of the Bar of the City of New York expressed doubt as to the proposed rule's efficacy. The Philadelphia Bar Association recommends against adoption on the ground that the rule will not reduce the overall costs of litigation. John L. Warden, Esquire of the New York Bar suggests that the rule specifically permit standard typographic printing.

B. Advisory Committee Recommendations

The Advisory Committee recommends no change in the preliminary draft.

Rule 45

A. Summary of Public Comment

Several commentators expressed approval of or no opposition to the preliminary draft. The Joint Federal Courts Committee of the Bar Association of San Francisco recommends clarification to assure that the clerk of court enter a record of all papers filed in the clerk's office and that these papers remain available to the public.

B. Advisory Committee Recommendations

The Advisory Committee recommends no changes in the preliminary draft except a stylistic change in line 24. The suggestion set forth above is not within the scope of the rule, and, in the opinion of the Advisory Committee, unnecessary.

Stylistic Changes

The Advisory Committee was requested to remove gender-specific language from all appellate rules. Amendments to many rules were required and the changes requested are included.

Respectfully submitted.

Pierce Lively
*Chairman, Advisory Committee on the
Federal Appellate Rules*

**PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF APPELLATE PROCEDURE***

Rule 3. Appeal as of Right - How Taken

* * * * *

1 (d) Service of the Notice of Appeal. The clerk of the district court
2 shall serve notice of the filing of a notice of appeal by mailing a
3 copy thereof to counsel of record of each party other than the
4 appellant, or, if a party is not represented by counsel, to the party
5 at ~~his~~ last known address of that party; and the clerk shall transmit
6 forthwith a copy of the notice of appeal and of the docket entries to
7 the clerk of the court of appeals named in the notice. When an
8 appeal is taken by a defendant in a criminal case, the clerk shall also
9 serve a copy of the notice of appeal upon ~~him~~ the defendant, either
10 by personal service or by mail addressed to ~~him~~ the defendant. The
11 clerk shall note on each copy served the date on which the notice of
12 appeal was filed. Failure of the clerk to serve notice shall not
13 affect the validity of the appeal. Service shall be sufficient
14 notwithstanding the death of a party or ~~his~~ the party's counsel. The

*New matter is underlined; matter to be omitted is lined through.

FEDERAL RULES OF APPELLATE PROCEDURE

15 clerk shall note in the docket the names of the parties to whom he
16 the clerk mails copies, with the date of mailing.

* * * * *

COMMITTEE NOTE

The amendments to Rule 3(d) are technical. No substantive change is intended.

**Rule 3.1. Appeals from Judgments Entered by
Magistrates in Civil Cases**

1 When the parties consent to a trial before a magistrate
2 pursuant to 28 U.S.C. § 636(c) (1), an appeal from a judgment entered
3 upon the direction of a magistrate shall be heard by the court of
4 appeals pursuant to 28 U.S.C. § 636(c) (3), unless the parties, in
5 accordance with 28 U.S.C. § 636(c) (4), consent to an appeal on the
6 record to a judge of the district court and thereafter, by petition
7 only, to the court of appeals. Appeals to the court of appeals
8 pursuant to 28 U.S.C. § 636 (c) (3) shall be taken in identical fashion
9 as appeals from other judgments of the district court.

COMMITTEE NOTE

Under the governing statute, 28 U.S.C. § 636(c) (3), the judgment of a magistrate becomes a judgment of the district court and is appealable to the court of appeals "as an appeal from any other judgment of a district court." This provision is designed to make this point explicit for the convenience of practitioners.

Rule 5.1. Appeals by Permission Under 28 U.S.C. . 636(c) (5)

1 (a) Petition for Leave to Appeal; Answer or Cross Petition.
2 An appeal from a district court judgment, entered after an
3 appeal pursuant to 28 U.S.C. . 636(c) (4) to a judge of the district
4 court from a judgment entered upon direction of a magistrate in a
5 civil case, may be sought by filing a petition for leave to appeal. An
6 appeal on petition for leave to appeal is not a matter of right, but
7 its allowance is a matter of sound judicial discretion. The petition
8 shall be filed with the clerk of the court of appeals within the time
9 provided by Rule 4(a) for filing a notice of appeal, with proof of
10 service on all parties to the action in the district court. A notice of
11 appeal need not be filed. Within 14 days after service of the
12 petition, a party may file an answer in opposition or a cross petition.

13 (b) Content of Petition; Answer. The petition for leave to
14 appeal shall contain a statement of the facts necessary to an
15 understanding of the questions to be presented by the appeal; a
16 statement of those questions and of the relief sought; a statement of
17 the reasons why in the opinion of the petitioner the appeal should be
18 allowed; and a copy of the order, decree or judgment complained of
19 and any opinion or memorandum relating thereto. The petition and
20 answer shall be submitted to a panel of judges of the court of
21 appeals without oral argument unless otherwise ordered.

FEDERAL RULES OF APPELLATE PROCEDURE

22 (c) Form of Papers; Number of Copies. All papers may be
23 typewritten. Three copies shall be filed with the original, but the
24 court may require that additional copies be furnished.

25 (d) Allowance of the Appeal; Fees; Cost Bond; Filing of
26 Record. Within 10 days after the entry of an order granting the
27 appeal, the appellant shall (1) pay to the clerk of the district court
28 the fees established by statute and the docket fee prescribed by the
29 Judicial Conference of the United States and (2) file a bond for costs
30 if required pursuant to Rule 7. The clerk of the district court shall
31 notify the clerk of the court of appeals of the payment of the fees.
32 Upon receipt of such notice, the clerk of the court of appeals shall
33 enter the appeal upon the docket. The record shall be transmitted
34 and filed in accordance with Rules 11 and 12(b).

COMMITTEE NOTE

When the initial appeal of a magistrate's decision is taken to the district court, the statute provides for a second discretionary appeal to the court of appeals. This rule provides the procedure for taking such an appeal.

Rule 8. Stay or Injunction Pending Appeal

1

* * * * *

2

3

4

(b) Stay May Be Conditioned Upon Giving of Bond;
Proceedings Against Sureties. Relief available in the court of
appeals under this rule may be conditioned upon the filing of a bond

5 or other appropriate security in the district court. If security is
6 given in the form of a bond or stipulation or other undertaking with
7 one or more sureties, each surety submits ~~himself~~ to the jurisdiction
8 of the district court and irrevocably appoints the clerk of the
9 district court as ~~his~~ the surety's agent upon whom any papers
10 affecting ~~his~~ the surety's liability on the bond or undertaking may be
11 served. ~~His~~ A surety's liability may be enforced on motion in the
12 district court without the necessity of an independent action. The
13 motion and such notice of the motion as the district court prescribes
14 may be served on the clerk of the district court, who shall forthwith
15 mail copies to the sureties if their addresses are known.

* * * * *

COMMITTEE NOTE

The amendments to Rule 8(b) are technical. No substantive change is intended.

Rule 10. The Record on Appeal

* * * * *

1
2 (b) The Transcript of Proceedings; Duty of Appellant to
3 Order; Notice to Appellee if Partial Transcript is Ordered.

FEDERAL RULES OF APPELLATE PROCEDURE

4 (1) Within 10 days after filing the notice of appeal the
5 appellant shall order from the reporter a transcript of such parts of
6 the proceedings not already on file as ~~he~~ the appellant deems
7 necessary, subject to local rules of the courts of appeals. The order
8 shall be in writing and within the same period a copy shall be filed
9 with the clerk of the district court. If funding is to come from the
1.0 United States under the Criminal Justice Act, the order shall so
11 state. If no such parts of the proceedings are to be ordered, within
12 the same period the appellant shall file a certificate to that effect.

13 (2) If the appellant intends to urge on appeal that a finding or
14 conclusion is unsupported by the evidence or is contrary to the
15 evidence, ~~he~~ the appellant shall include in the record a transcript of
16 all evidence relevant to such finding or conclusion.

17 (3) Unless the entire transcript is to be included, the
18 appellant shall, within the 10 days time provided in (b)(1) of this
19 Rule 10, file a statement of the issues ~~he~~ the appellant intends to
20 present on the appeal and shall serve on the appellee a copy of the
21 order or certificate and of the statement. If the appellee deems a
22 transcript or other parts of the proceedings to be necessary, ~~he~~ the
23 appellee shall, within 10 days after the service of the order or
24 certificate and the statement of the appellant, file and serve on the
25 appellant a designation of additional parts to be included. Unless
26 within 10 days after service of such designation the appellant has

27 ordered such parts, and has so notified the appellee, the appellee
28 may within the following 10 days either order the parts or move in
29 the district court for an order requiring the appellant to do so.

30 (4) At the time of ordering, a party must make satisfactory
31 arrangements with the reporter for payment of the cost of the
32 transcript.

33 (c) Statement on the Evidence or Proceedings When no
34 Report Was Made or When the Transcript is Unavailable. If no
35 report of the evidence or proceedings at a hearing or trial was made,
36 or if a transcript is unavailable, the appellant may prepare a
37 statement of the evidence or proceedings from the best available
38 means, including ~~his~~ the appellant's recollection. The statement
39 shall be served on the appellee, who may serve objections or
40 proposed amendments thereto with 10 days after service. Thereupon
41 the statement and any objections or proposed amendments shall be
42 submitted to the district court for settlement and approval and as
43 settled and approved shall be included by the clerk of the district
44 court in the record on appeal.

* * * * *

COMMITTEE NOTE

The amendments to Rules 10(b) and (c) are technical. No substantive change is intended.

Rule 11. Transmission of the Record

* * * * *

1
2 (b) Duty of Reporter to Prepare and File Transcript; Notice
3 to Court of Appeals; Duty of Clerk to Transmit the Record. Upon
4 receipt of an order for a transcript, the reporter shall acknowledge
5 at the foot of the order the fact that ~~he~~ the reporter has received it
6 and the date on which ~~he~~ the reporter expects to have the transcript
7 completed and shall transmit the order, so endorsed, to the clerk of
8 the court of appeals. If the transcript cannot be completed within
9 30 days of receipt of the order the reporter shall request an
10 extension of time from the clerk of the court of appeals and the
11 action of the clerk of the court of appeals shall be entered on the
12 docket and the parties notified. In the event of the failure of the
13 reporter to file the transcript within the time allowed, the clerk of
14 the court of appeals shall notify the district judge and take such
15 other steps as may be directed by the court of appeals. Upon
16 completion of the transcript the reporter shall file it with the clerk
17 of the district court and shall notify the clerk of the court of
18 appeals that ~~he~~ the reporter has done so.

19 When the record is complete for purposes of the appeal, the
20 clerk of the district court shall transmit it forthwith to the clerk of
21 the court of appeals. The clerk of the district court shall number
22 the documents comprising the record and shall transmit with the

23 record a list of documents correspondingly numbered and identified
24 with reasonable definiteness. Documents of unusual bulk or weight,
25 physical exhibits other than documents, and such other parts of the
26 record as the court of appeals may designate by local rule, shall not
27 be transmitted by the clerk unless ~~he~~ the clerk is directed to do so
28 by a party or by the clerk of the court of appeals. A party must
29 make advance arrangements with the clerks for the transportation
30 and receipt of exhibits of unusual bulk or weight.

* * * * *

COMMITTEE NOTE

The amendments to Rule 11(b) are technical. No substantive change is intended.

Rule 12. Docketing the Appeal; Filing of the Record

1 (a) Docketing the Appeal. Upon receipt of the copy of the
2 notice of appeal and of the docket entries, transmitted by the clerk
3 of the district court pursuant to Rule 3(d), the clerk of the court of
4 appeals shall thereupon enter the appeal upon the docket. An appeal
5 shall be docketed under the title given to the action in the district
6 court, with the appellant identified as such, but if such title does not
7 contain the name of the appellant, ~~his~~ the appellant's name,
8 identified as appellant, shall be added to the title.

* * * * *

COMMITTEE NOTE

The amendment to Rule 12(a) is technical. No substantive change is intended.

Rule 15.L. Briefs and Oral Argument in National Labor Relations Board Proceedings

1 Each party adverse to the National Labor Relations Board in
2 an enforcement or a review proceeding shall proceed first on
3 briefing and at oral argument unless the court orders otherwise.

COMMITTEE NOTE

This rule simply confirms the existing practice in most circuits.

Rule 19. Settlement of Judgments Enforcing Orders

1 When an opinion of the court is filed directing the entry of a
2 judgment enforcing ~~in whole or~~ in part the order of an agency, the
3 agency shall within 14 days thereafter serve upon the respondent and
4 file with the clerk a proposed judgment in conformity with the
5 opinion. If the respondent objects to the proposed judgment as not
6 in conformity with the opinion, ~~he~~ the respondent shall within 7 days
7 thereafter serve upon the agency and file with the clerk a proposed
8 judgment which ~~he~~ the respondent deems to be in conformity with
9 the opinion. The court will thereupon settle the judgment and direct
10 its entry without further hearing or argument.

COMMITTEE NOTE

The deletion of the words "in whole or" is designed to eliminate delay in the issuance of a judgment when the court of appeals has either enforced completely the order of an agency or denied completely such enforcement. In such a clear-cut situation, it serves no useful purpose to delay the issuance of the judgment until a proposed judgment is submitted by the agency and reviewed by the respondent. This change conforms the Rule to the existing practice in most circuits. Other amendments are technical and no substantive change is intended.

Rule 23. Custody of Prisoners in Habeas Corpus Proceedings

1

* * * * *

2

3

4

5

6

7

8

9

10

(b) Detention or Release of Prisoner Pending Review of Decision Failing to Release. Pending review of a decision failing or refusing to release a prisoner in such a proceeding, the prisoner may be detained in the custody from which release is sought, or in other appropriate custody, or may be enlarged upon ~~his~~ the prisoner's recognizance, with or without surety, as may appear fitting to the court or justice or judge rendering the decision, or to the court of appeals or to the Supreme Court, or to a judge or justice of either court.

11

12

13

14

15

16

17

(c) Release of Prisoner Pending Review of Decision Ordering Release. Pending review of a decision ordering the release of a prisoner in such a proceeding, the prisoner shall be enlarged upon ~~his~~ the prisoner's recognizance, with or without surety, unless the court or justice or judge rendering the decision, or the court of appeals or the Supreme Court, or a judge or justice of either court shall otherwise order.

* * * * *

COMMITTEE NOTE

The amendments to Rules 23(b) and (c) are technical. No substantive change is intended.

Rule 24. Proceedings in Forma Pauperis

1 (a) Leave to Proceed on Appeal in Forma Pauperis from
2 District Court to Court of Appeals. A party to an action in a
3 district court who desires to proceed on appeal in forma pauperis
4 shall file in the district court a motion for leave so to proceed,
5 together with an affidavit, showing, in the detail prescribed by Form
6 4 of the Appendix of Forms, ~~his~~ the party's inability to pay fees and
7 costs or to give security therefor, ~~his~~ the party's belief that he that
8 party is entitled to redress, and a statement of the issues which he
9 that party intends to present on appeal. If the motion is granted,
10 the party may proceed without further application to the court of
11 appeals and without prepayment of fees or costs in either court or
12 the giving of security therefor. If the motion is denied, the district
13 court shall state in writing the reasons for the denial.

14 Notwithstanding the provisions of the preceding paragraph, a
15 party who has been permitted to proceed in an action in the district
16 court in forma pauperis, or who has been permitted to proceed there
17 as one who is financially unable to obtain adequate defense in a
18 criminal case, may proceed on appeal in forma pauperis without
19 further authorization unless, before or after the notice of appeal is
20 filed, the district court shall certify that the appeal is not taken in

21 good faith or shall find that the party is otherwise not entitled so to
22 proceed, in which event the district court shall state in writing the
23 reasons for such certification or finding.

24 If a motion for leave to proceed on appeal in forma pauperis
25 is denied by the district court, or if the district court shall certify
26 that the appeal is not taken in good faith or shall find that the party
27 is otherwise not entitled to proceed in forma pauperis, the clerk
28 shall forthwith serve notice of such action. A motion for leave so to
29 proceed may be filed in the court of appeals within 30 days after
30 service of notice of the action of the district court. The motion
31 shall be accompanied by a copy of the affidavit filed in the district
32 court, or by the affidavit prescribed by the first paragraph of this
33 subdivision if no affidavit has been filed in the district court, and by
34 a copy of the statement of reasons given by the district court for its
35 action.

* * * * *

COMMITTEE NOTE

The amendments to Rule 24(a) are technical. No substantive change is intended.

Rule 25. Filing and Service

1 (a) Filing. Papers required or permitted to be filed in a court
2 of appeals shall be filed with the clerk. Filing may be accomplished
3 by mail addressed to the clerk, but filing shall not be timely unless
4 the papers are received by the clerk within the time fixed for filing,
5 except that briefs and appendices shall be deemed filed on the day
6 of mailing if the most expeditious form of delivery by mail,
7 excepting special delivery, is utilized. If a motion requests relief
8 which may be granted by a single judge, the judge may permit the
9 motion to be filed with ~~him~~ the judge, in which event ~~he~~ the judge
10 shall note thereon the date of filing and shall thereafter transmit it
11 to the clerk.

12 (b) Service of all Papers Required. Copies of all papers filed
13 by any party and not required by these rules to be served by the
14 clerk shall, at or before the time of filing, be served by a party or
15 person acting for ~~him~~ that party on all other parties to the appeal or
16 review. Service on a party represented by counsel shall be made on
17 counsel.

* * * * *

COMMITTEE NOTE

The amendments to Rules 25(a) and (b) are technical. No substantive change is intended.

Rule 26. Computation and Extension of Time

1 (a) Computation of Time. In computing any period of time
2 prescribed by these rules, by an order of court, or by any applicable
3 statute, the day of the act, event, or default from which the
4 designated period of time begins to run shall not be included. The
5 last day of the period shall be included, unless it is a Saturday, a
6 Sunday, or a legal holiday, in which event the period extends until
7 the end of the next day which is not a Saturday, a Sunday, or a legal
8 holiday. When the period of time prescribed or allowed is less than 7
9 days, intermediate Saturdays, Sundays, and legal holidays shall be
10 excluded in the computation. As used in this rule "legal holiday"
11 includes New Year's Day, Birthday of Martin Luther King, Jr.,
12 Washington's Birthday, Memorial Day, Independence Day, Labor Day,
13 Columbus Day, Veterans Day, Thanksgiving Day, Christmas Day, and
14 any other day appointed as a holiday by the President or the
15 Congress of the United States. It shall also include a day appointed
16 as a holiday by the state wherein the district court which rendered
17 the judgment or order which is or may be appealed from is situated,
18 or by the state wherein the principal office of the clerk of the court
19 of appeals in which the appeal is pending is located.

* * * * *

FEDERAL RULES OF APPELLATE PROCEDURE

20 (c) Additional Time after Service by Mail. Whenever a party
21 is required or permitted to do an act within a prescribed period after
22 service of a paper upon ~~him~~ that party and the paper is served by
23 mail, 3 days shall be added to the prescribed period.

COMMITTEE NOTE

The Birthday of Martin Luther King, Jr. is added to the list of national holidays in Rule 26(a). The amendment to Rule 26(c) is technical. No substantive change is intended.

Rule 28. Briefs

1

* * * * *

2

(c) Reply Brief. The appellant may file a brief in reply to the
3 brief of the appellee, and if the appellee has cross-appealed, the
4 appellee may file a brief in reply to the response of the appellant to
5 the issues presented by the cross appeal. No further briefs may be
6 filed except with leave of court. All reply briefs shall contain a
7 table of contents, with page references, and a table of cases
8 (alphabetically arranged), statutes and other authorities cited, with
9 references to the pages of the reply brief where they are cited.

10

* * * * *

11

(j) Citation of Supplemental Authorities. When pertinent and
12 significant authorities come to the attention of a party after ~~his~~ the

13 party's brief has been filed, or after oral argument but before
14 decision, a party may promptly advise the clerk of the court, by
15 letter, with a copy to all counsel, setting forth the citations. There
16 shall be a reference either to the page of the brief or to a point
17 argued orally to which the citations pertain, but the letter shall
18 without argument state the reasons for the supplemental citations.
19 Any response shall be made promptly and shall be similarly limited.

COMMITTEE NOTE

While Rule 28(g) can be read as requiring that tables of authorities be included in a reply brief, such tables are often not included. Their absence impedes efficient use of the reply brief to ascertain the appellant's response to a particular argument of the appellee or to the appellee's use of a particular authority. The amendment to Rule 28(c) is intended to make it clear that such tables are required in reply briefs.

The amendment to Rule 28(j) is technical. No substantive change is intended.

Rule 30. Appendix to the Briefs

1 (a) Duty of Appellant To Prepare and File; Content of
2 Appendix; Time for Filing; Number of Copies. The appellant shall
3 prepare and file an appendix to the briefs which shall contain:
4 (1) the relevant docket entries in the proceeding below; (2) any
5 relevant portions of the pleadings, charge, findings or opinion; (3)
6 the judgment, order or decision in question; and (4) any other parts
7 of the record to which the parties wish to direct the particular
8 attention of the court. Except where they have independent
9 relevance, memoranda of law in the district court should not be

10 included in the appendix. The fact that parts of the record are not
11 included in the appendix shall not prevent the parties or the court
12 from relying on such parts.

13 Unless filing is to be deferred pursuant to the provisions of
14 subdivision (c) of this rule, the appellant shall serve and file the
15 appendix with ~~his~~ the brief. Ten copies of the appendix shall be filed
16 with the clerk, and one copy shall be served on counsel for each
17 party separately represented, unless the court shall by rule or order
18 direct the filing or service of a lesser number.

19 (b) Determination of Contents of Appendix; Cost of
20 Producing. The parties are encouraged to agree as to the contents
21 of the appendix. In the absence of agreement, the appellant shall,
22 not later than 10 days after the date on which the record is filed,
23 serve on the appellee a designation of the parts of the record which
24 he the appellant intends to include in the appendix and a statement
25 of the issues which ~~he~~ the appellant intends to present for review. If
26 the appellee deems it necessary to direct the particular attention of
27 the court to parts of the record not designated by the appellant, ~~he~~
28 the appellee shall, within 10 days after receipt of the designation,
29 serve upon the appellant a designation of those parts. The appellant
30 shall include in the appendix the parts thus designated. In
31 designating parts of the record for inclusion in the appendix, the
32 parties shall have regard for the fact that the entire record is

33 always available to the court for reference and examination and
34 shall not engage in unnecessary designation.

35 Unless the parties otherwise agree, the cost of producing the
36 appendix shall initially be paid by the appellant, but if the appellant
37 considers that parts of the record designated by the appellee for
38 inclusion are unnecessary for the determination of the issues
39 presented ~~he~~ the appellant may so advise the appellee and the
40 appellee shall advance the cost of including such parts. The cost of
41 producing the appendix shall be taxed as costs in the case, but if
42 either party shall cause matters to be included in the appendix
43 unnecessarily the court may impose the cost of producing such parts
44 on the party. Each circuit shall provide by local rule for the
45 imposition of sanctions against attorneys who unreasonably and
46 vexatiously increase the costs of litigation through the inclusion of
47 unnecessary material in the appendix.

48 (c) Alternative Method of Designating Contents of the
49 Appendix; How References to the Record May be Made in the Briefs
50 When Alternative Method is Used. If the court shall so provide by
51 rule for classes of cases or by order in specific cases, preparation of
52 the appendix may be deferred until after the briefs have been filed,
53 and the appendix may be filed 21 days after service of the brief of
54 the appellee. If the preparation and filing of the appendix is thus
55 deferred, the provisions of subdivision (b) of this Rule 30 shall apply,

20

FEDERAL RULES OF APPELLATE PROCEDURE

56 except that the designations referred to therein shall be made by
57 each party at the time ~~his~~ each brief is served, and a statement of
58 the issues presented shall be unnecessary.

59 If the deferred appendix authorized by this subdivision is
60 employed, references in the briefs to the record may be to the pages
61 of the parts of the record involved, in which event the original
62 paging of each part of the record shall be indicated in the appendix
63 by placing in brackets the number of each page at the place in the
64 appendix where that page begins. Or if a party desires to refer in
65 ~~his~~ a brief directly to pages of the appendix, ~~he~~ that party may serve
66 and file typewritten or page proof copies of ~~his~~ the brief within the
67 time required by Rule 31(a), with appropriate references to the pages
68 of the parts of the record involved. In that event, within 14 days
69 after the appendix is filed ~~he~~ the party shall serve and file copies of
70 the brief in the form prescribed by Rule 32(a) containing references
71 to the pages of the appendix in place of or in addition to the initial
72 references to the pages of the parts of the record involved. No
73 other changes may be made in the brief as initially served and filed,
74 except that typographical errors may be corrected.

* * * * *

COMMITTEE NOTE

Subdivision (a). During its study of the separate appendix [see Report of the Advisory Committee on the Federal Appellate Rules on the Operation of Rule 30, FRD (1985)], the Advisory Committee found that this document was frequently encumbered with memoranda submitted to

the trial court. United States v. Noall, 587 F.2d 123, 125 n. 1 (2nd Cir. 1978). See generally Drewett v. Aetna Cas. & Sur. Co., 539 F.2d 496, 500 (5th Cir. 1976); Volkswagenwerk Aktiengesellschaft v. Church, 413 F.2d 1126, 1128 (9th Cir. 1969). Inclusion of such material makes the appendix more bulky and therefore less useful to the appellate panel. It also can increase significantly the costs of litigation.

There are occasions when such trial court memoranda have independent relevance in the appellate litigation. For instance, there may be a dispute as to whether a particular point was raised or whether a concession was made in the district court. In such circumstances, it is appropriate to include pertinent sections of such memoranda in the appendix.

Subdivision (b). The amendment to subdivision (b) is designed to require the circuits, by local rule, to establish a procedural mechanism for the imposition of sanctions against those attorneys who conduct appellate litigation in bad faith. Both 28 U.S.C. § 1927 and the inherent power of the court authorize such sanctions. See Brennan v. Local 357, International Brotherhood of Teamsters, 709 F.2d 611 (9th Cir. 1983). See generally Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980). While considerations of uniformity are important and doubtless will be taken into account by the judges of the respective circuits, the Advisory Committee believes that, at this time, the circuits need the flexibility to tailor their approach to the conditions of local practice. The local rule shall provide for notice and opportunity to respond before the imposition of any sanction.

Technical amendments also are made to subdivisions (a), (b) and (c) which are not intended to be substantive changes.

Rule 31. Filing and Service of Briefs

1 (a) Time for Serving and Filing Briefs. The appellant shall
2 serve and file ~~his~~ a brief within 40 days after the date on which the
3 record is filed. The appellee shall serve and file ~~his~~ a brief within 30
4 days after service of the brief of the appellant. The appellant may
5 serve and file a reply brief within 14 days after service of the brief
6 of the appellee, but, except for good cause shown, a reply brief must
7 be filed at least 3 days before argument. If a court of appeals is
8 prepared to consider cases on the merits promptly after briefs are

FEDERAL RULES OF APPELLATE PROCEDURE

9 filed, and its practice is to do so, it may shorten the periods
10 prescribed above for serving and filing briefs, either by rule for all
11 cases or for classes of cases, or by order for specific cases.

12

* * * * *

13 (c) Consequence of Failure to File Briefs. If an appellant
14 fails to file ~~his~~ a brief within the time provided by this rule, or
15 within the time as extended, an appellee may move for dismissal of
16 the appeal. If an appellee fails to file ~~his~~ a brief, ~~he~~ the appellee
17 will not be heard at oral argument except by permission of the
18 court.

COMMITTEE NOTE

The amendments to Rules 31(a) and (c) are technical. No substantive change is intended.

Rule 34. Oral Argument

1 (a) In General; Local Rule. Oral argument shall be allowed in
2 all cases unless pursuant to local rule a panel of three judges, after
3 examination of the briefs and record, shall be unanimously of the
4 opinion that oral argument is not needed. Any such local rule shall
5 provide any party with an opportunity to file a statement setting
6 forth the reasons why, ~~in his opinion,~~ oral argument should be
7 heard. A general statement of the criteria employed in the
8 administration of such local rule shall be published in or with the

9 rule and such criteria shall conform substantially to the following
10 minimum standard:

11 Oral Argument will be allowed unless

12 (i) the appeal is frivolous; or

13 (2) the dispositive issue or set of issues has been
14 recently authoritatively decided; or

15 (3) the facts and legal arguments are adequately
16 presented in the briefs and record and the decisional
17 process would not be significantly aided by oral
18 argument.

19 * * * * *

20 (e) Non-Appearance of Parties. If the appellee fails to
21 appear to present argument, the court will hear argument on behalf
22 of the appellant, if present. If the appellant fails to appear, the
23 court may hear argument on behalf of the appellee, if his counsel is
24 present. If neither party appears, the case will be decided on the
25 briefs unless the court shall otherwise order.

* * * * *

COMMITTEE NOTE

The amendments to Rules 34(a) and (e) are technical. No substantive change is intended.

Rule 39. Costs

1

* * * * *

2

(c) Costs of Briefs, Appendices, and Copies of Records.

3

~~Unless otherwise provided by local rule, the cost of printing, or~~

4

~~otherwise producing necessary copies of briefs, appendices, and~~

5

~~copies of records authorized by Rule 30(f) shall be taxable in the~~

6

~~court of appeals at rates not higher than those generally charged for~~

7

~~such work in the area where the clerk's office is located. By local~~

8

~~rule the court of appeals shall fix the maximum rate at which the~~

9

~~cost of printing or otherwise producing necessary copies of briefs,~~

10

~~appendices, and copies of records authorized by Rule 30(f) shall be~~

11

~~taxable. Such rate shall not be higher than that generally charged~~

12

~~for such work in the area where the clerk's office is located and~~

13

~~shall encourage the use of economical methods of printing and~~

14

~~copying.~~

15

(d) Bill of Costs; Objections; Costs to be Inserted in Mandate

16

or Added Later. A party who desires such costs to be taxed shall

17

state them in an itemized and verified bill of costs which ~~he~~ the

18

party shall file with the clerk, with proof of service, within 14 days

19

after the entry of judgment. Objections to the bill of costs must be

20

filed within 10 days of service on the party against whom costs are

21

to be taxed unless the time is extended by the court. The clerk shall

22 prepare and certify an itemized statement of costs taxed in the
23 court of appeals for insertion in the mandate, but the issuance of the
24 mandate shall not be delayed for taxation of costs and if the
25 mandate has been issued before final determination of costs, the
26 statement, or any amendment thereof, shall be added to the
27 mandate upon request by the clerk of the court of appeals to the
28 clerk of the district court.

* * * * *

COMMITTEE NOTE

The amendment to subdivision (c) is intended to increase the degree of control exercised by the courts of appeals over rates for printing and copying recoverable as costs. It further requires the courts of appeals to encourage cost-consciousness by requiring that, in fixing the rate, the court consider the most economical methods of printing and copying.

The amendment to subdivision (d) is technical. No substantive change is intended.

Rule 43. Substitution of Parties

1 (a) Death of a Party. If a party dies after a notice of appeal
2 is filed or while a proceeding is otherwise pending in the court of
3 appeals, the personal representative of the deceased party may be
4 substituted as a party on motion filed by the representative or by
5 any party with the clerk of the court of appeals. The motion of a
6 party shall be served upon the representative in accordance with the
7 provisions of Rule 25. If the deceased party has no representative,

8 any party may suggest the death on the record and proceedings shall
9 then be had as the court of appeals may direct. If a party against
10 whom an appeal may be taken dies after entry of a judgment or
11 order in the district court but before a notice of appeal is filed, an
12 appellant may proceed as if death had not occurred. After the
13 notice of appeal is filed substitution shall be effected in the court of
14 appeals in accordance with this subdivision. If a party entitled to
15 appeal shall die before filing a notice of appeal, the notice of appeal
16 may be filed by ~~his~~ that party's personal representative, or, if he has
17 there is no personal representative by his that party's attorney of
18 record within the time prescribed by these rules. After the notice
19 of appeal is filed substitution shall be effected in the court of
20 appeals in accordance with this subdivision.

21

* * * * *

22

(c) Public Officers; Death or Separation from Office.

23

24

25

26

27

28

29

30

31

32

(1) When a public officer is a party to an appeal or other proceeding in the court of appeals in ~~his~~ an official capacity and during its pendency dies, resigns or otherwise ceases to hold office, the action does not abate and ~~his~~ the public officer's successor is automatically substituted as a party. Proceedings following the substitution shall be in the name of the substituted party, but any misnomer not affecting the substantial rights of the parties shall be disregarded. An order of substitution may be entered at any time, but the omission to enter such an order shall not affect the substitution.

33 (2) When a public officer is a party to an appeal or other
34 proceeding in ~~his~~ an official capacity ~~he~~ that public officer may be
35 described as a party by ~~his~~ the public officer's official title rather
36 than by name; but the court may require ~~his~~ the public officer's
37 name to be added.

COMMITTEE NOTE

The amendments to Rules 43(a) and (c) are technical. No substantive change is intended.

Rule 45. Duties of Clerks

1 (a) General Provisions. The clerk of a court of appeals shall
2 take the oath and give the bond required by law. Neither the clerk
3 nor any deputy clerk shall practice as an attorney or counselor in
4 any court while ~~he continues~~ continuing in office. The court of
5 appeals shall be deemed always open for the purpose of filing any
6 proper paper, of issuing and returning process and of making motions
7 and orders. The office of the clerk with the clerk or a deputy in
8 attendance shall be open during business hours on all days except
9 Saturdays, Sundays, and legal holidays, but a court may provide by
10 local rule or order that the office of its clerk shall be open for
11 specified hours on Saturdays or on particular legal holidays other
12 than New Years Day, Birthday of Martin Luther King, Jr.,
13 Washington's Birthday, Memorial Day, Independence Day, Labor

14 Day, Columbus Day, Veterans Day, Thanksgiving Day, and Christmas
15 Day.

16 (b) The Docket; Calendar; Other Records Required. The
17 clerk shall keep a book, known as the docket, in such form and style
18 as may be prescribed by the Director of the Administrative Office
19 of the United States Courts with the approval of the Judicial
20 Conference of the United States, and shall enter therein each case.
21 Cases shall be assigned consecutive file numbers. The file number
22 of each case shall be noted on the folio of the docket whereon the
23 first entry is made. All papers filed with the clerk and all process,
24 orders and judgment shall be entered chronologically in the docket
25 on the folio assigned to the case. Entries shall be brief but shall
26 show the nature of each paper filed or judgment or order entered.
27 The entry of an order or judgment shall show the date the entry is
28 made. The clerk shall keep a suitable index of cases contained in
29 the docket.

30 The clerk shall maintain a docket in such form as may be
31 prescribed by the Director of the Administrative Office of the
32 United States Courts. The clerk shall enter a record of all papers
33 filed with the clerk and all process, orders and judgments. An index
34 of cases contained in the docket shall be maintained as prescribed by
35 the Director of the Administrative Office of the United States
36 Courts.

37 The clerk shall prepare, under the direction of the court, a
38 *calendar of cases awaiting argument. In placing cases on the*
39 *calendar for argument, he the clerk shall give preference to appeals*
40 *in criminal cases and to appeals and other proceedings entitled to*
41 *preference by law.*

42 The clerk shall keep such other books and records as may be
43 required from time to time by the Director of the Administrative
44 Office of the United States Courts *with the approval of the Judicial*
45 Conference of the United States, or as may be required by the court.

46 * * * * *

47 (d) Custody of Records and Papers. The clerk shall have
48 custody of the records and papers of the court. ~~He~~ The clerk shall
49 not permit any original record or paper to be taken from ~~his~~ the
50 clerk's custody except as authorized by the orders or instructions of
51 *the court. Original papers transmitted as the record on appeal or*
52 review shall upon disposition of the case be returned to the court or
53 agency from which they were received. The clerk shall preserve
54 copies of briefs and appendices and other printed papers filed.

COMMITTEE NOTE

The amendment to Rule 45(b) permits the courts of appeals to maintain computerized dockets. The Committee believes that the

Administrative Office of the United States Courts ought to have maximum flexibility in prescribing the format of this docket in order to ensure a smooth transition from manual to automated systems and subsequent adaptation to technological improvements.

The amendments to Rules 45(a) and (d) are technical. No substantive change is intended. The Birthday of Martin Luther King, Jr. has been added to the list of national holidays.

Rule 46. Attorneys

1 (a) Admission to the Bar of a Court of Appeals; Eligibility;
2 Procedure for Admission. An attorney who has been admitted to
3 practice before the Supreme Court of the United States, or the
4 highest court of a state, or another United States court of appeals,
5 or a United States district court (including the district courts for the
6 Canal Zone, Guam and the Virgin Islands), and who is of good moral
7 and professional character, is eligible for admission to the bar of a
8 court of appeals.

9 An applicant shall file with the clerk of the court of appeals,
10 on a form approved by the court and furnished by the clerk, an
11 application for admission containing ~~his~~ the applicant's personal
12 statement showing ~~his~~ eligibility for membership. At the foot of
13 the application the applicant shall take and subscribe to the
14 following oath or affirmation:

15 I, _____, do solemnly swear (or
16 affirm) that I will demean myself as an attorney and counselor of
17 this court, uprightly and according to law; and that I will support the
18 Constitution of the United States.

19 Thereafter, upon written or oral motion of a member of the
20 bar of the court, the court will act upon the application. An
21 applicant may be admitted by oral motion in open court, but it is not
22 necessary that ~~he~~ the applicant appear before the court for the
23 purpose of being admitted, unless the court shall otherwise order.
24 An applicant shall upon admission pay to the clerk the fee prescribed
25 by rule or order of the court.

26 (b) Suspension or disbarment. When it is shown to the court
27 that any member of its bar has been suspended or disbarred from
28 practice in any other court of record, or has been guilty of conduct
29 unbecoming a member of the bar of the court, ~~he~~ the member will
30 be subject to suspension or disbarment by the court. The member
31 shall be afforded an opportunity to show good cause, within such
32 time as the court shall prescribe, why ~~he~~ the member should not be
33 suspended or disbarred. Upon ~~his~~ the member's response to the rule
34 to show cause, and after hearing, if requested, or upon expiration of
35 the time prescribed for a response if no response is made, the court
36 shall enter an appropriate order.

* * * * *

COMMITTEE NOTE

The amendments to Rules 46(a) and (b) are technical. No substantive change is intended.

Report of the Advisory Committee on the Federal Appellate
Rules on the Operation of Rule 30

- I. Background
- II. The Committee's Investigation
- III. A Brief History of the Development of Federal Rule of Appellate Procedure 30
 - A. Introduction
 - B. Practice Before the Adoption of Rule 30
 - C. The Advisory Committee's Draft
 - D. Subsequent Drafts by the Advisory Committee
 - E. Final Adoption and Subsequent Amendments
- IV. Current Circuit Practice
 - A. The Local Rules Dealing Directly With the Separate Appendix
 - B. Other Rule Provisions Relating to the Appendix
- V. Survey of the Judges of the Courts of Appeals
 - A. The "Pros and Cons"
 - 1. - In Favor of the Separate Appendix
 - 2. - In Favor of the Record Excerpt
 - B. Common Ground
- VI. Survey of the Clerks of the Courts of Appeals
- VII. Conclusions and Recommendations

Report of the Advisory Committee on the Federal Appellate
Rules on the Operation of Rule 30

I. Background

At the first meeting of the newly-reconstituted Advisory Committee on the Federal Appellate Rules, the Chief Justice invited the Committee's attention to the problem of ever-spiraling costs of litigation. He noted in particular the growing amount of unnecessary documentation which was becoming accepted as standard practice in appellate litigation. More specifically, he asked the Committee to investigate whether the present requirements of Rule 30¹ contribute to the unnecessary expense and, if so, to recommend a solution to the problem.²

In general terms, Rule 30 requires that counsel prepare and file a separate appendix to the brief that contains: (1) the relevant docket entries in the proceeding below; (2) those portions of the pleadings, charge, findings, or opinion of the Court below that are relevant to the appeal; (3) the judgment, order or decision of the lower court; and (4) "any other parts of the record to which the parties wish to direct the particular attention of the Court."³ It is this last requirement which has the potential for inflating litigation costs. Although the record on appeal is already before the Court,⁴ segments of it are included in multiple copies of this separate appendix.⁵ Overdesignation⁶ of those segments can considerably increase overall litigation costs.

II. The Committee's Investigation

In fulfilling the mandate of the Chief Justice,⁷ the Committee undertook the following inquiries:

1) In order to understand the rationale of the present rule, it undertook an investigation of its history. The present rule was a deliberate choice from among several options considered by the original Advisory Committee. Therefore, respect for the work of its predecessors required that the present Committee, in reevaluating the rule, begin by understanding the reasons for that conscious choice. A summary of that investigation is set forth in Part III.

2) The Committee undertook an extensive survey of local circuit practice with respect to the separate appendix. In his dissenting opinion in New State Ice Company v. Liebmann, 285 U.S. 262, 311 (1932), Justice Brandeis described how a state may play the role of a laboratory in the development of a solution to a social or economic problem. Within the federal judiciary, the circuits often perform the same function as they try new approaches to judicial administration problems. Rule 30 affords a particularly good opportunity for such experimentation. Under subsection (f) of Rule 30, a circuit may "by rule applicable to all cases, to classes of cases, or by order in specific cases, dispense with the requirement of an appendix and permit appeals to be

heard on the original record, with such copies of the record, or relevant parts thereof, as the court may require." Most circuits have exercised this option and the Committee believed that their experimentation could contribute significantly to its understanding of the role of the appendix in federal appellate litigation and to possible solutions. The value of this experimentation was enhanced by the fact that some of the most radical departures from the separate appendix system had taken place in circuits with heavy caseloads, complex litigation, and wide geographic dispersion of judges. The results of this study of local rules are set forth in Part IV.

3) Since cost savings measures must be evaluated in light of their impact on the appellate process, the Committee next solicited the views of all active United States Circuit Judges. The judges were asked to evaluate their present system and the principal alternative approaches used in other circuits. This survey is described in Part V.

4) With the assistance of the Clerks of the Courts of Appeals, the Committee, through its Reporter, surveyed the costs and administrative burdens associated with each circuit's approach to the separate appendix. The results of this study were discussed with the Clerks by the Chairman and the Reporter and then discussed at a subsequent meeting of

the Committee. The results of this inquiry are contained in Part VI.

III. A Brief History of the Development of Federal Rule of Appellate Procedure 30

A. Introduction

In undertaking its review of FRAP 30, the Committee believed that respect for the long and careful work of its predecessor committees required that the origin of the Rule be identified and the reasons for its present form appreciated. This approach was especially important in the case of FRAP 30. Its present form is the product of a conscious choice after long and thoughtful consideration of several options.

B. Practice Before the Adoption of FRAP

Before the adoption of the Federal Rules of Appellate Procedure, most circuits (7) used an appendix. In six of these circuits, the appellant filed this document at the time of the filing of his brief. It contained those parts of the record which he deemed essential to an understanding of the questions presented in the brief. The appellee, if he believed that additional parts of the record were necessary for a fair consideration of the case, had to include those additional parts in a separate appendix to his brief.

A printed record was required in three circuits (5, 8, 10), although the Advisory Committee found that practice in those circuits made the difference between a printed record and the appendix "largely nominal."⁸ The Ninth Circuit permitted litigants, if they wished, to proceed on the original record and two copies.⁹

C. The Advisory Committee's First Draft

The Preliminary Draft of the Advisory Committee, issued in March 1964, called for a "deferred appendix" to be constructed after the submission of both briefs.¹⁰ In the opinion of the Committee, this system was preferable to the fragmentation which resulted when each party submitted its own appendix. Appellants had a tendency, noted the Committee, to underestimate what was necessary for a determination of the issues presented. The "no appendix" approach of the Ninth Circuit was rejected since the Committee decided against "any general dispensation from the requirement of submitting an appendix."¹¹ The Draft Rule did permit, however, an individual court to dispense with the requirement of submitting an appendix.¹²

D. Subsequent Drafts by the Advisory Committee

The Advisory Committee's initial draft met a good deal of opposition. Consequently, in December 1966, the Standing Committee on Rules of Practice and Procedure circulated three other drafts for comment:

1. Draft A¹³ called for the use of a single appendix which would contain all the record material "which it is deemed by the parties essential for the judges to read."¹⁴ Normally, this document was to be filed with the appellant's brief. By stipulation or order, it could be filed by the appellant within 21 days of service of the appellee's brief. Any circuit could opt to proceed on the original record.

The Advisory Committee, in a "special note," expressed its clear preference for this option:

"[O]f all the methods suggested for the presentation to the several members of a court of material in a record, the one thus devised would best serve the purposes of accurate and expeditious disposition of cases."¹⁵

It also stressed that the deferred appendix option would produce "economy and clarity" because "the necessary parts of a record can be designated more certainly and easily after the legal points at issue have been defined."¹⁶

2. Draft B¹⁷- This option was the separate appendix system then employed in most circuits. The draft gave the circuits the option of requiring a joint appendix or of

dispensing with the appendix altogether by rule, order, or stipulation.

In an accompanying comment, the Advisory Committee noted that this "individual appendix" approach, while permitting each attorney to concern himself only with his own selection of the record, required the appellate judge to work with a fragmented presentation of the record.¹⁸

3. Draft C¹⁹- This approach was modeled on the Ninth Circuit approach of proceeding on the original record and two copies. Each circuit could dispense with the requirement for filing copies and "direct that the appeal be heard on the original record alone."²⁰

The Advisory Committee gave the following reasons against adopting this procedure as a national rule:²¹

- 1) a busy court is entitled to the help of lawyers in finding those parts of the record essential to the disposition of the case;
- 2) selecting parts of the record will help lawyers in their own presentation;
- 3) the size of the original record will create problems in its transmittal;
- 4) insufficient copies will be available for simultaneous use by judges, law clerks and for deposit in law libraries.

The Committee did note, however, that this approach might

be appropriate "in certain types of appeals, particularly those with voluminous transcripts of which large portions require appellate consideration as when convictions are attacked as being without sufficient evidence or in appeals in forma pauperis."22

E. Final Adoption and Subsequent Amendments

The present FRAP 30 was based principally on "Draft A," although subsection (f) gave the circuits the option of adopting "Draft C" and proceeding on the original record.

In 1970, FRAP 30(a) was amended to shorten the time for filing the appendix when the Court of Appeals shortens the time for the filing of briefs under FRAP 31(a). FRAP 30(c) was also amended to permit deferral of the appendix only if the Court should provide by order or local rule. The litigants could no longer choose this option themselves. The purpose of the amendment was to prevent the practice of electing to defer filing of the appendix simply to obtain a 21 day delay. However, the Advisory Committee notes state specifically that this amendment "should not cause use of the deferred appendix to be viewed with disfavor."23

IV. Current Circuit Practice

The promulgation of Rule 30 hardly put an end to the diversity of views on the separate appendix issue. Over the years, the circuits have employed a variety of techniques to

formulate the appellate record and to deal with the problem of costs. The following subsections describe briefly the current practice.

A. The Local Rules Dealing Directly With The Separate Appendix

In examining current circuit practice under Rule 30, the local rules provide a logical and helpful starting point. The approaches of the circuits can roughly be divided as follows:

1. The "Separate Appendix" Circuit

The Fourth Circuit is the only circuit without a local rule on the matter of the separate appendix.

2. The "Specific Exception" Circuits

The First,²⁴ Second,²⁵ Third,²⁶ Sixth,²⁷ District of Columbia²⁸ and Federal Circuits,²⁹ while generally adhering to the requirement for a separate appendix, have eliminated the requirement in certain types of cases or have provided by local rule that the requirement may be waived in a given case. In many of these circuits, in forma pauperis cases are heard on the original record. In some, social security cases are treated in similar fashion.

3. The "Record Excerpt" Circuits

The Fifth,³⁰ Seventh,³¹ Ninth³² and Eleventh³³ Circuits have adopted a "record excerpt" method. The "record excerpt" is an abbreviated appendix.

There are significant variations in each circuit's rule. However, the basic approach is the same. The appeal is heard on the original appellate record as defined in FRAP 10. However, an additional document is prepared for the judges. It contains those parts of the appellate record which, by consensus, the judges of that circuit deem essential. The most abbreviated version appears to be that of the Fifth Circuit which contains: 1) the docket sheet; 2) the judgment or interlocutory order appealed from; 3) any other orders or rulings sought to be reviewed; 4) any supporting opinion, findings of fact or conclusions of law filed or delivered orally by the district court.³⁴ The Circuit's internal operating procedures permit the appellant to add "the pleadings, charge, transcript, or exhibits if they are essential to an understanding of the issues raised."³⁵ The Seventh Circuit rule, by comparison, requires that the document also contain "any other short excerpts from the record . . . important to a consideration of the issues raised on appeal."³⁶

4. The "Original Record" Circuit

The Tenth Circuit hears most cases on the original record. Local Rules 10 and 11 provide that, with the exception of civil cases containing a transcript of 300 pages or more, the appeal will

proceed on the original record. All criminal appeals proceed on the original record.

5. The Eighth Circuit Approach

The Eighth Circuit has adopted another and somewhat unique approach.³⁷ Unless the parties agree to proceed on agreed statement of facts under FRAP 10(d), the appeal is on the appellate record (referred to as the "designated record"). The parties may choose between two methods of preparing the "designated record:"

- a. the parties may prepare the "designated record" in accordance with FRAP 30(b). This form is called "the appendix."
- b. the parties may request the district court clerk to compile and transmit to the Court of Appeals those portions of the original record on appeal which they designate.

Thus, the Eighth Circuit has combined the "appendix" and "original record" approach.

B. Other Rule Provisions Relating to the Appendix

In addition to describing the basic form of the separate appendix, other local rules further shape practice in this area.

1. Material for Inclusion in the Appendix

A few local rules contain additional guidance for counsel aimed at reducing the material contained in the appendix.

Two local rules set forth explicitly the material which ought not be included in the appendix.³⁸ The Second Circuit has admonished counsel not to include in the appendix extraneous material such as memoranda of counsel to the trial court.³⁹ One rule assures counsel that, if reference to such material is necessary in the decision of the case, the *original record* will be consulted.⁴⁰ By contrast, a First Circuit rule warns counsel that "notwithstanding the provisions of FRAP Rule 30 the court may decline to refer to portions of the record omitted from the Appendix, except by inadvertence, unless leave is granted prior to argument."⁴¹

Two other circuits affirmatively urge counsel to enter into stipulations which will reduce costs by reducing the size of the transcripts.⁴²

2. Number of Copies

Several circuits have, by local rule, reduced the number of copies required.⁴³

3. Method of Copying

Some circuits have explicit rules governing the method of copying the record and the amount recoverable for such copying.⁴⁴

4. Sanctions for Over-Inclusion of Material

Some circuits have also reiterated and made more explicit the provision of FRAP 30(b) permitting the court to disallow

costs for the inclusion of unnecessary material in the record.⁴⁵ Two circuits now explicitly provide for the imposition of costs against counsel pursuant to 28 U.S.C. § 1927.⁴⁶ These rules also explicitly note that counsel can be subject to disciplinary proceedings for unreasonably and vexatiously increasing costs.

5. Leaving Record in District Court

Several circuits have also adopted the practice, either on a temporary or experimental basis, of leaving the appellate record in the District Court.⁴⁷ The Court of Appeals decides the appeal on the basis of the material in the appendix (or its equivalent) or by requesting that the appellate record, or parts of it, be forwarded to the Court of Appeals. While this procedure may well simplify the administrative burdens of the Court of Appeals, it would appear, at first glance, to have the potential of inducing counsel to include more material within the appendix. Knowing that the record is not immediately on hand during the consideration of the appeal, counsel could well decide not to rely on a busy court's taking the time to procure the necessary documentation. This supposition is not easy to verify. Moreover, the Committee's repeated inquiries have produced no evidence that overdesignation in appendices is attributable to this administrative practice.

V. Survey of the Judges of the Courts of Appeals

In Fall 1981, the Reporter, at the direction of the Committee, invited every active United States Circuit Judge to submit to the Committee a statement on the operation of Rule 30. Each judge was asked to comment on the practice currently in use in his or her circuit. Each was also afforded an opportunity to comment on the practices of the other circuits.

The responses received from the various judges demonstrated no clear nation-wide preference for any single approach to the separate appendix question. To the extent that any "trend" could be perceived, it was a tendency to preserve the status quo in each circuit. However, the responses - often quite long and thoughtful - were extremely helpful to the Committee because they revealed a good deal about the various roles which an appendix or its alternative plays in the methodology of appellate judges.

The most important message of the survey is that judges - like the judges at the time of the original formulation of Rule 30 - do not regard the question of the separate appendix as a simple "administrative" matter, but as quite central to the process of deciding cases. There are many styles of judging on the appellate bench and the question of what kind of appendix will be required is worked out among the judges, sometimes through trial and error. While most circuits have

achieved a fairly stable consensus on the matter, there is, beneath the surface, a significant disparity of views.

A. The "Pros and Cons"

1. - In Favor of the Separate Appendix

Those judges preferring the separate appendix tended to be more forceful in their answers to the survey. They stressed that the quality and quantity of judicial productivity were to be weighed against cost savings to the litigants. Their arguments may be summarized as follows:

- a. A separate appendix is needed at oral argument to permit easy access to the record when questioning counsel.
- b. Preparation of an appendix requires counsel to focus at an early stage on the essential points in the case.
- c. The separate appendix permits earlier identification of those cases in which summary disposition is appropriate.
- d. The separate appendix permits the judge to cast the tentative, but crucial, vote at conference immediately after argument on the basis of more of the record than would be available under a "record excerpt" approach.
- e. A separate appendix permits more thorough preargument preparation. The non-resident judge or the judge who works at home can take a good deal of

the record along if he has an appendix. More than one judge must prepare for oral argument at the same time and often a judge and his law clerk must use the materials separately.

- f. An appendix can also act as a check on attorney hyperbole in the brief and at oral argument since any member of the court can check the accuracy of a statement easily.

2. In Favor of the Record Excerpt

Judges in circuits using some variation of the "record excerpt" approach generally believe that their system also fulfills the objectives set forth by those who favor the appendix method. When the record excerpt does not suffice, the appendix will not suffice either is an oft-repeated claim.

Responses from these judges also exhibit a marked tendency to emphasize that the record excerpt must be flexible to the needs of the case and include material necessary for a resolution of the issues raised. Most frequently suggested additions are the inclusion of pertinent parts of the transcript and, when applicable, the jury charge.

Interestingly, most judges using the record excerpt method (and those where the case is heard on the original record) do not seem bothered by the necessity of transmitting

the record in the mail. On the other hand, judges in circuits which use the separate appendix often cite this problem as a major reason for not adopting the "record excerpt" method.

B. Common Ground

The survey also suggested some areas where there is a general consensus among the judges:

1. There is no disagreement on goals: 1) the quality and quantity of judicial productivity; 2) the reduction of litigant costs.
2. The difference of opinion between the "separate appendix" method and the "record excerpt" method centers on the pre-oral argument and oral argument stages of the appellate process. There is little dissent from the position that the entire record must be used in writing the opinion for the court.
3. There are certain cases which, because of their voluminous records or complex issues, need an appendix. (There is no unanimity, however, on how to describe this category.)

VI. Survey of the Clerks of the Courts of Appeals

In 1982, the Reporter, working with Mr. John Hehman, Clerk of the United States Court of Appeals for the Sixth Circuit, and Mr. Gilbert Gannucheau, Clerk of the United States Court of Appeals for the Fifth Circuit, formulated a

survey for the clerks of all the federal circuits designed to elicit information on the impact of the separate appendix requirement on their offices and upon counsel appearing before their courts. The Chairman and the Reporter later discussed the results of this survey with the Clerks at their annual meeting at the Federal Judicial Center. Mr. Leonard Green, Chief Deputy Clerk of the Sixth Circuit summarized the results for the Committee as follows:

The survey suggests that the following conclusions can fairly be drawn:

Each of the circuits has its own alternative to Rule 30. In that sense, the Rule plays an important role; it defines a document to serve as a supplement to the briefs, in which is to be distilled from the larger record on appeal only those items necessary to the adjudicative process. Rule 30, then, serves as a fixed point of reference for the circuits to use in fashioning for themselves that vehicle which will respond to their needs.

There is a wide variation among the local alternatives, ranging from the "record excerpt" system in use in several circuits to the full-blown FRAP 30 appendix or something very closely akin to it, in use in other circuits.

Use of the deferred appendix procedure of 30(c) is negligible, even where use of that arrangement is given some encouragement.

There are several categories of cases, collectively comprising a significant portion of the docket, in which the appendix requirement is commonly waived. These categories include prisoner cases, especially without counsel, CJA cases, in forma pauperis cases, and social security cases.

The principal distinction among the courts as far as what parts of the record need to be included in the appendix is the transcript. The differences among the courts in this respect reflect differences and different judicial approaches to the adjudicative process.

Because of the nearly universal use of photocopy as the preferred method of reproduction, rather than costly printing, the actual cost of preparing the appendix is not high, certainly not when compared with other costs associated with litigation. The average

number of pages reported in an appendix range from seven to seven-hundred, but most commonly seems to be in the two-hundred to three-hundred page range; from four to ten copies of the appendix are required in the various courts.

The cost of the appendix requirement to the Clerks' offices is not great. Neither the investment of man hours required nor the storage requirements would seem to represent a significant burden to the offices.

All of the circuits except the Third and, in some cases, the Eighth, require that the district court proceedings be filed with the Court of Appeals.

There is a wide variation among the practices of the courts in circulating the record or parts of it to the court. Some will send the record automatically to the lead judge of the hearing panel or the writing judge while other courts will send the record only in response to a specific request from a judge.

VII. Conclusions and Recommendations

On the basis of the foregoing study, the Committee makes the following conclusions and recommendations:

1. Today, as at the time of the formulation of the Rules, most judges do not consider the form of the separate appendix a simple "administrative" matter. There are many styles of judging. On any Court, arriving at a decision as to the most appropriate form of appendix is a collegial decision aimed at accomodating the particular judging styles of the bench in question and, consequently, at maximizing the efficiency of the Court and the quality of its workproduct. While considerations of uniformity are important and doubtless will be taken into account by the judges of the respective circuits, the committee concludes that at this time the form of the separate appendix is not an appropriate subject for rigid national regulation.

2. Litigation costs remain, however, a significant concern. Each court has a responsibility to consider such costs in formulating its approach to the separate appendix issue. In this respect, current circuit practice evidences a general, although somewhat uneven, acknowledgment of this responsibility. Over recent years, there has been, even in many of those circuits which adhere to the "separate appendix approach," a "natural shrinkage" of the appendix or at least of its costs. Exceptions to the appendix requirement in many

cases and the replacement of "hot lead" printing by much less *expensive copying methods have been the principal* improvements. Other avenues must be explored more fully, however:

- a. *Local rules and internal operating procedures must articulate more precisely how the Court uses the* separate appendix. It must be emphasized that the *appendix is used principally in evaluating the* briefs and in preparing for oral argument and that the entire record is normally used in writing an *opinion. Furthermore, counsel must be assured that,* throughout the appellate process, the Court will consult the entire record whenever it becomes necessary.

In addition to making such information available to the bar through local rules, the Court *and its Clerk ought to communicate more informally* and more regularly with the bar regarding the proper role of the appendix.

- b. Through local rule and informal contact with the bar, the Court ought to communicate its continuing concern with litigation costs. Each circuit ought to have in its local rules a specific provisions fixing the maximum recoverable costs for copying of appendix material and noting the availability of sanctions for overdesignation of appendix material.

- c. The application of sanctions against the litigant or counsel for abuse of the appendix process ought to be given sufficient dissemination to have a deterrent effect.

3. While the Committee believes that, at this time, no particular form of separate appendix ought to be mandated in a rule of national application, several changes to FRAP are desirable:

- a. Rule 30(a) should be amended to specify that memoranda of law in the trial court are not to be included in the separate appendix. See United States v. Noall, 587 F.2d 123 (2d Cir. 1978).
- b. Rule 30(b) ought to be amended to require that each circuit have a local rule specifically noting that, in addition to sanctions against the litigant, the court may, in an appropriate case, impose sanctions against counsel.
- c. Rule 39(c) ought to be amended to require each circuit to fix by local rule the ~~maximum~~ allowable costs for copying appendix material.

4. Cost to the litigants must remain a matter for continuous and careful monitoring by the circuits. It is especially important that, in assessing innovations aimed at increasing administrative efficiency, the Court identify and weigh any resulting increase in costs to the litigants.

Advisory Committee on Federal Appellate Rules

Honorable Pierce Lively, Chairman
E. Milton Farley, III, Esquire
Honorable J. Smith Henley
Honorable Rex E. Lee
Honorable Edward D. Re
Ira C. Rothgerber, Esquire
Honorable Edward A. Tamm
Honorable Eugene A. Wright

Professor Kenneth F. Ripple, Reporter

Footnotes

¹Fed. R. App. P. 30 provides in pertinent part

(a) DUTY OF APPELLANT TO PREPARE AND FILE; CONTENT OF APPENDIX; TIME FOR FILING; NUMBER OF COPIES. The appellant shall prepare and file an appendix to the briefs which shall contain: (1) the relevant docket entries in the proceeding below; (2) any relevant portions of the pleadings, charge, findings or opinion; (3) the judgment, order or decision in question; and (4) any other parts of the record to which the parties wish to direct the particular attention of the court. The fact that parts of the record are not included in the appendix shall not prevent the parties or the court from relying on such parts.

. . . .

(b) DETERMINATION OF CONTENTS OF APPENDIX; COST OF PRODUCING. The parties are encouraged to agree as to the contents of the appendix. *In the absence of agreement, the* appellant shall, not later than 10 days after the date on which the record is filed, serve on the appellee a designation of the parts of the record which he intends to include in the appendix and a statement of the issues which he intends to present for review. *If the appellee deems it* necessary to direct the particular attention of the court to parts of the record not designated by the appellant, he shall, within 10 days after receipt of the designation, serve upon the appellant a designation of those parts. The

appellant shall include in the appendix the parts thus designated. In designating parts of the record for inclusion in the appendix, the parties shall have regard for the fact that the entire record is always available to the court for reference and examination and shall not engage in unnecessary designation.

Unless the parties otherwise agree, the cost of producing the appendix shall initially be paid by the appellant, but if the appellant considers that parts of the record designated by the appellee for inclusion are unnecessary for the determination of the issues presented he may so advise the appellee and the appellee shall advance the cost of including such parts. The cost of producing the appendix shall be taxed as costs in the case, but if either party shall cause matters to be included in the appendix unnecessarily the court may impose the cost of producing such parts on the party.

. . . .

(f) HEARING OF APPEALS ON THE ORIGINAL RECORD WITHOUT THE NECESSITY OF AN APPENDIX. A court of appeals may by rule applicable to all cases, or to classes of cases, or by order in specific cases, dispense with the requirement of an appendix and permit appeals to be heard on the original record, with such copies of the record, or relevant parts thereof, as the court may require.

²See Burger, Annual Report on the State of the Judiciary - 1980, Midyear Meeting of the American Bar Association (Feb. 3, 1980), 66 A.B.A.J. 295 (1980).

³Fed. R. App. P. 30(a)(4).

⁴Fed. R. App. P. 10, 11.

⁵Fed. R. App. P. 30 reads in pertinent part:

(a). . . Unless filing is to be deferred pursuant to the provisions of subdivision (c) of this rule, the appellant shall serve and file the appendix with his brief. Ten copies of the appendix shall be filed with the clerk, and one copy shall be served on counsel for each party separately represented, unless the court shall by rule or order direct the filing or service of a lesser number. . . .

(e) REPRODUCTION OF EXHIBITS. Exhibits designated for inclusion in the appendix may be contained in a separate volume, or volumes, suitably indexed. Four copies thereof shall be filed with the appendix and one copy shall be served on counsel for each party separately represented. The transcript of a proceeding before an administrative agency, board, commission or officer used in an action in the district court shall be regarded as an exhibit for the purpose of this subdivision.

⁶See, e.g., Drewett v. Aetna Cas. & Sur. Co., 539 F.2d 496, 498-501 (5th Cir. 1976) (reproduction of entire trial transcript); Bernard v. Omaha Hotel, Inc. 482 F.2d 1222, 1225-26 (8th Cir. 1973) (inclusion of complete medical testimony that was totally irrelevant to appeal).

⁷For a description of the Committee's early work see Ainsworth and Ripple, The Separate Appendix in Federal Appellate Practice - Necessary Tool or Costly Luxury?, 34 S.L.J. 1159 (1981).

⁸Prop. Fed. R. App. P. 30, advisory committee note, March 1964 Preliminary Draft [hereinafter cited as Preliminary Draft], reprinted in ⁹J. Moore, B. Ward and J. Lucas, Moore's Federal Practice § 100.01, at 9-10 (2d ed. 1983).

⁹J. Moore, B. Ward and J. Lucas, supra note 8, at 10. The Eighth Circuit dispensed with its printed record in criminal, habeas corpus, and 28 U.S.C. § 2255 cases.

¹⁰Id. at 7.

¹¹Preliminary Draft, supra note 8, at 10.

¹²Prop. Fed. R. App. P. 30(a) (March 1964 Draft).

¹³J. Moore, B. Ward and J. Lucas, supra note 8, at 12-16.

¹⁴Letter from Judge Maris, Chairman of the Standing Committee, to the bench and bar (Dec. 20, 1966), reprinted in J. Moore, B. Ward and J. Lucas, supra note 8, at 10.

¹⁵Special Note to the December 30, 1966, Proposed Draft A by the Advisory Committee on Appellate Rules, reprinted in J. Moore, B. Ward and J. Lucas, supra note 8, at 18-20 [hereinafter cited as Special Note].

¹⁶Id. at 19.

¹⁷J. Moore, B. Ward and J. Lucas, supra note 8, at 20-23.

¹⁸Special Note, supra note 15, at 19.

¹⁹J. Moore, B. Ward and J. Lucas, supra note 8, at 25-27.

²⁰Id. at 27.

²¹Special Note, supra note 15, at 20.

²²Id. at 19-20.

²³Fed. R. App. P. 30, advisory committee note to 1970 amendment.

²⁴The First Circuit generally uses a separate appendix. However, 1st Cir. R. 11(i) provides that, absent order of the court, all in forma pauperis cases shall be considered on the record on appeal as certified by the district court without the necessity of filing an appendix.

²⁵In the Second Circuit, 2d Cir. R. 30.2 authorizes appeals on the original record without printed appendix in: (1) all appeals under CJA; (2) all other in forma pauperis proceedings; (3) all appeals involving a social security decision. In such cases, the appellant files three legible copies of those portions of the transcript that he wants the court to read. To avoid additional expense, application may be made to file less than three copies.

²⁶In the Third Circuit, 3d Cir. R. 10 permits hearing on original papers in applications for writs of habeas corpus and for relief under 28 U.S.C. § 2255 when permission has been granted to proceed in forma pauperis. The appeal is heard on the original record, three copies of the opinion (if any), and the order from which the appeal is taken. In any other case, the court may dispense with the requirement of a record and proceed on the original record.

²⁷In the Sixth Circuit, 6th Cir. R. 11 requires that only five (5) copies of the appendix be filed. When the entire record is 100 pages or less, three copies of the record may be filed. In Social Security Law cases, the United States Attorney files four (4) copies of the administrative record provided that the appellant files with his brief copies of the opinion and order of the District Court and the recommendation of the magistrate if the District Court relied upon it.

²⁸D.C. Cir. R. 17(c)(3) permits in forma pauperis appeals on the original record without the necessity of an appendix. The appellant furnishes two copies of the relevant parts of the transcript with a list of the page numbers of the transcript so furnished. The findings of fact and conclusions of law and the opinion, if any, of the district court must always be included. The appellee furnishes two copies of any pages of the transcript to which he wishes to

call the court's attention and that were not furnished by the appellant.

²⁹Fed. Cir. R. 12(j) provides that the Court may dispense with the requirement of an appendix on motion or sua sponte.

³⁰5th Cir. Rule 30.1 (described in text accompanying note 34 infra).

³¹7th Cir. R. 12 states that a full appendix is not required. The appellant files, either bound with his brief or as a separate document, an appendix containing the judgment or order under review, and any opinion, memorandum, findings of fact, or conclusions of law of the trial court or the administrative agency. The local rule also states that the court prefers that the brief appendix contain "any other short excerpts from the record . . . important to a consideration of the issues raised on appeal." The rule declares that "costs for a lengthy appendix will not be awarded." It is apparently fairly rare for these "other short excerpts" to exceed 15 pages.

³²9th Cir. R. 13 provides that the appellant file five (5) copies of the following documents:

- (a) the complaint and answer(s) and, in criminal cases, the indictment;
- (b) the pretrial order, if any;
- (c) the judgment or interlocutory order from which the appeal is taken;

- (d) other orders sought to be reviewed, if any;
- (e) any supporting opinion, findings of fact or conclusions of law filed or delivered orally by the trial court (citations if opinion is published);
- (f) the motion and response upon which the court rendered judgment, if any;
- (g) the notice of appeal;
- (h) the trial court docket sheet, and
- (i) the parties' stipulation to a direct appeal to the U.S. Court of Appeals if the appeal is taken directly from a decision of the U.S. Bankruptcy Court.

With respect to administrative proceedings, the same rule requires the petitioner to file five copies of any order to be reviewed and of any supporting opinion, findings of fact or conclusions of law filed by the agency, board, commission, or officer.

3311th Cir. Rule 22(a) requires that the following material be included in the "record excerpt:"

- (1) the docket sheet;
- (2) the indictment, information, or complaint as amended;
- (3) the answer, counterclaim, cross-claim, and replies thereto;
- (4) those parts of any pretrial order relative to the issues on appeal;
- (5) the judgment or interlocutory order appealed from;

(6) any other order or orders sought to be reviewed;
(7) any supporting opinion, findings of fact and conclusions of law filed or delivered orally by the court, and

(8) if the correctness of a jury instruction is in issue, the instruction in question and any other relevant part of the jury charge.

345th Cir. R. 30.1

355th Cir. R. 30.1, internal operating procedures commentary.

367th Cir. R. 12(a).

378th Cir. R. 7.

388th Cir. R. 7(c)(2); Fed. Cir. R. 12(a).

³⁹United States v. Noall, 587 F.2d 123 (2d Cir. 1978).

408th Cir. R. 7(c)(2).

411st Cir. R. 11(c).

421st Cir. R. 7; 10th Cir. R. 7(a).

431st Cir. R. 11(f); 3d Cir. R. 10(1); 5th Cir. R. 13.1; 6th Cir. R. 11(c),(f); 8th Cir. R. 7(d)(3); 9th Cir. R. 13(a)(1); 11th Cir. R. 22(a); D.C. Cir. R. 9(a)(1); Fed. Cir. R. 12(f).

⁴⁴4th Cir. R. 12; 5th Cir. R. 39; 6th Cir. R. 26(a); 8th Cir. R. 7 (f); 9th Cir. R. 14(b) & (d); 10th Cir. R. 18; 11th Cir. R. 28; D.C. Cir. R. 15(b).

⁴⁵6th Cir. R. 11(h); 7th Cir. R. 12(a); 8th Cir. R. 7(c)(2); D.C. Cir. R. 9(a)(3).

466th Cir. R. 11(h); 8th Cir. R. 7(c)(2).

473d Cir. R. 14(1); 8th Cir. R. 6(a). Two circuits urge counsel to endeavor to enter into stipulations that will avoid or reduce transcripts. 1st Cir. R. 7; 10th Cir. R. 7(a).