

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

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**TO:** Honorable Alicemarie Stotler, Chair, and Members of the Standing  
Committee on Rules of Practice and Procedure

**FROM:** Honorable James K. Logan, Chair  
Advisory Committee on Appellate Rules

**DATE:** December 8, 1994

The Advisory Committee on Appellate Rules is not presenting any items that require Standing Committee action. Part II of this report summarizes current committee projects. More detailed information about committee activity may be found in the draft minutes of the Advisory Committee's October meeting and in the committee's docket, both of which are attached to this report.

**I. ACTION ITEMS**

The Advisory Committee on Appellate Rules is not presenting any items that require Standing Committee action. At its October meeting the Advisory Committee approved amendments to four rules. In light of the numerous changes to the appellate rules currently in the pipeline, however, the Advisory Committee decided that it would be undesirable to publish any additional amendments at this time. Rather than submit the proposed changes to the Standing Committee at this meeting, the Advisory Committee decided to submit the rules to the Style Subcommittee for its review. The Advisory Committee will assess the Style Subcommittee's recommendations at the Advisory Committee's spring meeting and submit the rules to the Standing Committee at some later time.

## II. INFORMATION ITEMS

### A. Three day extension following service by mail

Fed. R. App. P. 26(c) says that when a party is required or permitted to act within a prescribed time after service of a paper upon the party, three days are added to the prescribed period if service was by mail. A similar provision is contained in Civil Rule 6(e), Criminal Rule 45(e), and Bankruptcy Rule 9006(f). At the June 1994 Standing Committee meeting a member of the Committee suggested that all these rules be amended to change "three days" to "five days" because there are frequent delays in mail delivery. The Standing Committee asked each of the advisory committees to consider the suggestion and to report its views at the January 1995 Standing Committee meeting.

After a brief discussion the Advisory Committee on Appellate Rules voted to recommend no change. By the time of the FRAP Committee's late October meeting all of the other advisory committees had reached a similar conclusion and, as a consequence, the discussion was very brief. The fact that a court of appeals has the ability to enlarge, for good cause, all time periods effected by Rule 26(c) probably was, however, the determining factor.

### B. Approved Rule Changes

As indicated above, amendments to four rules were approved by the Advisory Committee at its October meeting. The Advisory Committee is not requesting action on any of these proposals. A summary of the changes is included for informational purposes.

#### 1. Rule 26.1

For purposes of assisting a judge in determining whether he or she should recuse himself or herself from a case, Rule 26.1 currently requires a non-governmental corporate party to disclose affiliated corporations. Specifically the rule requires the party to name "all parent companies, subsidiaries (except wholly-owned subsidiaries), and affiliates that have issued shares to the public."

The Committee determined that disclosure of subsidiaries or brother/sister corporations is not necessary. There is only a remote possibility that a judgment for or against a corporate party would affect a shareholder of a subsidiary or a brother/sister corporation in a way that would bias the shareholder. Therefore, a judge's ownership of an interest in a subsidiary or brother/sister corporation should not disqualify the judge

from hearing the case.

The Committee will recommend that Rule 26.1 require disclosure only of a parent corporation and any stockholders that are publicly held companies owning 10% or more of the stock of the party.

2. Rule 29

Rule 29 governs amicus briefs. The Local Rules Project provided the impetus for amendment of this rule. The proposed amendments do the following:

- a. require that the brief accompany a motion for leave to file the brief;
- b. specify which of the items required by Rule 28 should be included in an amicus brief;
- c. establish a page limit for an amicus brief; and
- d. prohibit the filing of a reply brief by an amicus.

3. Rule 35

Rule 35 governs in banc proceedings. Several changes have been approved.

- a. Rule 35 currently lists two criteria that can lead to the grant of an in banc hearing. They are: 1) consideration by the full court is needed to secure or maintain uniformity of the court's decisions with those of the United States Supreme Court or with the circuit's own decisions; 2) the case involves a "question of exceptional importance." The amendment identifies the existence of an intercircuit conflict as a factor that may lead a court to conclude that the case involves a question of "exceptional importance." Specifically, if the panel decision creates a conflict or maintains a conflict created only by a decision of the same circuit, the case may involve a question of "exceptional importance."
- b. Rule 35 currently contains no length limits. The amendments provide that a petition for a hearing or rehearing in banc may not exceed 15 pages.
- c. A petition for in banc consideration must begin with a statement concisely demonstrating that the case meets the criteria for in banc consideration.
- d. Language is added to make it clear that a senior judge or a judge sitting by designation may not call for a vote on a request for rehearing in banc unless such a judge was a

member of the panel whose decision is sought to be reviewed.

4. Rule 41

Rule 41 governs the issuance of a mandate and the staying of a mandate. Several amendments have been approved.

- a. Rule 41 is currently silent about when a mandate is effective. At the request of the Solicitor General the Advisory Committee has approved an amendment stating that a mandate is effective when it is issued.
- b. Another amendment provides that the mandate may not issue while a motion for a stay of mandate is pending.
- c. Rule 41 currently provides that a stay of mandate pending the filing of a petition for a writ of certiorari cannot exceed 30 days unless the period is extended for cause shown. The amendments would change the presumptive period to 90 days. A court of appeals remains free to specify a shorter period for any reason.

C. Style Revisions

The Style Subcommittee prepared draft revisions of Appellate Rules 1-23. At the Advisory Committee's October meeting the Committee reviewed all 23 rules and in many instances the Advisory Committee suggested further amendment or return to the existing language. A marked copy showing the Advisory Committee's recommendations is attached to the minutes of the October meeting which are attached to this report. It is likely that the Style Subcommittee will want to discuss some of the Advisory Committee's recommendations.

The Advisory Committee compiled a list of substantive questions that arose during its discussions of the revised rules. Some of those substantive questions will need to be resolved prior to publication of the rules. In other instances the Committee Note simply will need to identify an ambiguity in the existing rule and note that the language of the revised rule adopts one of the possible interpretations of the existing language and request comments upon the Committee's decision.

The Style Subcommittee is working on the remaining rules. At its spring meeting the Advisory Committee will consider as many of the revised rules as possible. In view of the need to review the rules currently published and the comments on those rules, it is doubtful that the Advisory Committee will be able to complete even its initial review of Rules 24-48 at the spring meeting. In as

much as the initial review brings to light substantive issues that need resolution, the earliest that the Advisory Committee could be in a position to present the entire packet of Rules to the Standing Committee would be January 1996. Even that may be optimistic.

### III. MINUTES AND COMMITTEE DOCKET

The reporter's draft of the minutes of the Advisory Committee's October meeting are attached to this report. These minutes have not yet been approved by the Advisory Committee. The committee's docket, showing the current status of its projects, is also attached.



**ADMINISTRATIVE OFFICE OF THE  
UNITED STATES COURTS**

WASHINGTON, D.C. 20544

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CHIEF, RULES COMMITTEE  
SUPPORT OFFICE

December 13, 1994

**MEMORANDUM TO THE COMMITTEE ON RULES OF PRACTICE AND  
PROCEDURE**

**SUBJECT: Federal Rules of Appellate Procedure -- Revised For Style**

The Advisory Committee on Appellate Rules has reviewed the Style Subcommittees draft of Rules 1-23 of the Federal Rules of Appellate Procedure. The Rules Committee Support Office has on file a marked copy showing the advisory committee's recommendations. If you would like a copy contact Anne Rustin at (202) 273-1820.

*John K. Rabiej*

John K. Rabiej

**Advisory Committee on the Federal Appellate Rules  
Table of Agenda Items -- Revised December 1994**

<u>FRAP Item</u>	<u>Proposal</u>	<u>Source</u>	<u>Current Status</u>
86-19	Amendment of Rule 38 to afford appellant opportunity to respond to proposed award of damages or costs.	Standing Committee & Chicago Council of Lawyers	Drafts considered by Committee, Chair to contact Circuits re current practices and possible possible committee action 10/89 Further research requested 10/90 Approved for submission to Standing Committee 12/91 Approved by Standing Committee for publication 1/92 Approved for resubmission to Standing Committee 4/93 Approved for submission to Judicial Conference 6/93 Approved by Judicial Conference 9/93 Forwarded to Congress by Supreme Court 4/94 Effective 12/1/94
86-24	Rule to permit sanctioning of attorneys for bringing frivolous appeals.	Chief Justice Vincent McKusick (ME)	See notes under item 86-19 and 92-8 Subcommittee appointed to monitor; no need for action at this time 4/93 C.J. Breyer's suggestion submitted to subcommittee 9/93, see item 93-9 Response provided to C.J. Breyer 5/94; no further action deemed appropriate at this time 4/94

<u>FRAP Item</u>	<u>Proposal</u>	<u>Source</u>	<u>Current Status</u>
89-5	Amendment of FRAP 35(c).	Mr. Robert St. Vrain (CA-8)	<p>Under study by reporter</p> <p>Discussion with Supreme Court Clerk to precede any further action 10/90</p> <p>Additional drafts requested 12/91</p> <p>Approved for submission to Standing Committee 4/92</p> <p>Standing Committee requested that Advisory Committee reconsider 6/92</p> <p>Draft approved for submission to Standing Committee 4/93. Check all other FRAP for cross-references to "suggestions" for rehearing in banc</p> <p>Approved by Standing Committee for publication to bench and bar 6/93</p> <p>Publication delayed pending completion of Items 91-25 and 92-4, 9/93</p>
90-1	Amend FRAP 35(b) and (c) to change "suggestion" for an in banc to a "petition" for an in banc.	Hon. Jon Newman (CA-2) Mr. St. Vrain (CA-8)	<p>Under study</p> <p>See notes under item 89-5</p>
91-2	Amend rules 40(a) and 41(a) to lengthen time for filing a petition for rehearing in civil cases involving the U.S.	Solicitor General, Kenneth Starr	<p>Approved for submission to Standing Committee 12/91</p> <p>Approved by Standing Committee for publication 1/92</p> <p>Approved for resubmission to Standing Committee 4/93</p> <p>Approved by Standing Committee for submission to the Judicial Conference 6/93</p> <p>Approved by Judicial Conference 9/93</p> <p>Forwarded to Congress by Supreme Court 4/94</p> <p>Effective 12/1/94</p>



<u>FRAP Item</u>	<u>Proposal</u>	<u>Source</u>	<u>Current Status</u>
91-3	Final decision by rule/expanding interlocutory appeal by rule.	Federal Courts Study Committee Judicial Improvement Act of 1990, P.L. No. 101-650; and Federal Courts Administration Act of 1992, P.L. No. 102-572	Discussion on-going 4/91 Consideration of interlocutory review of rulings on class certification. Referral from Civil Rules Committee 6/93
91-4	Typeface, re: rule 32.	Mr. Greacen (CA-5)	Reporter asked to draft language 12/91 Approved for submission to Standing Committee 11/92 Approved by Standing Committee for publication to bench and bar 12/92 Advisory Committee approved new drafts for submission to Standing Committee for re- publication 5/93 Standing Committee approved new draft for re- publication 6/93 Published 11/93 Advisory Committee approved new draft for submission to Standing Committee for republishing 4/94 Approved by Standing Committee for republication 6/94 Published 9/94
91-5	Use of special masters in courts of appeals.	Hon. Kenneth Ripple Hon. Gilbert Merritt Hon. Delores Sloviter	Reporter asked to draft language 12/91 Approved for submission to Standing Committee 10/92 Approved by Standing Committee for publication to bench and bar 12/92 Approved for resubmission to Standing Committee 4/93 Approved by Standing Committee for submission to the Judicial Conference 6/93 Approved by Judicial Conference 9/93 Forwarded to Congress by Supreme Court 4/94 Effective 12/1/94

FRAP Item	Proposal	Source	Current Status
91-8	Amendment of Rule 25 so that whenever service is accomplished by mailing, the proof of service shall include the addresses to which the papers were mailed.	Local Rules Project	<p>Approved for submission to Standing Committee 12/91</p> <p>Approved by Standing Committee for publication 1/92</p> <p>Approved for resubmission to Standing Committee 4/93</p> <p>Approved by Standing Committee for submission to Judicial Conference 6/93</p> <p>Approved by Judicial Conference 9/93</p> <p>Forwarded to Congress by Supreme Court 4/94</p> <p>Effective 12/1/94</p>
91-9	Amendment of Rule 32(a) to require counsel to include their telephone numbers on the covers of briefs and appendices.	Local Rules Project	<p>Approved for submission to Standing Committee 12/91</p> <p>Approved by Standing Committee for publication 1/92</p> <p>Approved for resubmission to Standing Committee 4/93</p> <p>Approved by Standing Committee 6/93 but not forwarded to the Judicial Conference, republished along with other changes to Rule 32 under item 91-4</p> <p>Published 11/93</p> <p>Republished 9/94</p>
91-11	Amendment of Rule 25 re: authority of clerks to return or refuse documents that do not comply with federal or local rules.	Local Rules Project	<p>Reporter asked to prepare draft 12/91</p> <p>Approved for submission to Standing Committee 10/92</p> <p>Approved by Standing Committee for publication to bench and bar 12/92</p> <p>Approved for resubmission to Standing Committee 4/93</p> <p>Approved by Standing Committee for submission to Judicial Conference 6/93</p> <p>Approved by Judicial Conference 9/93</p> <p>Forwarded to Congress by Supreme Court 4/94</p> <p>Effective 12/1/94</p>

<u>FRAP Item</u>	<u>Proposal</u>	<u>Source</u>	<u>Current Status</u>
91-12	Amendment of Rule 33.	Local Rules Project	<p>Judge Hall, Judge Logan, Mr. Kopp, &amp; Reporter asked to develop drafts 12/91</p> <p>Approved for submission to Standing Committee 10/92</p> <p>Approved by Standing Committee for publication to bench and bar 12/92</p> <p>Approved for resubmission to Standing Committee 4/93</p> <p>Approved by Standing Committee for submission to Judicial Conference 6/93</p> <p>Approved by Judicial Conference 9/93</p> <p>Forwarded to Congress by Supreme Court 4/94</p> <p>Effective 12/1/94</p>
91-13	Amendment of Rule 41 to provide a uniform standard for granting a stay of a mandate.	Local Rules Project	<p>Reporter asked to draft language 12/91</p> <p>Approved for submission to Standing Committee 10/92</p> <p>Approved by Standing Committee for publication to bench and bar 12/92</p> <p>Approved for resubmission to Standing Committee 4/93</p> <p>Approved by Standing Committee for submission to Judicial Conference 6/93</p> <p>Approved by Judicial Conference 9/93</p> <p>Forwarded to Congress by Supreme Court 4/94</p> <p>Effective 12/1/94</p>

FRAP Item	Proposal	Source	Current Status
91-14	Amendment of Rule 21 so that a petition for mandamus does not bear the name of the district judge and the judge is represented pro forma by counsel for the party opposing the relief unless the judge requests an order permitting the judge to appear.	Local Rules Project	<p>Reporter asked to draft language 12/91          Approved for submission to Standing Committee 10/92          Standing Committee referred the proposal back to to Advisory Committee for further consideration 12/92          New draft approved for submission to Standing Committee 4/93          Approved by Standing Committee for publication to bench and bar 6/93          Published 11/93          Advisory Committee approved new draft for submission to Standing Committee for republication 4/94          Approved by Standing Committee for republication 6/94          Published 9/94</p>
91-17	Uniform plan for publication of opinions.	Local Rules Project & Federal Courts Study Committee	Further study recommended 12/91
91-22	Amend Rule 9(a) or (b) to specify the type of information that should be presented to a court in bail matters.	CA-5 in response to Local Rules Project	<p>Adopted in substance, Reporter asked to draft language 12/91          Approved for submission to Standing Committee 10/92          Approved by Standing Committee for publication to bench and bar 12/92          Approved for resubmission to Standing Committee 4/93          Approved by Standing Committee for submission to Judicial Conference 6/93          Approved by Judicial Conference 9/93          Forwarded to Congress by Supreme Court 4/94          Effective 12/1/94</p>

<u>FRAP Item</u>	<u>Proposal</u>	<u>Source</u>	<u>Current Status</u>
91-24	Page limits for and contents of amicus briefs.	CA-5 in response to Local Rules Project	For future discussion 12/91 Approved in substance; Reporter to prepare new draft 9/93 Discussion of new draft postponed until fall meeting 4/94 Draft approved 10/94 to be submitted to Style Subcommittee
91-25	Amendment of Rule 35 to specify contents of suggestions for rehearing in banc.	CA-5 in response to Local Rules Project	For future discussion 12/91 Approved in substance; Reporter to prepare new draft 9/93 Discussion of new draft postponed until fall meeting 4/94 Draft approved 10/94 to be submitted to Style Subcommittee
91-26	Amendment of Rule 28 to require a summary of argument, any claim for attorney's fees with statutory basis & amendment of Rule 32.	Advisory Committee in response to Local Rules Project	For future discussion 12/91 Mr. Kopp and Mr. Strubbe asked to assist reporter 12/91 Summary of argument -- approved for submission to Standing Committee 10/92 Attorney fees -- no further action deemed appropriate 10/92 Summary of argument -- approved by Standing Committee for publication 12/92 Approved for resubmission to Standing Committee 4/93 Summary of argument amendment -- approved by Standing Committee for submission to Judicial Conference 6/93 Approved by Judicial Conference 9/93 Forwarded to Congress by Supreme Court 4/94 Effective 12/1/94

FRAP Item	Proposal	Source	Current Status
91-27	Number of copies.	Local Rules Project	<p>Reporter asked to draft language 12/91            Mr. Koopp, Mr. Strubbe, &amp; Mr. Spaniol            asked to study chart question 12/91            Approved for submission to Standing Committee            10/92            Approved by Standing Committee for publication            to bench and bar 12/92            Approved for resubmission to Standing Committee            4/93            Approved by Standing Committee for submission            to Judicial Conference 6/93            Approved by Judicial Conference 9/93            Forwarded to Congress by Supreme Court 4/94            Effective 12/1/94</p>
91-28	Updating Rule 27.	Advisory Committee	<p>Mr. Koopp asked to prepare memo 12/91            Held over 10/92            Subcommittee appointed 4/93            Approved in substance; subcommittee to            prepare new draft 9/93            Approved for submission to Standing Committee            4/94            Approved by Standing Committee for publication            6/94            Published 9/94</p>

FRAP Item

Proposal

Source

Current Status

92-1

Amendment of Rule 47 to require that local rules follow uniform numbering system and delete repetitious language.

Standing Committee

Draft requested 1/92  
Approved for submission to Standing Committee 4/92  
Standing Committee referred to Committee of Reporters 6/92  
New draft approved 10/92  
Uniform language developed by Standing Committee--referred to Advisory Committee for incorporation 12/92  
Approved by Advisory Committee for submission to Standing Committee 4/93  
Approved by Standing Committee for publication to bench and bar 6/93  
Published 11/93  
Approved for resubmission to Standing Committee 4/94  
Approved by Standing Committee for submission to Judicial Conference 6/94  
Approved by Judicial Conference 9/94

92-2

Amendment permitting technical amendments without full procedures.

Standing Committee

Draft requested 1/92  
Draft discussed 4/92; discussion ongoing  
New draft approved 10/92  
Uniform language developed by Standing Committee--referred to Advisory Committee for incorporation 12/92  
Approved by Advisory Committee for submission to Standing Committee 4/93  
Approved by Standing Committee for publication to bench and bar 4/93  
Published 11/93  
Approved for resubmission to Standing Committee 4/94  
Standing Committee determined that no further action is appropriate 6/94

FRAP Item	Proposal	Source	Current Status
92-4	Amendment of Rule 35 to include intercircuit conflict as ground for seeking in banc.	Solicitor General Starr	Subcommittee consisting of Judges Logan and Williams and Mr. Kopp to consult with Reporter Report from FJC pending 1/93 On hold pending views of Solicitor General 4/93 Approved in substance; subcommittee to prepare new draft 9/93 Discussion of new draft postponed until fall meeting 4/94 Draft approved 10/94 to be submitted to Style Subcommittee
92-5	Amendment of Rule 25 re "most expeditious form . . . except special delivery".	Advisory Committee	Approved for submission to Standing Committee 4/93 Approved by Standing Committee for publication to bench and bar 6/93 Published 11/93 Advisory Committee approved new draft for submission to Standing Committee for republication 4/94 Approved by Standing Committee for republication 6/94 Published 9/94
92-8	Amendment of Rule 38 re: 1) defining "trivoltous"; 2) whether responsibility falls on the client or the attorney; 3) requiring a court to state reasons.	Alan B. Morrison, Esq.	Subcommittee appointed to monitor; no need for action at this time 4/93 Subcommittee reported; new chair to be approved 10/94



<u>FRAP Item</u>	<u>Proposal</u>	<u>Source</u>	<u>Current Status</u>
92-9	Amendment of Rule 10(b)(1) to conform to 4(a)(4).	Advisory Committee on Bankruptcy Rules	Approved for submission to Standing Committee 4/93 Approved by Standing Committee for publication to bench and bar 6/93 Published 11/93 Approved for resubmission to Standing Committee 4/94 Approved by Standing Committee for submission to Judicial Conference 6/94 Approved by Judicial Conference 9/94
92-10	Reconsideration of some of the language of amended Rule 4(a)(4).	Standing Committee	Approved for submission to Standing Committee 4/93 Approved by Standing Committee for publication to bench and bar 6/93 Published 11/93 Approved for resubmission to Standing Committee 4/94 Approved by Standing Committee for submission to Judicial Conference 6/94 Approved by Judicial Conference 9/94
92-11	Consideration of local rules that do not exempt government attorneys from being required to join court bar or from paying admission fees.	Attorney General Barr and Standing Committee	On hold pending views of Solicitor General 4/93
93-1	Conflict between Civil Rule 9(h) & 28 U.S.C. § 1292(a)(3) re: interlocutory appeal of admiralty cases with non-admiralty claims.	Hon. Edward Becker (CA-3)	Awaiting initial Committee discussion Referred to Advisory Committee on Civil Rules 4/94

<u>FRAP Item</u>	<u>Proposal</u>	<u>Source</u>	<u>Current Status</u>
93-2	Amend Rule 8(c) re: cross-reference to Crim. R. 38.	Department of Justice	Approved for submission to Standing Committee 4/93 Approved by Standing Committee for publication 6/93 Published 11/93 Approved for resubmission to Standing Committee 4/94 Approved by Standing Committee for submission to Judicial Conference 6/94 Approved by Judicial Conference 9/94
93-3	Amend Rule 41 re: 7-day period for issuance of mandate.	Advisory Committee	Draft approved 10/94 to be submitted to Style Subcommittee
93-4	Amend Rule 41 re: length of time for stay of mandate.	Advisory Committee	Draft approved 10/94 to be submitted to Style Subcommittee
93-5	Amend Rule 26.1 to delete use of term "affiliate."	Mr. Joseph Spaniol	Draft approved 10/94 to be submitted to Style Subcommittee
93-6	Amend Rule 41 re: effective date of mandate.	Solicitor General; Days	Draft approved 10/94 to be submitted to Style Subcommittee
93-10	Applicability of Rule 26.1 to trade assoc.	Advisory Committee	No further action deemed appropriate 10/94
93-11	Rule permitting party to submit draft opinions as appendix to brief.	Hon. E. Peterson (Sup. Ct. OR)	No further action deemed appropriate 10/94
94-1	Amend Rule 26(c) re: length of time for responding when service is by mail.	Standing Committee	No further action deemed appropriate 10/94

<u>FRAP Item</u>	<u>Proposal</u>	<u>Source</u>	<u>Current Status</u>
94-2	Amend Rule 28(a) to prohibit citation of appellate decisions without clear recitation of jurisdiction.	Wm. Leighton, Esq.	No further action deemed appropriate 10/94