4/30/92

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Style Subcommittee
DRAFT
4-27-92

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

Rule 3. Appeal as of Right — How Taken[1]

* * * * *

(d) *Service of [Serving] the notice [Notice] of appeal [Appeal]*. — The clerk of the district court shall serve notice of the filing of [send a copy of[2]] a notice of appeal by mailing a copy thereof to [each party's] counsel of record of each party other than the appellant [(apart from the appellant's)], or, if a party is not represented by counsel, to the party's last known address[.] of that party~~; and t~~. The [district] clerk shall transmit forthwith [forthwith send] a copy of the notice of appeal and of the docket entries to the clerk of the court of appeals[.] named in the notice and the clerk of the district court [The district clerk] shall [likewise] transmit [send] copies [a copy] of any later docket entries [entry] in that [the] case to the [appellate] clerk[.] of the court of appeals. When an appeal is taken by a defendant [a

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[1] The Style Subcommittee has uniformly put rule headings in initial capitals.

[2] The Style Subcommittee wishes to alert the Appellate Rules Advisory Committee to this change. The use of "send" is perhaps a substantive change, but the wording seems more likely than "mail" to endure as technology advances. To simplify, we likewise recommend "send" instead of "transmit."

defendant appeals] in a criminal case, the clerk of the district court [district clerk] shall also serve [send] a copy of the notice of appeal upon [to] the defendant, either by personal service or by mail addressed to the defendant. The clerk shall note on each copy served [sent] the date on which [when] the notice of appeal was filed and, if the notice of appeal was filed in the manner provided in Rule 4(c) by an inmate confined in an institution, the date on which the notice of appeal was received by the clerk [when the clerk received the notice of appeal]. Failure of the clerk [The clerk's failure] to serve [send] notice shall [does] not affect the validity of the appeal. Service shall be [is] sufficient notwithstanding the death of a party or the party's counsel. The clerk shall note in the docket the names of the parties to whom the clerk mails copies [are sent[3]], with the date of mailing.

* * * * *

[3] The passive-voice verb is a superior alternative to repeating "clerk" in this way.

COMMITTEE NOTE

Note to subdivision [paragraph] 3(d).[4] The amendment requires the district court clerk to transmit [send] to the [appropriate appellate] clerk of the appropriate court of appeals copies [a copy of every] of all docket entries in a case following [after] the filing of a notice of appeal. This amendment accompanies the amendment to Rule 4(a)(4)[,] which provides that in a case in which [when] one of the post trial [posttrial] motions enumerated in Rule 4(a)(4) is filed, a notice of appeal filed before the disposition of the motion will become [becomes] effective upon disposition of the motion. The court of appeals needs to be advised that the filing of a post trial [posttrial] motion has suspended a notice of appeal. The court of appeals also needs to know when the district court has ruled on the motion. Transmitting [Sending] copies of all docket entries following [after] the filing of a notice of appeal [is filed] should provide the courts of appeals with the necessary information.

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[4] Bryan Garner, the consultant to the Style Subcommittee, has spoken with Judge Pointer and Dean Carrington about the use of "subdivision" and "paragraph" – terms used inconsistently in some of the drafts that the Subcommittee is working on. We've learned that, since at least 1938, the standard order has been as follows:

Rule 1

(a) Subdivision

(1) Paragraph

(A) Subparagraph

(i) Item.

The Subcommittee has therefore made the references in these amendments consistent with the established policy of the federal drafters. Where a specific paragraph is referred to (e.g., (a)(4)), it is preceded by "paragraph" instead of "subdivision."

Rule 3.1. Appeals [Appeal] from [a] Judgments [Judgment] Entered by [a] Magistrates Judges [Judge] in [a] Civil Cases [Case]

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

COMMITTEE NOTE

The amendment conforms the rule to the change in title from [“]magistrate[”] to [“]magistrate judge[”] made by the Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089, 5117 (1990).

Rule 4(a)(4)

> If any party makes a timely motion under the Federal Rules of Civil Procedure: (i) for judgment under Rule 50(b); (ii) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (iii) under Rule 59 to alter or amend the judgment; (iv) under Rule 54 for costs or attorney's fees if a district court under Federal Rule of Civil Procedure 58 enters an order delaying entry of judgment and extending the time for appeal; or (v) under Rule 59 for a new trial, or if any party serves a motion under Rule 60 of the Federal Rules of Civil Procedure within 10 days after the entry of judgment, the time for appeal for all parties shall run from the entry of the order disposing of the last of all such motions.

Using a bulleted list (with letters, for ease of reference) not only displays the points better, but also improves the sentence structure:

> If any party makes a timely motion of a type in the list that follows, the time for appeal for all parties runs from the entry of the order disposing of the last such motion. This provision applies to a timely motion under the Federal Rules of Civil Procedure:
>
> (A) for judgment under Rule 50(b);
> (B) to amend or make additional findings of fact under Rule 52(b), whether or not granting the motion would alter the judgment;
> (C) to alter or amend the judgment under Rule 59;
> (D) for costs or attorney's fees under Rule 54 if a district court under Rule 58 delays entry of judgment and extends the time for appeal; and
> (E) for a new trial under Rule 59, or if any party serves a Rule 60 motion within 10 days after the entry of judgment.

Rule 4. Appeal as of Right — When Taken

(a) ~~Appeals~~ *[Appeal] in [a]* ~~civil~~ *[Civil]* ~~cases~~ *[Case]*. —

* * * * *

(2) ~~Except as provided in (a)(4) of this Rule 4, a~~ A notice of appeal filed after the ~~announcement of~~ [judge announces] a decision or order but before the entry of the judgment or order ~~shall be~~ [is] treated as filed ~~after such~~ entry and on the day thereof [on the date of entry[5]].

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

(4) If any party makes a timely motion [of a type specified immediately below, the time for

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[5] The Style Subcommittee would like the Appellate Rules Committee to consider this suggested revision. We want to ensure that it will not change the substance of the rule.

appeal for all parties runs from the entry of ~~the~~ order disposing of the last such motion. This provision applies to a timely motion[6] under the Federal Rules of Civil Procedure[:] ~~is filed in the district court by any party~~

(A) for judgment under Rule 50(b);

(B) ~~under Rule 52(b)~~ to amend or make additional findings of fact [under Rule 52(b)], whether or not ~~an alteration of~~ [granting the motion would alter] the judgment[;] ~~would be required if the motion is granted;~~

(C) ~~under Rule 59~~ to alter or amend the judgment [under Rule 59]; ~~or~~

(D) under Rule 54 for ~~costs or~~ attorney's fees [under Rule 54] if a district court under Federal Rule of Civil Procedure 58 enters an order delaying ~~[delays]~~ entry ~~of judgment and extending~~ [extends] the time for appeal; or

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[6] See footnote 5.

(E) under Rule 59 for a new trial [under Rule 59], or if any party serves a [Rule 60] motion under Rule 60 of the Federal Rules of Civil Procedure within 10 days after the entry of judgment[.], the time for appeal for all parties shall run [runs] from the entry of the order ~~denying a new trial or granting or denying any other such motion~~ disposing of the last of all such motions. ~~A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above. No additional fees shall be required for such filing.~~ A notice of appeal filed after entry of the judgment but before disposition of any of the above motions shall be in abeyance and shall become effective upon [is ineffective until] the date of the

entry of an order that disposes of the last of all such motions [disposing of the last such motion]. An appeal from an order disposing of any of the above motions requires amendment of the party's [the party, in compliance with Appellate Rule 3(c), to amend a] previously filed notice of appeal[.] in compliance with Rule 3(c). Any such [An] amended notice of appeal shall [must] be filed within the time prescribed by this Rule 4 measured from the entry of the order disposing of the ~~last of all~~ such motions [motion].

* * * * *

(b) *Appeals [Appeal] in [a] criminal [Criminal] cases [Case].* — In a criminal case[,] a defendant shall [must] file the notice of appeal ~~by a defendant shall be filed~~ in the district court within 10 days after the entry [either] of (i) the judgment or order appealed from[,] or [of] (ii) a notice of appeal by the Government. A notice of appeal filed after the announcement of a

decision, sentence[,] or order[—]but before entry of the judgment or order[—]~~shall be~~ [is] treated as filed ~~after such entry and on the day thereof~~ [on the date ~~when the judgment is entered~~]. If a [defendant makes a] timely motion [specified immediately below, in accordance with] under the Federal Rules of Criminal Procedure[, an appeal from a judgment of conviction must be taken within 10 days after the entry of ~~an~~ the order disposing of the last such motion, or within 10 days after the entry of the judgment of conviction, whichever is later. This provision applies to a timely motion:]

(1) for judgment of acquittal,[;]

(2) for ~~in~~ arrest of judgment,[;] ~~or~~

(3) for a new trial on any ground other than newly discovered evidence,[;] or

(4) for a new trial based on the ground of newly discovered evidence if the motion is

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[7] The Style Subcommittee would like the Appellate Rules Committee to consider this suggested change. We want to ensure that it will not change the substance of the rule.

made before or within 10 days after entry of the judgment[.], ~~has been made~~ an appeal from a judgment of conviction may be taken within 10 days after the entry of an order ~~denying the motion~~ disposing of the last of all such motions, or within 10 days after the entry of the judgment of conviction, whichever is later. ~~A motion for a new trial based on the ground of newly discovered evidence will similarly extend the time for appeal from a judgment of conviction if the motion is made before or within 10 days after entry of the judgment.~~ A notice of appeal filed after announcement of [the court announces] a decision, sentence, or order[,] but before disposition [it disposes] of any of the above motions[,] shall be in abeyance and shall become effective upon [is ineffective until] the date of the entry of ~~an~~ the order that disposes [disposing] of the last of all such motions [motion], or upon [until] the date of the entry of the judgment of conviction, whichever is later. Notwithstanding the provisions of Appellate Rule 3(c), a valid notice of appeal is effective without amendment to

appeal from an order disposing of any of the above motions. When an appeal by the government is authorized by statute, the notice of appeal ~~shall~~ [must] be filed in the district court within 30 days after ~~the entry of~~ (i) the entry of the judgment or order appealed from or (ii) the filing of [any defendant files] a notice of appeal[.] ~~by any defendant.~~

A judgment or order is entered within the meaning of this subdivision when it is entered ~~in~~ [on] the criminal docket. Upon a showing of excusable neglect[,] the district court may,[—]before or after the time has expired, with or without motion and notice,[—]extend the time for filing a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision.

The filing of a notice of appeal under this Rule 4(b) does not divest a district court of jurisdiction to correct a sentence under Fed. R. Crim. P. 35(c), nor does the filing of a motion under Fed. R. Crim. P. 35(c) affect the validity of a notice of appeal filed before disposition of

such [entry of the order disposing of the] motion.

(c) *Appeals by [an] inmates [Inmate] confined [Confined] in [an] institutions [Institution].* — If an inmate [a person] confined in an institution files a notice of appeal in either a civil case or a criminal case, the notice of appeal is timely filed if it is deposited in the institution's internal mail system on or before the last day for filing. Timely filing may be shown by a notarized statement or by a declaration [(]in compliance with 28 U.S.C. § 1746[)] setting forth the date of deposit and stating that first-class postage has been prepaid. In [a] civil cases [case] in which the first notice of appeal is filed in the manner provided in this paragraph [subdivision] (c), the 14 day [14-day] period provided in [paragraph] (a)(3) of this Rule 4 for [an]other parties [party] to file [a] notices [notice] of appeal shall run [runs] from the date [when] the [district court receives the] first notice of appeal[.] is received by the district court. In [a] criminal cases [case] in which a defendant

files a notice of appeal in the manner provided in this paragraph [subdivision] (c), the 30 day [30-day] period for the government to file its notice of appeal shall run [runs] from the entry of the judgment or order appealed from or from the [district court's] receipt of the defendant's notice of appeal[.] by the district court.

COMMITTEE NOTE

Note to Subdivision [Paragraph (a)](2). The amendment treats all notices [a notice] of appeal filed after [the] announcement of [a] decisions [decision] or orders [order,] but before [its] formal entry[,] of such orders as if the notices of appeal [notice] had been filed after such entry. The amendment deletes the language that made subdivision [paragraph] (a)(2) inapplicable to notices [a notice] of appeal filed after announcement of the disposition of post trial motions [a posttrial motion] enumerated in [paragraph] (a)(4) but before the entry of such orders [the order], see, Acosta v. Louisiana Dept. [Dep't] of Health & Human Resources, 478 U.S. 251 (1986) (per curiam); and Alerte v. McGinnis, 898 F.2d 69 (7th Cir. 1990). Because the amendment of subdivision [paragraph] (a)(4) recognizes all notices of appeal filed after entry of judgment,[—]even those that are filed while the post trial [posttrial] motions enumerated in [paragraph] (a)(4) are pending,[—]the amendment of this subdivision [paragraph] is consistent with the amendment of subdivision [paragraph] (a)(4).

Note to Subdivision [Paragraph] (a)(3). The amendment is technical in nature, [~~merely tightens the phrasing~~;] no substantive change is intended.

Note to Subdivision [Paragraph] (a)(4). The 1979 amendment of this subdivision [paragraph] created a trap for [an] unsuspecting litigants [litigant] who file notices [files a notice] of appeal before post trial motions [a posttrial motion], or while post trial motions are [a posttrial motion is] pending. The 1979 amendment requires parties [a party] to file new notices [a new notice] of appeal after [the motion's] disposition of the motions. Unless a new notice is filed, the court of appeals lacks jurisdiction to hear the appeal. Griggs v. Provident Consumer Discount Co., 459 U.S. 56 (1982). Many litigants, especially pro se litigants, fail to file the second notice of appeal[,] and several courts have expressed dissatisfaction with the rule. See, e.g., Averhart v. Arrendondo, 773 F.2d 919 (7th Cir. 1985); Harcon Barge Co. v. D & G Boat Rentals, Inc., 746 F.2d 278 (5th Cir. 1984), *cert. denied*, 479 U.S. 930 (1986).

The amendment provides that notices [a notice] of appeal filed before [the] disposition of the [a] specified post trial motions [posttrial motion] will become effective upon disposition of the motions. A notice of appeal filed before the filing of one of the specified motions or after the filing of a motion but before disposition of the motion, is, in effect, suspended until the disposition of the motion [motion is disposed of, whereupon] . Upon disposition of the motion, the previously filed notice of appeal becomes effective to grant [effectively places] jurisdiction to a [in the] court of appeals. The Committee realizes that holding notices [a notice] of appeal in abeyance will create a new species of appeal that is not truly "pending" and recommends that[,] for statistical purposes[,] appeals [an appeal] held in abeyance not be counted as pending. A new statistical classification may be appropriate.

Because notices [a notice] of appeal will ripen into [an] effective appeals [appeal] upon disposition of post trial motions [a posttrial motion], in some instances there will be appeals [an appeal] from judgments [a judgment] that have [has] been altered substantially because the motions were [motion was] granted in whole or in part. Many such appeals will be

dismissed for want of prosecution when the appellant fails to meet the briefing schedule. However, [But] the appellee also may [also] move to have [strike] the appeal[.] stricken. When responding to such a motion, the appellant would have an opportunity to state that[,] even though some relief sought in a post trial [posttrial] motion was granted, the appellant still plans to pursue the appeal. The [Since the] appellant's response would provide the appellee with sufficient notice of the appellants' [appellant's] intentions[,] that the Committee does not believe that an additional notice of appeal is needed.

The amendment provides that a notice of appeal filed before the disposition of a post trial [posttrial] tolling motion is sufficient to bring the underlying case to the court of appeals. If the judgment is altered upon disposition of a post trial [posttrial] motion, however, and [if] a party wishes to appeal from the disposition of the motion, the party must amend the notice of appeal to so indicate.

Subdivision [Paragraph] (a)(4) also is [also] amended to include[, among motions that extend the time for filing a notice of appeal,] motions [a Rule 60 motion] under Rule 60 that are [is] served within 10 days after entry of judgment[.] among the motions that extend the time for filing a notice of appeal. This eliminates the difficulty of determining whether a post trial [posttrial] motion made within 10 days after entry of a judgment is a motion under Rule 59(e) [motion], which tolls the time for filing an appeal, or a motion under Rule 60 [motion], which historically has not tolled the time. The amendment is consistent [comports] with the practice in several circuits that treat [of treating] all motions to alter or amend judgments that are made within 10 days after entry of judgment as Rule 59(e) motions for purposes of Rule 4(a)(4). *See, e.g.*, Finch v. City of Vernon, 845 F.2d 256 (11th Cir. 1988); Rados v. Celotex Corp., 809 F.2d 170 (2d Cir. 1986); Skagerberg v. Oklahoma, 797 F.2d 881 (10th Cir. 1986). However, to [To] conform to recent Supreme Court decisions, [however —]Buchanan v. Stanships, Inc., 485 U.S. 265 (1988); [and] Budinich v. Becton Dickinson and [&] Co., 486 U.S. 196

(1988), [—]the amendment excludes motions for costs and attorney's fees from the class of motions that extend the filing time unless a district court, acting under Rule 58, enters an order delaying the entry of judgment and extending the time for appeal. This amendment is to be read in conjunction with the amendment of Fed. R. Civ. P. 58.

Note to subdivision (b). The amendment grammatically restructures the portion of this subdivision that lists the types of motions that toll the time for filing an appeal. This restructuring is intended to make the rule easier to read. No substantive change is intended other than to add motions [a motion] for judgment of acquittal under Criminal Rule 29 to the list of tolling motions. Such motions are [a motion is] the equivalent of a Fed. R. Civ. P. 50(b) motions [motion] for judgment notwithstanding the verdict, which toll [tolls] the running of time for appeals in civil cases [an appeal in a civil case].

The proposed amendment also eliminates an ambiguity from the third sentence of this subdivision. The third sentence currently provides that if one of the specified motions is filed, the time for filing an appeal will run from the entry of any order denying the motion. That sentence, like the parallel provision in Rule 4(a)(4), was intended to toll the running of time for appeal if one of the post trial [posttrial] motions is timely filed. However, in criminal cases [In a criminal case, however,] the time for filing the motions runs not from entry of judgment (as it does in civil cases), but from the verdict or finding of guilt. Thus, in a criminal case, a post trial [posttrial] motion may be disposed of more than 10 days before sentence is imposed, *i.e.* [i.e.,] before the entry of judgment. United States v. Hashagen, 816 F.2d 899, 902 N.5 [n.5] (3d Cir. 1987). To make it clear that a notice of appeal need not be filed before entry of judgment, the proposed amendment states that an appeal may be taken within 10 days after the entry of an order disposing of the motion, or within 10 days after the entry of judgment, whichever is later. The amendment also changes the language in the third sentence which

provides [providing] that an appeal may be taken within 10 days after the entry of an order denying the motion and[;] [the amendment] says instead that an appeal may be taken within 10 days after the entry of an order disposing of the last of such motions [motion]. (Emphasis added) [(emphasis added).] The change recognizes that there may be multiple post trial [posttrial] motions filed and that[,] although one or more motions may be granted in whole or in part, a defendant may still wish to pursue an appeal.

The amendment also states that notices [a notice] of appeal filed before [the] disposition of any of the post trial [posttrial] tolling motions shall become [becomes] effective upon disposition of the motions. In most circuits this language simply restates the current practice, see [. *See*] United States v. Cortes, 895 F.2d 1245 (9th Cir. 1990). However, two [Two] circuits[, however,] have questioned that practice in light of the language of the rule, see United States v. Gargano, 826 F.2d 610 (7th Cir. 1987), and United States v. Jones, 669 F.2d 559 (8th Cir. 1982), and[.] the [The] committee [therefore] wishes to clarify the rule. The amendment is consistent with the proposed amendment of Rule 4(a)(4).

Subdivision (b) is further amended in light of new Fed. R. Crim. P. 35(c)[,] which authorizes [a] sentencing courts [court] to correct [any] arithmetic [arithmetical], technical, or other clear errors in sentencing within 7 days after the imposition of [imposing the] sentence. The Committee believes that a sentencing court should be able to act under Criminal Rule 35(c) even if a notice of appeal has already been filed[;] and that a notice of appeal should not be affected by the filing of a motion under Rule 35(c) [motion] or by correction of [a] sentence pursuant to [under] Rule 35(c).

Note to subdivision (c). In Houston v. Lack, 487 U.S. 266 (1988), the Supreme Court held that [a] *pro se* prisoners' [prisoner's] notices [notice] of appeal are [is] "filed" at the moment of delivery to prison authorities for forwarding to the district court. The amendment reflects that decision. The language of the

amendment is similar to that in Supreme Court Rule 29.2.

Permitting inmates to file notices [a notice] of appeal by depositing the notices [it] in [an] institutional mail systems [system] requires adjustment of the rules governing the filing of cross appeals [cross-appeals]. In a civil case[,] the time for filing a cross appeal [cross-appeal] ordinarily runs from the date on which [when] the first notice of appeal is filed. If an inmate's notice of appeal is filed by depositing it in an institution's mail system, it is possible that the notice of appeal will not arrive in the district court until several days after the "filing" date and perhaps even after the time for filing a cross appeal [cross-appeal] has expired. To avoid that [problem], subdivision (c) provides that in civil cases [a civil case] when [an] institutionalized persons file notices [person files a notice] of appeal by depositing them [it] in [the] institutions' [institution's] mail systems [system], the time for filing cross appeals [a cross-appeal] shall run [runs] from the district courts' [court's] receipt of the notices of appeal [notice]. A parallel provision is made [The amendment makes a parallel change] regarding the time for the government to bring appeals in criminal cases [appeal in a criminal case].

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

(a) *Petition for Leave to Appeal; Answer or Cross Petition.* — An appeal from a district court judgment, entered after an appeal pursuant to [under] 28 U.S.C. § 636(c)(4) to a district judge ~~of the district court~~ from a judgment entered upon direction of a magistrate judge in a civil case,

may be sought by filing a petition for leave to appeal . . . .

COMMITTEE NOTE

The amendment conforms the rule to the change in title from magistrate to magistrate judge made by the Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089, 5117 (1990).

Rule 10. The Record on Appeal

* * * * *

(b) *The ~~transcript~~ [Transcript] of proceedings [Proceedings]; ~~duty~~ duty of appellant to order; ~~notice~~ notice to appellee ~~if~~ if partial ~~transcript~~ transcript is ~~ordered~~ ordered [Duty of Appellant to Order; Notice to Appellee If Partial Transcript Is Ordered].* —

* * * * *

(3) Unless the entire transcript is to be included, the appellant shall, within the ~~10 days~~ [10-day] time provided in [paragraph] (b)(1) of this Rule 10, file a statement of the issues the appellant intends to present on the appeal[,] and shall serve on the appellee a copy of the order or certificate and of the statement. ~~If the~~ [An] appellee ~~deems~~ [who ~~desires~~] a transcript ~~or~~ of other parts of the proceedings ~~to be~~ necessary, ~~the~~ appellee shall, within 10 days after the service of the order or certificate and the statement of the appellant, file and serve on the appellant a designation of additional parts to be included. Unless within 10 days after service of ~~such~~ [the] designation the appellant has ordered

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

* * * * *

COMMITTEE NOTE

The amendment is technical and [merely tightens the phrasing;] no substantive change is intended.

Rule 25. Filing and Service

(a) *Filing.* — Papers required or permitted to be filed in a court of appeals **shall** [must] be filed with the clerk. Filing may be accomplished by mail addressed to the clerk, but filing **shall not** be [is not] timely unless **the papers are received** by the clerk [the clerk receives the papers] within the time fixed for filing, except that briefs and appendices **shall be** [are] deemed [treated as] filed on the day of mailing if the most expeditious form of delivery by mail, excepting [except] special delivery, is utilized

[used], and except further that papers [Papers] filed by [an] inmates confined in institutions are [an institution are] timely filed if they are deposited in the institutions' [institution's] internal mail systems [system] on or before the last day for filing. Timely filing of papers by [an] inmates confined in institutions [an institution] may be shown by [a] notarized statements or declarations [statement or declaration] [(]in compliance with 28 U.S.C. § 1746[)] setting forth the date of deposit and stating that first-class postage has been prepaid. If a motion requests relief which [that] may be granted by a single judge, the judge may permit the motion to be filed with the judge, in which event the judge shall [must] note thereon the date of filing and shall thereafter transmit [give] it to the clerk.

* * * * *

COMMITTEE NOTE

The amendment accompanies new subdivision (c) of Rule 4 and extends the holding in Houston v. Lack, 487 U.S. 266 (1988), to all papers filed in the courts of appeals by persons confined in institutions.

Rule 28. Briefs

(a) *[Appellant's] Brief of the appellant.* — The brief of the appellant ~~shall~~ [must] contain[,] under appropriate headings and in the order here indicated:

* * * * *

(5) An argument. The argument may be preceded by a summary. The argument ~~shall~~ [must] contain the contentions of the appellant ~~with respect to~~ [on] the issues presented, and the reasons therefor, with citations to the authorities, statutes[,] and parts of the record relied on. The argument also ~~shall~~ [must also] include [for each issue] a concise statement of the applicable standard of review ~~for each issue, which~~[; this statement] may ~~be presented~~ [appear] in the discussion of each issue or under a separate heading ~~preceding~~ [placed before] the discussion of the issues.

* * * * *

(b) *[Appellee's] Brief of the Appellee.* — The brief of the appellee ~~shall~~ [must] conform to the requirements of ~~subdivisions~~ [paragraphs] (a)(1)-

(5), except that ~~a statements~~ of jurisdiction, of the issues, ~~or~~ of the case, or of the standard of review need not be made unless the appellee is dissatisfied with the statement of the appellant. [none of the following need appear unless the appellee is dissatisfied with the statement of the appellant:

(1) the jurisdictional statement;

(2) the statement of the issues;

(3) the statement of the case;

(4) the statement of the standard of review.]

* * * * *

COMMITTEE NOTE

Note to subdivision [paragraph] (a)(5). The amendment requires ~~appellants' briefs~~ [an appellant's brief] to state the standard of review applicable to each issue on appeal. Five circuits currently require ~~such~~ [these] statements[.] ~~and those~~ [Experience in those] ~~circuits' experience~~ [circuits] indicates that requiring a statement of the standard of review generally results in arguments ~~being~~ [that are] properly shaped in light of the standard.

Rule 34. Oral Argument

* * * * *

(c) *Order and content [Content] of argument [Argument].* — The appellant is entitled to open and conclude the argument. ~~The opening argument shall include a fair statement of the case.~~ Counsel will not be permitted to [may not] read at length from briefs, records[,] or authorities.

* * * * *

COMMITTEE NOTE

Subdivision (c). The amendment deletes the requirement that the opening argument ~~shall~~ [must] include a fair statement of the case. The Committee proposed the change because in some circuits the court does not want appellants to give such statements. In those circuits[,] the rule is not followed and is misleading. ~~However~~, [Nevertheless,] the Committee does not want the deletion of the requirement to

indicate disapproval of the practice. Those circuits that desire a statement of the case may continue the practice.

Rule 35. Determination of ~~causes~~ [a Cause] by the Court in Banc[8]

(a) *~~When hearing or rehearing in banc will be ordered~~ [When a Hearing or Rehearing in Banc Will Be Ordered]*. — A majority of the circuit judges ~~who are~~ currently in regular active service and who are not disqualified from participating in the case may order that an appeal or other proceeding be heard or reheard by the court ~~of appeals~~ in banc, except that no in banc hearing or rehearing may be ordered if the number of judges not disqualified is less than a majority of those currently in regular active service. ~~Such a~~ [A] hearing or rehearing [in banc] is not favored and ordinarily will not be ordered except [in two circumstances:] ~~(1)~~ when consideration by the full court is necessary to secure or maintain

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[8] The phrase "in banc" could be rendered either "In Banc" or "in Banc" in a title. The Style Subcommittee has rendered it as if the "in" were a preposition instead of a particle.

Incidentally, the majority of the Subcommittee prefers the spelling "en banc" — the predominant spelling in the United States. But, given the spelling in the statute ("in banc"), the Subcommittee has decided not to create an inconsistency.

uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance.

* * * * *

COMMITTEE NOTE

The circuits ~~are divided as to~~ [differ on] whether vacancies and recusals ~~are~~ [should be] counted in determining whether a majority of the judges in regular active service has ordered a case to be heard or reheard in banc. The amendment establishes a uniform rule that vacancies and recusals are not counted, ~~i.e.~~ [i.e.], that the base from which the majority is determined consists only of the judges currently in regular active service who are not disqualified. The amendment also establishes a quorum requirement that the number of nondisqualified judges must constitute a majority of the active judges, including those who may be recused. Without such a quorum requirement, if seven of twelve active judges were disqualified, for example, an in banc could be ordered by a three-to-two vote among the five judges available to sit.

STYLE SUBCOMMITTEE PROPOSED DRAFT

RULE 84. Forms; Technical and Conforming Amendments.

(b) Technical and Conforming Amendments. - The Judicial Conference of the United States may amend these rules to correct errors or inconsistencies in grammar, spelling, cross-references, typography, or style, to make changes essential to conforming these rules with statutory amendments, or to make other similar technical or conforming changes.

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PROPOSED APPELLATE DRAFT

RULE 49. Technical and Conforming Amendments.

The Judicial Conference of the United States may amend these rules to correct errors or inconsistencies in grammar, spelling, cross-references, typography, or style, to make changes essential to conforming these rules with statutory amendments, or to make other similar technical or conforming changes.

AGENDA

REVISED AGENDA
Meeting of the Advisory Committee on Appellate Rules
April 30, 1992

I. Gap Report

Consideration of comments on items published August 1992:

- item 86-10 and 86-26, amendment of Rules 4(a)(4) and 4(b) regarding the need for a new notice of appeal after disposition of post-trial tolling motions;
- item 86-25, amendment of Rule 28 to require a statement of the standard of review in briefs;
- item 88-10, amendment of Rule 34(c) deleting the requirement that an opening argument shall include a statement of the case;
- item 88-13, amendment of Rule 35(a) to provide that a majority of judges eligible to participate in a case shall have the power to grant in banc review;
- item 89-2, amendment of the filing rules in light of the Supreme Court's decision in Houston v. Lack (amendments to Rule 3(d), 4(c), and 25);
- item 90-5, technical amendment of Rule 10(b)(3); and,
- item 91-1, changing "magistrate" to "magistrate judge" in all rules (amendments to Rules 3.1 and 5.1).

II. Requests from the Standing Committee:

A. Item 92-1. The Standing Committee asked the Advisory Committees on Civil and Appellate Rules to draft amendments to the national rules requiring uniform numbering of local rules and deletion of all language in local rules that merely repeats the language of the national rules.

B. Item 92-2. The Standing Committee would like to dispense with the need to follow the full procedures (publication, comment, etc.) whenever a typographical or clerical error gives rise to the need to amend a rule. The Standing Committee has asked each of the Advisory Committees to consider the possibility of amending their rules to authorize such changes.

C. The Standing Committee would like a report from each of the Advisory Committees about the desirability of developing a numbering system that would eliminate the duplication of numbers from one set of rules to another. The report is due next November. At the April meeting we will have a preliminary discussion, with further discussion to follow in the fall.

D. Item 90-4. The Standing Committee approved publication of the proposed amendments to Rules 3(c), 15(a) and Forms 1, 2, and 3 on an expedited basis because of the importance of the Torres problem which those

changes address. However, the Standing Committee requested that the Advisory Committee revisit the question of whether a procedure analogous to that in Supreme Court Rule 12.4 would be a better approach because it would both deal with the Torres problem and preserve as many appeals as possible.

III. Action Items

A. Items 89-5 and 90-1, amendment of Rule 35 to treat suggestions for rehearing in banc like petitions for panel rehearing so that a request for a rehearing in banc will also suspend the finality of the court's judgment and thus toll the period in which a petition for certiorari may be filed.

B. Item 91-5, rule to authorize use of special masters in the courts of appeals.

C. Item 91-27, amendment of all the appellate rules that require the filing of copies of a document to authorize local rules that require a different number of copies.

D. Item 91-22, amendment of Rule 9 regarding the type of information that should be presented to a court.

E. Item 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.

F. Item 91-11, amendment of Rule 42 regarding the authority of clerks to return or refuse documents that do not comply with national or local rules.

G. Item 91-4, amendment of Rule 32 regarding typeface.

IV. Discussion items:

A. Item 86-23 regarding the ten day period within which an objection to a magistrate's report must be filed and the difficulty that prisoners have in meeting that time schedule.

B. Item 91-7 regarding appeal of remand orders.

C. Item 91-6 regarding allocation of word processing equipment costs between producing originals and producing "copies."

D. Item 91-17 regarding the publication of opinions.

E. Eleventh Circuit's response to the Local Rules Project.

F. Solicitor General's suggestion with respect to in banc hearings.

G. Recommendation to the Judicial Conference regarding the continuation of the committee.

I. Gap Report

TO: Honorable Kenneth F. Ripple, Chair, Members of the Advisory Committee on Appellate Rules and Liaison Members

FROM: Carol Ann Mooney, Reporter

DATE: April 13, 1992

SUBJECT: Comments on the draft rules published August, 1991, and suggested amendments to the drafts.

The comments received as a result of the publication in August 1991 of draft amendments to the Federal Rules of Appellate Procedure are summarized in the attached document entitled Draft GAP Report.

The current task of the Advisory Committee is to review the comments and consider whether to amend the draft rules in light of the comments. After the Advisory Committee decides whether amendment of the rules is warranted, the committee must make a recommendation to the Standing Committee regarding the next steps in the rulemaking process.

If the Advisory Committee decides that no amendment of the published rules is needed or that only technical or non-substantial amendments are needed, the committee may request that the Standing Committee approve the rules with the new amendments, if any, and forward them to the Judicial Conference for approval.

If the Advisory Committee decides that substantial revision of the published rules is needed, an additional period for public notice and comment may be required. The Advisory Committee may be ready to approve such amendments and request that the Standing Committee approve publication of the amended drafts, or the Advisory Committee may wish to have time for further study and may ask the Standing Committee to remand the matter to the Advisory Committee for reconsideration.

Copies of the draft rules as published in August 1991 are attached for your convenience. The copies are marked showing changes I have drafted for your consideration.

Rule 3

There were no comments on the proposed amendments to Rule 3. However, if the committee considers any substantial amendments to Rule 4 as it was published, the Rule 3 changes need to be reexamined in light of such amendments because the Rule 3 changes are coordinated with the published amendments to Rule 4.

Rule 3.1

There were no comments on the proposed amendment to Rule 3.1 which changes "magistrate" to "magistrate judge."

Rule 4

The suggested amendments to Rule 4 serve two main purposes: 1) to eliminate the trap for litigants who file notices of appeal before post trial motions, or while post trial motions are pending, and 2) to "codify" the Supreme Court's decision in Houston v. Lack, holding that notices of appeal filed by inmates confined in institutions are timely if they are deposited in the institutions' internal mail systems, with postage prepaid, on or before the filing date. No comments were submitted regarding proposed Rule 4(c), dealing with inmate filings. Several commentators had suggestions for improving Rule 4(a)(4). In light of those comments, I have revised draft Rule 4 for the committee's consideration.

Rule 4. Appeal as of right - When taken

(a) Appeals in civil cases.-

(1) Except as provided in (a)(4) of this Rule 4, ~~I~~in a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after such entry. If a notice of appeal is mistakenly filed in the court of appeals, the clerk of the court of appeals shall note thereon the date on which it was received and transmit it to the clerk of the district court and

it shall be deemed filed in the district court on the date so noted.

(2) ~~Except as provided in (a)(4) of this Rule 4, a~~ A notice of appeal filed after the announcement of a decision or order but before the entry of the judgment or order shall be treated as filed after such entry and on the day thereof.

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

(4) If any party makes a timely motion under the Federal Rules of Civil Procedure ~~is filed in the district court by any party~~: (i) for judgment under Rule 50(b); (ii) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (iii) under Rule 59 to alter or amend the judgment; ~~or~~ (iv) ~~under Rule 54 for~~ attorneys' fees if a district court under ~~Federal Rule of Civil Procedure~~ 58, ~~enters an order delaying finality of judgment and extending~~ the time for appeal; or (v) under Rule 59 for a new trial, or if any party serves a motion under Rule 60 of the

Federal Rules of Civil Procedure within 10 days after the entry of judgment, the time for appeal for all parties shall run from the entry of the order ~~denying a new trial or granting or denying any other such motion~~ disposing of the last of all such motions. ~~A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above.~~ A notice of appeal filed after entry of the judgment but before disposition of any of the above motions shall be in abeyance and shall become effective to appeal from the judgment or order, or part thereof, specified in the notice of appeal, upon the date of the entry of an order that disposes of the last of all such motions. Appellate review of an order disposing of any of the above motions requires amendment of the party's previously filed notice of appeal in compliance with Rule 3(c). Any such amended notice of appeal shall be filed within the time prescribed by this Rule 4 measured from the entry of the order disposing of the last of all such motions. No additional fees shall be required for such filing.

* * *

(b) Appeals in criminal cases.- In a criminal case a defendant shall file the notice of appeal ~~by a defendant shall be filed~~ in the district court within 10 days after the entry of (i) the judgment or order appealed from or (ii) a notice of appeal by the Government. A notice of appeal filed after the announcement of a decision, sentence or order but before entry of the judgment or order shall be treated as filed after such entry and on the day thereof. If a timely motion under the Federal Rules of Criminal Procedure is made: (i) for judgment of acquittal, (ii) for ~~in~~ arrest of judgment, ~~or~~ (iii) for a new trial on any ground other than newly discovered evidence, or (iv) for a new trial based on the ground of newly discovered evidence if the motion is made before or within 10 days after entry of the judgment, ~~has been made~~ an appeal from a judgment of conviction may be taken within 10 days after the entry of an order ~~denying the motion~~ disposing of the last of all such motions, or within 10 days after the entry of the judgment of conviction, whichever is later. ~~A motion for a new trial based on the ground of newly discovered evidence will similarly extend the time for appeal from a judgment of conviction if the motion is made before or within 10 days after entry~~

~~of the judgment.~~ A notice of appeal filed after announcement of a decision, sentence, or order but before disposition of any of the above motions shall be in abeyance and shall become effective upon the date of the entry of an order that disposes of the last of all such motions, or upon the date of the entry of the judgment of conviction, whichever is later. Notwithstanding the provisions of Rule 3(c), a valid notice of appeal is effective without amendment to appeal from an order disposing of any of the above motions. When an appeal by the government is authorized by statute, the notice of appeal shall be filed in the district court within 30 days after ~~the entry of~~ (i) the entry of the judgment or order appealed from or (ii) the filing of a notice of appeal by any defendant.

A judgment or order is entered within the meaning of this subdivision when it is entered in the criminal docket. Upon a showing of excusable neglect the district court may, before or after the time has expired, with or without motion and notice, extend the time for filing a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision.

The filing of a notice of appeal under this Rule 4(b) does not divest a district court of jurisdiction to correct a sentence under Fed. R. Crim. P. 35(c), nor does the filing of a motion under Fed. R. Crim. P. 35(c) affect the validity of a notice of appeal filed before disposition of such motion.

(c) Appeals filed by inmates confined in institutions.- If an inmate confined in an institution files a notice of appeal in either a civil case or a criminal case, the notice of appeal is timely filed if it is deposited in the institution's internal mail system on or before the last day for filing. Timely filing may be shown by a notarized statement or by a declaration in compliance with 28 U.S.C. § 1746 setting forth the date of deposit and stating that first-class postage has been prepaid. In civil cases in which the first notice of appeal is filed in the manner provided in this paragraph (c), the 14 day period provided in (a)(3) of this Rule 4 for other parties to file notices of appeal shall run from the date the first notice of appeal is received by the district court. In criminal cases in which a defendant files a notice of appeal in the manner provided in this paragraph (c), the 30 day period

for the government to file its notice of appeal shall run from the entry of the judgment or order appealed from or from the receipt of the defendant's notice of appeal by the district court.

Committee Note

Note to Subdivision (a)(1). The amendment is intended to alert readers to the fact that subdivision (a)(4) extends the time for filing appeals when certain post trial motions are filed. It is the Committee's hope that awareness of the provisions of subdivision (a)(4) will prevent the filing of notices of appeal when post trial tolling motions are pending.

Note to Subdivision (a)(2). The amendment treats all notices of appeal filed after announcement of decisions or orders but before formal entry of such orders as if the notices of appeal had been filed after such entry. The amendment deletes the language that made subdivision (a)(2) inapplicable to notices of appeal filed after announcement of the disposition of post trial motions enumerated in (a)(4) but before the entry of such orders, see Acosta v. Louisiana Dept. of Health & Human Resources, 478 U.S. 251 (1986) (per curiam); and Alerte v. McGinnis, 898 F.2d 69 (7th Cir. 1990). Because the amendment of subdivision (a)(4) recognizes all notices of appeal filed after entry of judgment, even those that are filed while the post trial motions enumerated in (a)(4) are pending, the amendment of this subdivision is consistent with the amendment of subdivision (a)(4).

Note to Subdivision (a)(3). The amendment is technical in nature, no substantive change is intended.

Note to Subdivision (a)(4). The 1979 amendment of this subdivision created a trap for unsuspecting litigants who file notices of appeal before post trial motions, or while post trial motions are pending. The 1979 amendment requires parties to file new notices of appeal after disposition of the motions. Unless a new notice is filed, the court of appeals lacks jurisdiction to hear the appeal. Griggs v. Provident Consumer Discount Co., 459 U.S. 56 (1982). Many litigants, especially pro se litigants, fail to file the second notice of appeal and several courts have expressed dissatisfaction with the rule. See, e.g., Averhart v. Arrendondo, 773 F.2d 919 (7th Cir. 1985); Harcon Barge Co. v. D & G Boat Rentals, Inc., 746 F.2d 278 (5th Cir. 1984), cert. denied, 479 U.S. 930 (1986).

The amendment provides that notices of appeal filed before disposition of the specified post trial motions will become effective upon disposition of the motions. A notice of appeal filed before the filing of one of the specified motions or after the filing of a motion but before disposition of the motion, is, in effect, suspended until the disposition of the motion. Upon disposition of the motion, the previously filed notice of appeal becomes effective to grant jurisdiction to a court of appeals.

Because notices of appeal will ripen into effective appeals upon disposition of post trial motions, in some instances there will be appeals from judgments that have been altered substantially because the motions were granted in whole or in part. Many such appeals will be dismissed for want of prosecution when the appellant fails to meet the briefing schedule. However, the appellee also may move to have the appeal stricken. When responding to such a motion, the appellant would have an opportunity to state that even though some relief sought in a post trial motion was granted, the appellant still plans to pursue the appeal. The appellant's response would provide the appellee with sufficient notice of the appellant's intentions that the Committee does not believe that an additional notice of appeal is needed.

The amendment provides that a notice of appeal filed before the disposition of a post trial tolling motion is sufficient to bring the underlying case, as well as any orders specified in the original notice, to the court of appeals. If the judgment is altered upon disposition of a post trial motion, however, and a party wishes to appeal from the disposition of the motion, the party must amend the notice of appeal to so indicate. The filing of an amended notice of appeal requires no additional fees because it is an amendment of the original notice of appeal and not a new notice of appeal.

Subdivision (a)(4) also is amended to include motions under Rule 60 that are served within 10 days after entry of judgment among the motions that extend the time for filing a notice of appeal. This eliminates the difficulty of determining whether a post trial motion made within 10 days after entry of a judgment is a motion under Rule 59(e), which tolls the time for filing an appeal, or a motion under Rule 60, which historically has not tolled the time. The amendment is consistent with the practice in several circuits that treat all motions to alter or amend judgments that are made within 10 days after entry of judgment as Rule 59(e) motions for purposes of Rule 4(a)(4). See, e.g., Rados v. Celotex Corp., 809 F.2d 170 (2d Cir. 1986); Skagerberg v. Oklahoma, 797 F.2d 881 (10th Cir. 1986); Finch v. City of Vernon, 845 F.2d 256 (11th Cir. 1988). However, to conform to a recent Supreme Court decision, Budinich v. Becton Dickinson and Co., 486 U.S. 196 (1988), the amendment excludes motions for attorneys' fees from the class of motions that extend the filing

time unless a district court, acting under Rule 58, enters an order delaying the finality of judgment and extending the time for appeal. This amendment is to be read in conjunction with the amendment of Fed. R. Civ. P. 58.

Note to subdivision (b). The amendment grammatically restructures the portion of this subdivision that lists the types of motions that toll the time for filing an appeal. This restructuring is intended to make the rule easier to read. No substantive change is intended other than to add motions for judgment of acquittal under Criminal Rule 29 to the list of tolling motions. Such motions are the equivalent of Fed. R. Civ. P. 50(b) motions for judgment notwithstanding the verdict, which toll the running of time for appeals in civil cases.

The proposed amendment also eliminates an ambiguity from the third sentence of this subdivision. The third sentence currently provides that if one of the specified motions is filed, the time for filing an appeal will run from the entry of any order denying the motion. That sentence, like the parallel provision in Rule 4(a)(4), was intended to toll the running of time for appeal if one of the post trial motions is timely filed. However, in criminal cases the time for filing the motions runs not from entry of judgment (as it does in civil cases), but from the verdict or finding of guilt. Thus, in a criminal case, a post trial motion may be disposed of more than 10 days before sentence is imposed, i.e. before the entry of judgment. United States v. Hashagen, 816 F.2d 899, 902 N.5 (3d Cir. 1987). To make it clear that a notice of appeal need not be filed before entry of judgment, the proposed amendment states that an appeal may be taken within 10 days after the entry of an order disposing of the motion, or within 10 days after the entry of judgment, whichever is later. The amendment also changes the language in the third sentence which provides that an appeal may be taken within 10 days after the entry of an order denying the motion and says instead that an appeal may be taken within 10 days after the entry of an order disposing of the last of such motions. (Emphasis added). The change recognizes that there may be multiple post trial motions filed and that although one or more motions may be granted in whole or in part, a defendant may still wish to pursue an appeal.

The amendment also states that notices of appeal filed before disposition of any of the post trial tolling motions shall become effective upon disposition of the motions. In most circuits this language simply restates the current practice, see United States v. Cortes, 895 F.2d 1245 (9th Cir.), cert. denied, 495 U.S. 939 (1990). However, two circuits have questioned that practice in light of the language of the rule, see United States v. Gargano, 826 F.2d 610 (7th Cir. 1987), and United States v. Jones, 669 F.2d 559 (8th Cir. 1982), and the committee wishes to clarify the rule. The amendment is consistent with the proposed

amendment of Rule 4(a)(4).

Subdivision (b) is further amended in light of new Fed. R. Crim. P. 35(c) which authorizes sentencing courts to correct arithmetic, technical, or other clear errors in sentencing within 7 days after the imposition of sentence. The Committee believes that a sentencing court should be able to act under Criminal Rule 35(c) even if a notice of appeal has already been filed and that a notice of appeal should not be affected by the filing of a motion under Rule 35(c) or by correction of a sentence pursuant to Rule 35(c).

Note to subdivision (c). In Houston v. Lack, 487 U.S. 266 (1988), the Supreme Court held that pro se prisoners' notices of appeal are "filed" at the moment of delivery to prison authorities for forwarding to the district court. The amendment reflects that decision. The language of the amendment is similar to that in Supreme Court Rule 29.2.

Permitting inmates to file notices of appeal by depositing the notices in institutional mail systems requires adjustment of the rules governing the filing of cross appeals. In a civil case the time for filing a cross appeal ordinarily runs from the date on which the first notice of appeal is filed. If an inmate's notice of appeal is filed by depositing it in an institution's mail system, it is possible that the notice of appeal will not arrive in the district court until several days after the "filing" date and perhaps even after the time for filing a cross appeal has expired. To avoid that, subdivision (c) provides that in civil cases when institutionalized persons file notices of appeal by depositing them in institutions' mail systems, the time for filing cross appeals shall run from the district courts' receipt of the notices of appeal. A parallel provision is made regarding the time for the government to bring appeals in criminal cases.

* * * * * * * *

The differences between this draft and the published draft are:

1. "Except as provided in (a)(4) of this Rule 4" is added to the beginning of the first sentence of subpart (a)(1). This amendment is intended to alert readers to the fact that the time for filing notices of appeal may be effected by the provisions in (a)(4). (The published draft included no changes to subpart (a)(1).) Such a cautionary note was suggested by Mr. Ganucheau, the Clerk of the Fifth Circuit, in the hope that it would discourage the filing of notices of appeal when post trial motions are pending. In fact, I do not think the change will have that effect. Perhaps a first time reader of the rules will be more aware of the provisions of (a)(4) because of this cross-reference. However, because (a)(4) provides that notices of appeal filed before the disposition of post trial

motions will become effective upon disposition of the motions, cautious lawyers may adopt the habit of filing notices of appeal during the pendency of the motions to eliminate the possibility of missing the deadline.

2. Rule 4(a)(4)(iv) is changed in two ways.

A. At line 38-40 of this amended draft (line 24 of the published draft), the rule provides that a motion for attorneys' fees extends the time for filing a notice of appeal, if a district judge enters an order delaying finality of judgment and extending the time for appeal.

(The published draft read: delaying entry of judgment and extending the time for appeal. The "delaying entry of judgment and extending the time for appeal" language was added to the draft by the Standing Committee at its July meeting, to conform with an amendment to Fed. R. Civ. P. 58 proposed by the Civil Rules Committee. The draft originally submitted to the Standing Committee by the Advisory Committee on Appellate Rules stated that motions for costs or attorneys' fees would not extend the time for filing notices of appeals.)

Mr. Munford pointed out that ordinarily a district court is required to enter judgment "forthwith" and that a district court may not delay entry of a judgment that has already been entered. Proposed Civil Rule 58 provides:

> entry of judgment shall not be delayed, nor the time for appeal extended, in order to award fees, except that, when a timely motion for attorneys' fees is made under Rule 54(d)(2), the court before a notice of appeal has been filed and become effective, may order that the motion have the same effect under Rule 4(a)(4) of the Federal Rules of Appellate Procedure as a timely motion under Rule 59.

Proposed Civil Rule 54 provides that a motion for attorneys' fees must be filed within 14 days after entry of judgment. Therefore, Mr. Munford is correct that entry of judgment may precede the filing of a motion for attorneys' fees and that a district court cannot then delay entry of judgment. Proposed Civil Rule 58 allows a district court to order that an attorneys' fee motion has the same effect upon the time for appeal as a Rule 59 motion, that is, it would extend the time for filing a notice of appeal.

The language I have suggested, "delaying finality of judgment and extending the time for appeal," makes minimal changes from the published draft. Language more closely tracking that in Proposed Civil Rule 58 might be more accurate. The words at lines 38 through 40, "delaying finality of judgment and extending the time for appeal" could be deleted and replaced by the following: "giving a motion for attorneys' fees the same effect as a timely motion under Rule 59." The "delaying finality" language is probably clearer to the typical reader (and the committee note accompanying proposed

rule 58 refers to the order authorized by it as one that delays the finality of judgment) but the "giving ... the same effect" language is more accurate.

B. The changes made at the Standing Committee meeting create another problem that none of the commentators addressed. As stated above, the Advisory Committee's original draft provided that motions for costs or attorneys' fees would not extend the time for filing a notice of appeal. The language inserted in rule 4(a)(4) by the Standing Committee to conform to proposed Civil Rule 58 provides that motions under Rule 54 for costs or attorneys' fees will extend the time for filing notices of appeal if a district court enters an order under Rule 58 so providing. (See published rule at lines 21 through 25.) However, the language of proposed Rule 58 only authorizes a district court to delay the finality of judgment "when a timely motion for attorneys' fees is made" (emphasis added). Nothing in proposed Rule 58 authorizes a district court to delay the finality of judgment when a motion for costs is filed without a motion for attorneys' fees.

Because proposed Civil Rule 58 does not authorize district courts to delay the finality of judgment when there is a motion for costs, at line thirty-eight, I have deleted the words "costs or" that appear at line 22 of the published draft. The result of that change is that the Advisory Committee's original objective, to make it clear in the text of Fed. R. App. P. 4(a)(4) that motions for costs (as well as motions for attorneys' fees) do not extend the time for filing notices of appeal, is lost. But at least, the inaccuracy that exists in the published draft is corrected.

3. At lines 56 and 57 the words "effective to appeal from the judgment or order, or part thereof, specified in the notice of appeal," have been added. This language was suggested by Ms. Phelan. She believes that with this added language, the altered sentence and the following one will make it clear that the first-filed notice of appeal will become effective to appeal only from whatever orders it initially specified, and that to perfect an appeal from any of the post-judgment orders, the first-filed notice of appeal must be amended and such additional orders specified.

4. Line 60 now provides that to obtain "[a]ppellate review of" an order disposing of the tolling motions requires amendment of a party's previously filed notice of appeal. The published draft did not speak of "appellate review of" such orders but stated that "[a]n appeal from" such orders required amendment of any previously filed notice of appeal. Professor Lushing pointed out that some or all of the decisions on such post trial motions are not appealable themselves, but are reviewable on appeal from the final decision. Therefore, he suggested the language change noted above.

5. Lines 66 and 67 now provide that "[n]o additional fees shall be required for such filings," *i.e.* no additional fees will be required when a party files an amended notice of appeal indicating that the party intends to appeal from an order disposing of a post trial motion. Both Mr. Morrison and Mr. Ganucheau noted that the fees question will arise and should be answered by the draft.

6. Several changes have been made to the Committee notes. As previously stated marked copies of the published rules and comments are attached. Most of the changes made to the notes simply conform the notes to the changes, discussed above, in the draft rule. However, the reason for the deletion of the last two sentences of the second paragraph of the subdivision (a)(4) notes may not be apparent. During the Committee's discussion of the rule, the need for the language stating that it may not be appropriate for statistical purposes to treat notices of appeal that are held in abeyance under the new rule as pending seemed apparent. However, Mr. Ganucheau's comments indicate otherwise. Mr. Ganucheau states that there are many categories of appeals held in abeyance, those awaiting decisions of the Supreme Court, or further proceedings in the district court, or settlement, etc. None of those other appeals "in abeyance" need special statistical handling and Mr. Ganucheau does not believe that "premature" notices of appeal will need special handling. It may be better to omit any suggestion as to the handling of such appeals from the notes and allow the court administrators determine such questions as they see the need arising.

There were suggestions that I did not include in the draft. Mr. Morrison wanted clarification regarding the title of the document needed to get appellate review of an order disposing of a post trial motion when a notice of appeal has been previously filed. He inquired whether it should be "Amendment to Notice of Appeal," "Notice of Appeal," or "Amended Notice of Appeal." Mr. Morrison's question may have been more substantive than stylistic; that is he may have asked the question as a way of determining whether this document represents a new notice of appeal requiring a new filing fee, and new docket number. I believe that both the substantive and stylistic questions are adequately addressed by the amended draft. First, the draft now states that no additional fees are required, which not only answers the fees questions but also implies that the amendment does not constitute a separate appeal. Also, the amended committee note states that the reason that no additional fees are due is that the amendment is "an amendment of the original notice of appeal and not a new notice of appeal." As to the caption of the document, the rule itself refers to the document as an "amended notice of appeal," see line 63. Mr. Morrison also inquired about the language that should be used in the body of the document. Because no formulaic language is required to perfect an appeal, I see no need to specify whether the document should state "Plaintiffs hereby amend their notice of appeal to appeal also from...." or "Plaintiff hereby appeals from..."

Mr. Munford suggested that the 4(a)(4) trap should be approached in an entirely different manner; that suggestion is discussed below. However, as to the present approach, Mr. Munford offered some additional comments, one of which has been incorporated in the new draft, two of which have not been. The comments that I did not incorporate into the new draft are "solved" by proposed Civil Rule 54. Mr. Munford notes that the draft refers to motions for attorneys' fees under Rule 54 but that an attorneys' fee motion is not a motion "under Rule 54." Under the current rules he is correct, but proposed Rule 54 makes attorneys' fees motions Rule 54 motions. Mr. Munford also notes that if the time for filing a notice of appeal can be delayed by a

motion for attorneys' fees, the rule needs some time limit. Proposed rule 54 requires parties to file and serve motions for attorneys' fees within 14 days after entry of judgment.

An alternate approach.

Mr. Munford suggests that the committee abandon the approach taken in the draft and adopt an entirely new approach to the 4(a)(4) trap. He suggests retaining current Rule 4(a)(4) but amending Rule 26 so that a party caught in the trap can ask the court to suspend the provision in Rule 4 which invalidates notices of appeal filed prior to the disposition of the enumerated motions, thus eliminating the requirement that the party file a new notice of appeal. He suggests adding the following sentence to Fed. R. App. 26(b):

> The court may, however, unless good cause is shown to the contrary, suspend under Rule 2 the provision of Rule 4(a)(4) invalidating notices of appeal filed prior to the disposition of motions listed in that rule.

Frankly, this suggestion is an approach to the problem that the committee has not considered, at least in my recollection. The provision in Rule 26 prohibiting a court from expanding the time for filing notices of appeal is statutorily based.[1] Because the U.S.

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[1] 28 U.S.C. § 2107 states:

> Time for appeal to court of appeals
> (a) Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.
> (b) In any such action, suit or proceeding in which the United States or an officer or agency thereof is a party, the time as to all parties shall be sixty days from such entry.
> (c) The district court may, upon motion filed not later than 30 days after the expiration of the time otherwise set for bringing appeal, extend the time for appeal upon a showing of excusable neglect or good cause. In addition, if the district court finds
> (1) that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry, and
> (2) that no party would be prejudiced,
> the district court may, upon motion filed within 180 days after entry of the judgment or order or within 7 days after receipt of such notice, whichever is earlier, reopen the

Code sets the time for bringing appeal and because there is a dispute concerning the ability of the rules to supersede section 2107 (Do such extensions of time cross the line from procedure to substance? A belief that they do was the motivation behind S.1284 that resulted in amendment of section 2107 last December to authorize the extensions in the new Rule 4(a)(6).), I had not given much thought to amending Rule 26. I thought of such an amendment as one that would "enlarge" the time for appeal. However, Mr. Munford's letter points out that in reality his suggestion is not one that extends the time for appeal, but rather one that suspends the rule invalidating a notice of appeal filed (within 30 or 60 days after entry of judgment but) before the disposition of post trial motions.

There may be another flaw in Mr. Munford's suggestion. He assumes that Rule 4(a)(4) makes a notice of appeal a nullity if it is filed during the pendency of one of the post trial tolling motions. However, there is a line of cases indicating that, at least as to some of the motions, it is the motions themselves that make the appeal premature because the motions suspend the finality of the underlying judgment making it non-appealable. See United States v. Dieter, 429 U.S. 6, 8 (1976) (*per curiam*) (there is a "consistent practice in civil and criminal cases alike" that a motion for rehearing renders "the original judgment nonfinal for purposes of appeal for as long as the petition is pending."); In re X-Cel, Inc., 823 F.2d 192 (7th Cir. 1987) (a notice of appeal was held premature because it was filed during the pendency of a motion for district court rehearing of the initial appeal from a bankruptcy court decision even though FRAP Rule 6(b)(2)(i) and Bankruptcy Rule 8015 are silent about the validity of appeals filed when motions for rehearing are pending). The approach taken in the published draft avoids that problem by providing that the notice is held in abeyance and becomes effective upon disposition of the motion.

If the Committee is interested in considering Mr. Munford's suggestion, I recommend that the Committee refrain from trying to make any such changes before the Standing Committee's June meeting. Rather, I think it would be better for the Advisory Committee to request that the Standing Committee take no action on Rule 4(a)(4) in June and give the Advisory Committee time to consider the new alternative. The reason that I do not favor acting immediately is that Mr. Munford's suggestion is a starting point but not a complete solution. For example, it does not contain any time limit. There probably should be some time limit on a court's authority to suspend the provisions of 4(a)(4) or else in those cases in which a notice of appeal was filed during the pendency of the post trial motions but no new notice was filed after the disposition of the motions, there will always be doubt about whether the judgment is really final. I think that the

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time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal.

(d) This section shall not apply to bankruptcy matters or other proceedings under Title 11.

suggestion merits committee discussion at the April 30 meeting, but that, if the committee determines that it merits serious consideration, it is not yet sufficiently developed to go forward with it in June.

Bankruptcy Committee's suggestion. At its March meeting, the Bankruptcy Rules Advisory Committee reviewed the proposed change to Fed. R. App. P. 4(a)(4) and its possible implications for bankruptcy practice. The Bankruptcy Committee approves of the approach taken in the published draft but the reporter for the Bankruptcy Committee was asked to communicate to me the committee's concern that there is no proposal to add analogous language to Fed. R. App. P. 6(b)(2)(i).

Fed. R. App. P. 6(b) governs appeals in bankruptcy cases after a district court or bankruptcy appellate panel has already heard a first appeal. Fed. R. App. P. 6(b)(1) provides that Rule 4(a) governs the time for filing a notice of appeal to a court of appeals, except that subpart (a)(4) does not apply. Subpart (a)(4) is inapplicable with regard to these second appeals because following a district court's exercise of appellate jurisdiction the tolling motions enumerated in 4(a)(4) are inappropriate. (With regard to the first appeal, Bankruptcy R. 8002(b) is the analogue to Rule 4(a)(4). Bankruptcy R. 8002(b) currently parallels 4(a)(4) and provides that a notice of appeal filed during the pendency of one of the post trial motions enumerated in 8002(b) has no effect and a new notice of appeal must be filed.)

Fed. R. App. P. 6(b)(2)(i) states that if a timely motion for rehearing under Bankruptcy Rule 8015 is filed with a district court or a bankruptcy appellate panel, the time for appeal to the court of appeals runs from the entry of the order denying the rehearing or the entry of the subsequent judgment. It is silent about the effect of a notice of appeal filed during the pendency of the motion for rehearing. (Bankruptcy R. 8015 requires that motions for rehearing be filed within 10 days after entry of judgment of the district court or the bankruptcy panel and it too states that the time for appeal to a court of appeals runs from the entry of the order denying the rehearing or the entry of a subsequent judgment.)

The Advisory Committee note accompanying Rule 6(b)(2)(i) states that the "Committee deliberately omitted from the rule any provision governing the validity of a notice of appeal filed prior to the entry of an order denying a rehearing; the Committee intended to leave undisturbed the current state of the law on that issue." Upon reviewing the file on the 1989 amendment of Rule 6, I recalled that the reason for the Committee's decision to remain silent on that issue was that the Committee was unprepared to deal with the question because it had not resolved the 4(a)(4) question. The most prudent course of action seemed to be to leave undisturbed the current practice regarding notices of appeal filed during the pendency of motions for rehearing.

With regard to the practice in bankruptcy cases in which a notice of appeal is filed after an initial appeal to a district court and during the pendency of a motion for

rehearing, very few cases are directly on point. Analyzing the case law is complicated by the fact that Bankruptcy Rule 8015 was amended, effective August 1, 1987.

Prior to August 1, 1987, Bankruptcy Rule 8015 said nothing about whether the filing of a motion for rehearing extended the time for filing a notice of appeal to a court of appeals. However, the Advisory Committee Note accompanying old Rule 8015, said that the "filing of a motion for rehearing does not toll the time for taking an appeal to the court of appeals from the district court . . ." Influenced by the Committee's comment, several courts held that a notice of appeal must be filed within 30 days after the district court's decision even if a motion for rehearing was pending at that time. See, e.g., In re Sundale Assocs., Ltd., 786 F.2d 1456 (11th Cir. 1986), and In re Lovitt, 757 F.2d 1035 (9th Cir.), *cert. denied*, 474 U.S. 849 (1985). In spite of the Committee note, at least one court concluded that a motion for rehearing did suspend the finality of the judgment and that any notice of appeal filed before disposition of the motion was premature. The court reasoned that if a motion for rehearing did not suspend finality, a losing party would be forced to protect itself by filing an appeal if the district court did not act on the motion within the time limit for appeal. Such appeals would deprive the district court of jurisdiction and prevent it from correcting its judgment. In re X-Cel, Inc., 823 F.2d 192 (7th Cir. 1987). Because of the confusion that may have been caused by the Committee note, cases decided prior to the August 1, 1987, amendment of Rule 8015 do not provide clear guidance as to the effectiveness of notices of appeal filed while motions for rehearing are pending.

Since August 1, 1987, Bankruptcy Rule 8015 has provided that a motion for rehearing extends the time for filing a notice of appeal to the court of appeals. This change in the rule makes it clear that the finality of the district court decision is suspended, but it does not clearly state whether a notice of appeal filed before disposition of the motion is a nullity. In the X-Cel case, the Seventh Circuit held that the notice of appeal filed during the pendency of a motion for district court rehearing was premature, and it dismissed the appeal. A recent case from a district court within the Seventh Circuit cited X-Cel for the proposition that a notice of appeal is a "nullity" if it is filed while a motion for reconsideration is pending. Grabill Corp. v. Pelliccioni, 135 B.R. 835 (N.D. Ill. 1992). Cases from two other circuits have indicated that if a notice of appeal is filed in a bankruptcy case before action is taken on a motion for rehearing, a new notice of appeal must be filed after the conclusion of the proceedings in the district court. Neu Cheese Co. v. F.D.I.C., 825 F.2d 1270 (8th Cir. 1987); In re Shah, 859 F.2d 1463 (10th Cir. 1988).

Such cases indicate that the 4(a)(4) trap exists even though the language of Rule 6(b)(2)(i) does not state that a notice of appeal filed during the pendency of the motion for rehearing is a nullity. Therefore, if the Committee is ready to move forward with an amendment to 4(a)(4) it should consider a simultaneous and analogous amendment to Rule 6(b)(2)(i). The Bankruptcy Committee has expressed its approval of the approach taken in the published draft, and because it is a conforming amendment there should be

no need for a publication and comment period.

I have prepared draft changes to Rule 6(b)(2)(i):

(i) Effect of motion for rehearing on time for appeal. If a timely motion for rehearing under Bankruptcy Rule 8015 is filed in the district court or the bankruptcy appellate panel, the time for appeal to the court of appeals for all parties shall run from the entry of the order ~~denying the rehearing or the entry of the subsequent judgment~~ disposing of the motion for rehearing. A notice of appeal filed after entry of ~~the district court's or bankruptcy appellate panel's~~ judgment, but before disposition of the motion for rehearing ~~shall be in abeyance and shall become effective to appeal from the judgment or order, or part thereof, specified in the notice of appeal, upon~~ the date of the entry of the order disposing of the motion for rehearing. Appellate review of the order disposing of the motion requires amendment of the party's previously filed notice of appeal in compliance with Rule 3(c) and 6(b)(1)(ii). Any such amended notice of appeal shall be filed within the time prescribed by Rule 4, excluding 4(a)(4) and 4(b), measured from the entry of the order disposing of the motion. No additional fees shall be required for such filing.

Committee Note

Note to subdivision (b)(2)(i). The amendment accompanies concurrent changes to Rule 4(a)(4). Although Rule 6 never

included language such as that being changed in Rule 4(a)(4), language that made a notice of appeal void if it was filed during the pendency of certain post trial motions, courts have found that notices of appeal are premature if they are filed while motions for rehearing are pending. See, e.g., In re X-Cel, Inc., 823 F.2d 192 (7th Cir. 1987); In re Shah, 859 F.2d 1463 (10th Cir. 1988). The committee wishes to achieve the same result here as in Rule 4, the elimination of a procedural trap.

Rule 5.1

There were no comments submitted on proposed Rule 5.1 that changes "magistrate" to "magistrate judge."

Rule 10

There were no comments submitted regarding proposed Rule 10 that simply corrects a printer's error.

Rule 25

There were no comments submitted regarding proposed Rule 25 that extends the holding in Houston v. Lack to all papers filed by persons confined in institutions.

Rule 28

Only one substantive comment was submitted regarding the proposed requirement that an opening brief include a statement of the standard of review. Mr. Morrison of the Public Citizen Litigation Group urged the committee to include a statement that the requirements of Rule 28 regarding the contents of brief are exclusive and cannot be altered or supplemented by local rules.

Mr. Morrison's suggestion goes to the heart of the discussion the Advisory Committee had at its December meeting about uniformity and local rules. Mr. Morrison wants the rules to prohibit any local variations from the requirements of Rule 28. Because his group is involved nationally in litigation, his interest in uniformity is understandable. On the other hand, local experimentation with the contents of briefs has proven to be a good testing ground for new requirements. The addition of a jurisdictional statement was prompted by positive experience with local rules requiring

such statements and the current proposal also was prompted by positive experience with local rules requiring statements of the applicable standard(s) of review. Prohibiting local variations would cut off such experimentation. As the committee discussed at its last meeting, an intermediate approach could be to prohibit local variations unless local experimentation is authorized for a fixed period of time. That is, rather than prohibiting local experimentation, perhaps better control could be exerted over local experimentation.

Rule 34

No comments were submitted regarding the proposed amendment deleting the requirement that an opening argument shall include a statement of the case.

Rule 35

Three Chief Judges oppose the proposed amendment of Rule 35 which creates a uniform method for calculating a majority for purposes of hearing or rehearing a case in banc. The proposal does not count vacancies or recusals when determining whether a majority favors granting an in banc hearing. However, it does provide that the number of judges participating in an in banc vote must be a majority of the active judges including those who may be recused.

Chief Judge Sloviter, who is joined in her opposition with Chief Judge McKay and Chief Judge Nies, opposes the amendment because the courts of appeals have historically had the power to define the base from which a majority is counted for convening in banc and she does not believe that any compelling reason has been advanced in support of the proposed change. She views the matter of determining how a circuit shall convene in banc as a uniquely internal function.

Mr. Morrison favors the proposal in as much as it seeks to resolve the long-standing debate about whether vacancies and recusals should be counted in determining whether a case should be heard or reheard in banc. That is, Mr. Morrison favors a uniform method for determining the base. However, he opposes that portion of the proposal which does not count recusals. He points out that to the extent in banc hearings are used to maintain consistency in circuit law or to decide issues of importance within that circuit there is value in having the participation of all, or at least most, of the judges then in regular active service. Mr. Morrison believes that the better rule would allow an in banc hearing only when a majority of all judges in regular active service vote in favor of the in banc. If, however, the committee is inclined to recommend a change along the lines contained in the proposal, he recommends requiring the participation of at least two-thirds of the total membership of the court in the voting.

Both objections address issues already discussed by the committee. In 1989, at the initial discussion of this item, the committee considered whether it had the power to amend Rule 35 and whether it should exercise that power.

Rule 35(a) is based upon 28 U.S.C. § 46(c) which provides that an in banc hearing may be ordered only by "a majority of the circuit judges of the circuit who are in regular active service." The committee discussed whether Congressional amendment of section 46(c) should be the first step in bringing about any change or whether rulemaking is appropriate. In 1973 the Judicial Conference of the United States took the position that a majority of the judges in regular active service who are entitled to vote should be sufficient to order an in banc hearing (the same position adopted in the draft under discussion), but the Judicial Conference thought that Congress should amend section 46(c) to so provide. Since 1973, two Congresses have amended section 46(c) without addressing themselves to this issue. In its 1989 discussion, the Advisory Committee stated that it believed that the Rules Enabling Act provides authority to make such a change by rule.

The committee also considered whether the Supreme Court has indicated that the procedures for in banc practice should be determined by the individual circuits. In Western Pac. Ry. Corp. v. Western Pac. R.R. Co., 345 U.S. 247 (1953), the Supreme Court stated that a circuit court is "left free to devise its own administrative machinery to provide the means whereby a majority may order" an in banc hearing. However, given the issue in that case, that language need not be read to preclude a national rule governing in banc procedures. The Western Pacific petitioners claimed that a suggestion for rehearing in banc must be passed upon by every judge. The Supreme Court concluded otherwise. It said that a circuit may delegate the responsibility to decide whether to grant a hearing or rehearing in banc to the three judges who heard the case. The Court concluded that the statute gives litigants no right to compel all circuit judges to take formal action on the suggestion for hearing or rehearing in banc. It was in the context of clarifying that litigants have no right to compel each circuit judge to act upon a suggestion for rehearing in banc, that the Supreme Court stated that the courts of appeals are free to devise their own "administrative machinery to provide the means whereby a majority may order such a hearing." That litigants may not require the courts of appeals to exercise their in banc power in a certain manner, does not lead necessarily to the conclusion that the Supreme Court may not direct the courts in their use of that power.

However, ten years later, in Shenker v. Baltimore & Ohio R.R. Co., 374 U.S. 1 (1963), the Supreme Court may have stated its position more strongly. In that case the petitioner had requested a rehearing in banc. Of the eight Third Circuit judges, four had voted for rehearing in banc, two voted against, and two abstained. Although the Third Circuit did not require a judge to enter a formal vote on a suggestion, it did require an absolute majority of the active members of the court and so the rehearing was denied. Petitioner claimed that only a majority of those voting should be required. The Supreme

Court held: "Such a procedure is clearly within the scope of the court's discretion as we spoke of it in Western Pacific. For this Court to hold otherwise would involve it unnecessarily in the internal administration of the Courts of Appeals." Shenker, 374 U.S. at 5.

The Advisory Committee, cognizant of the Supreme Court's language in both Western Pacific and Shenker and of the Judicial Conference's earlier actions, decided that it favored the amendment and if either the Judicial Conference or the Supreme Court did not, those bodies could act accordingly.

The draft under discussion had its genesis in an American Bar Association House of Delegates resolution that originated in the Antitrust Law Section. The proposal is a middle of the road proposal. Approximately one-half the circuits require that a majority of all active judges, regardless of recusals or temporary absences, must approve a rehearing in banc or no in banc hearing will take place. The other half of the circuits require only a majority of the participating judges. The draft allows a majority of the participating judges to grant in banc review, but only if the participating judges constitute a majority of all the judges in regular active service. It permits approval of an in banc rehearing with less than an absolute majority, but the in banc panel can be no smaller than an absolute majority.

The Advisory Committee's reasons for going forward with the current draft are well captured in the following quote from Judge Adams of the Third Circuit:

> Whatever may be the best solution, I believe that the current lack of uniformity among the circuits on this important issue creates the appearance of rights determined by happenstance . . . . I do record my concern with the intercircuit conflict over the rules for granting in banc reconsideration and express the thought that the Congress or the Supreme Court should provide definitive guidance at an early occasion. Lewis v. University of Pittsburgh, 725 F.2d 910, 930 (3d Cir. 1984) (Adams, J., statement sur petition for rehearing).

I have not prepared any alternate drafts in light of these comments. The Committee essentially must decide whether to withdraw the draft or to go forward with it, and if the decision is to go forward with the draft, whether to increase the "quorum" as suggested by Mr. Morrison.

SUMMARY OF COMMENTS REGARDING PROPOSED AMENDMENTS TO FED. R. APP. P. 4

Six commentators submitted remarks on the proposed amendments to Fed. R. App. P. 4. One commentator supports the proposed amendments without further elaboration.

Four commentators support the approach taken in the proposed amendments but suggest language changes:

1) two commentators suggest adding language that clarifies whether an additional fee must be paid when filing an amendment indicating intent to appeal from an order disposing of a post-decision motion;

2) two commentators suggest clarifying the nature and form of an amended notice with regard to
   - whether it is a new notice of appeal that must be separately docketed, or whether it is an amendment of the notice in an existing appeal, and
   - whether it should be styled "Notice of Appeal," "Amendment to Notice of Appeal," or "Amended Notice of Appeal" and what level of formality is required in the body of the notice;

3) one commentator suggests adding a cautionary note to rule 4(a)(1) that would discourage filing notices of appeal while post-trial motions are pending;

4) one commentator notes that some decisions disposing of post-trial motions are not appealable independent of an appeal from the decision in the underlying case and suggests a language change consistent with that fact;

5) one commentator suggests a language change that would emphasize that the first-filed notice of appeal is sufficient to appeal the decision in the case but an amendment is needed to perfect an appeal from any of the post judgment orders; and

6) one commentator suggests eliminating the language in 4(a)(4)(iv) regarding "delaying entry of judgment" and substituting in its place language that more accurately reflects the proposed change in Fed. R. Civ. P. 58.

One commentator favors an entirely different approach to eliminating the 4(a)(4) trap. He suggests making no change in Rule 4 but amending Rule 26 to permit a party caught in the trap to request suspension of that rule, which suspension should be granted unless the party opposing the motion can demonstrate prejudice or show cause for not granting it. If the approach taken in the published draft is used, the commentator suggests language changes 1) because a motion for attorneys' fees is not a motion "under Rule 54,"[1] 2) because a district court cannot enter an order "delaying entry of judgment," and 3) because there is no time limit for filing motions for attorneys' fees.[2]

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[1] A proposed amendment to Fed. R. Civ. P. 54, published concurrently with the proposed amendment to Fed. R. App. P. 4, would make a motion for attorneys' fees a Rule 54 motion.

[2] A proposed amendment to Fed. R. Civ. P. 54, published concurrently with the proposed amendment to Fed. R. App. P. 4, would impose a 14 day time limit on filing motions for attorneys' fees.

List of Commentators
Proposed Amendment of Fed. R. App. P. 4

1. Mr. Gilbert F. Ganucheau
Clerk
United States Court of Appeals
600 Camp Street
New Orleans, Louisiana 70130

2. Mark Alan Hart, Esquire
Chair, Appellate Courts Committee
Los Angeles County Bar Association
19360 Rinaldi Street, Suite 353
Northridge, California 91326

3. Professor Peter Lushing
Benjamin N. Cardozo School of Law
Yeshiva University
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55 Fifth Avenue
New York, New York 10003

4. Alan B. Morrison, Esquire
Director
Public Citizen Litigation Group
2000 P Street, N.W., Suite 700
Washington, D.C. 20036

5. Luther T. Munford, Esquire
Chair, Federal and Local Rules Subcommittee of the ABA Litigation Section's
Appellate Practice Committee
2829 Lakeland Drive
P.O. Box 55507
Jackson, Mississippi 39296-5507

6. Elizabeth A. Phelan, Esquire
Appellate Practice Subcommittee of the Litigation Section of the Colorado Bar
Association
1881 Ninth Street, Suite 210
Boulder, Colorado 80302

COMMENTS ON PROPOSED AMENDMENT OF FED. R. APP. P. 4

1. Mr. Gilbert F. Ganucheau
Clerk
United States Court of Appeals
600 Camp Street
New Orleans, Louisiana

Generally supports the approach taken in the amendment but suggests:

A. Clarifying whether an amendment that is needed to indicate intent to appeal from an order disposing of a post-decision motion is a new notice that must be docketed separately or an amendment to the existing appeal. He recommends that it be treated as an amendment to an existing appeal.

B. Clarifying whether an additional fee needs to be paid when filing an amendment indicating intent to appeal from an order disposing of a post-decision motion.

C. Adding a cautionary note to rule 4(a)(1) which discourages filing notices of appeal while a post-trial motion is pending.

2. Mark Alan Hart, Esquire
Chair, Appellate Courts Committee of the Los Angeles County Bar Association
19360 Rinaldi Street, Suite 353
Northridge, California 91326

Supports all the proposed changes

3. Professor Peter Lushing
Benjamin N. Cardozo School of Law
Yeshiva University
Brookdale Center
55 Fifth Avenue
New York, New York 10003

Notes that some decisions disposing of post-trial motions are not appealable but are reviewable only on appeal from the decision in the underlying case, normally the judgment in the case. He suggests a language change consistent with that fact.

4. Alan B. Morrison, Esquire
Director
Public Citizen Litigation Group
2000 P Street, N.W., Suite 700
Washington, D.C. 20036

Generally supports the approach taken in the draft but suggests:

A. specifying how a party effects the "amendment" required to appeal from the denial of a post-trial motion, in an "Amendment to Notice of Appeal" or in a "Notice of Appeal" or even in an "Amended Notice of Appeal;"

B. clarifying whether an additional filing fee will be charged when an amended notice of appeal is filed.

5. Luther T. Munford, Esquire
Chair, Federal and Local Rules Subcommittee of the ABA Litigation Section's Appellate Practice Committee
2829 Lakeland Drive
P.O. Box 55507
Jackson, Mississippi 39296-5507

Favors a different approach to eliminating the 4(a)(4) trap. He suggests keeping the current rule but adding to Fed. R. App. P. 26(b) a provision allowing a party caught in the 4(a)(4) trap to request suspension of that rule which suspension would be granted unless the party opposing the motion can demonstrate prejudice or show good cause for not granting it.

With regard to new 4(a)(4)(iv), he notes that a motion for attorneys' fees is not a motion "under Rule 54," that a district court cannot enter an order "delaying entry of judgment," and that the rule needs some time restriction. [Reporter's note: Proposed Civil Rules 54 and 58 are responsive to the first and third portions of the comments summarized in this paragraph.]

6. Elizabeth A. Phelan, Esquire
Appellate Practice Subcommittee of the Litigation Section of the Colorado Bar Association
1881 Ninth Street, Suite 210
Boulder, Colorado 80302

"Strongly" supports the proposed changes but suggests language clarifying that the first-filed notice of appeal must be amended to perfect an appeal from any of the post-judgment orders. Suggests eliminating the language in 4(a)(4)(iv) regarding "delaying entry of judgment" and substituting in its place "granting tolling effect to the motion" or some other similar language that more accurately reflects the proposed change in Fed. R. Civ. P. 58.

SUMMARY OF COMMENTS REGARDING PROPOSED AMENDMENTS TO FED. R. APP. P. 28

There were two comments on the proposed requirement that an opening brief include a statement of the standard of review.

One commentator simply supported this proposal along with all of the other proposed amendments to the appellate rules without further elaboration.

The other commentator urged the inclusion of a statement that the requirements of Rule 28 regarding the contents of briefs are exclusive and cannot be altered or supplemented by local rules. In other words, the commentator wants the rule to prohibit circuit by circuit variations from the requirements of Rule 28.

List of Commentators
Proposed Amendment of Fed. R. App. P. 28

1. Mark Alan Hart, Esquire
Chair, Appellate Courts Committee
Los Angeles County Bar Association
19360 Rinaldi Street, Suite 353
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2. Alan B. Morrison, Esquire
Director
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2000 P Street, N.W., Suite 700
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COMMENTS ON PROPOSED AMENDMENT OF FED. R. APP. P. 28

1. Mark Alan Hart, Esquire
Chair, Appellate Courts Committee
Los Angeles County Bar Association
19360 Rinaldi Street, Suite 353
Northridge, California 91326

Supports this proposed amendment as well as all others.

2. Alan B. Morrison, Esquire
Director
Public Citizen Litigation Group
2000 P Street, N.W., Suite 700
Washington, D.C. 20036

Does not oppose the proposed requirement that an opening brief include a statement of the standard of review. Urges the committee to state that the requirements of Fed. R. App. P. 28 regarding the contents of briefs are exclusive and cannot be altered or supplemented by local rules.

SUMMARY OF COMMENTS REGARDING PROPOSED AMENDMENT OF FED. R. APP. P. 35

Five commentators submitted remarks concerning the proposed amendment of Fed. R. App. P. 35.

One commentator supports this proposed amendment, as well all other proposed amendments to the appellate rules, without further comment.

One commentator supports resolving the question of whether vacancies and recusals should be counted in determining whether a majority of judges have voted to hear or rehear a case in banc but opposes the approach taken in the proposal which does not count recusals in determining whether a majority favors in banc review. The commentators favors counting recusals, but at a minimum he suggests that the judges participating in an in banc vote should constitute at least two-thirds of the total membership of the circuit (the draft requires participation by a majority of the total membership of the circuit).

Three commentators oppose not only the approach taken in the draft but any rulemaking that would curtail the ability of the individual circuits to define for themselves the base from which a majority is determined for purposes of convening an in banc hearing.

List of Commentators
Proposed Amendment of Fed. R. App. P. 35

1. Mark Alan Hart, Esquire
Chair, Appellate Courts Committee
Los Angeles County Bar Association
19360 Rinaldi Street, Suite 353
Northridge, California 91326

2. Honorable Monroe G. McKay
Chief Judge
United States Court of Appeals
6012 Wallace Bennett Federal Building
Salt Lake City, Utah 84138-1181

3. Alan B. Morrison, Esquire
Director
Public Citizen Litigation Group
2000 P Street, N.W., Suite 700
Washington, D.C. 20036

4. Honorable Helen W. Nies
Chief Judge
United States Court of Appeals
717 Madison Place, N.W.
Washington, D.C. 20439

5. Honorable Dolores K. Sloviter
Chief Judge
United States Court of Appeals
601 Market Street
Philadelphia, Pennsylvania 19106

COMMENTS ON PROPOSED AMENDMENT OF FED. R. APP. P. 35

1. Mark Alan Hart, Esquire
Chair, Appellate Courts Committee
Los Angeles County Bar Association
19360 Rinaldi Street, Suite 353
Northridge, California 91326

Supports this proposed amendment as well as all others.

2. Honorable Monroe G. McKay
Chief Judge
United States Court of Appeals
6012 Wallace Bennett Federal Building
Salt Lake City, Utah 84138-1181

Endorses Chief Judge Sloviter's statement in opposition to amendment of Rule 35.

3. Alan B. Morrison, Esquire
Director
Public Citizen Litigation Group
2000 P Street, N.W., Suite 700
Washington, D.C. 20036

Supports resolving by rule the question of whether vacancies and recusals should be counted in determining whether a majority of judges have voted to hear or rehear a case in banc but opposes the approach taken in the proposal which would not count recusals in determining whether a majority favors in banc review. The commentator favors maximum participation by judges in an in banc proceeding. At a minimum, the commentator suggests requiring participation by at least two-thirds of the total membership of a circuit.

4. Honorable Helen W. Nies
Chief Judge
United States Court of Appeals
717 Madison Place, N.W.
Washington, D.C. 20439

Endorses Chief Judge Sloviter's statement in opposition to the proposed amendment of Fed. R. App. P. 35.

5. Honorable Dolores K. Sloviter
Chief Judge

United States Court of Appeals
601 Market Street
Philadelphia, Pennsylvania 19106

Opposes the proposed amendment on the grounds that defining the body that establishes circuit precedent is a uniquely local function and the courts of appeals should retain their power to define individually the base from which a majority of the court is counted for purposes of convening an in banc hearing.

Except that Mr. Hart's letter expressed support for all of the proposed amendments, there were no comments submitted regarding the proposed amendments to the following rules:

1. Rule 3 (conforming amendments to the changes proposed in Rule 4)
2. Rule 3.1 and 5.1 (changing "magistrate" to "magistrate judge")
3. Rule 10 (correcting a printer's error)
4. Rule 25 (extending the ruling in Houston v. Lack to all papers filed by persons confined in institutions so that filing is timely if papers are deposited in the institution's mail systems on or before the filing date)
5. Rule 34 (deleting the requirement that an opening argument shall include a statement of the case).

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

Rule 3. Appeal as of right - How taken

* * * * *

(d) *Service of the notice of appeal.* - The clerk of the district court shall serve notice of the filing of a notice of appeal by mailing a copy thereof to counsel of record of each party other than the appellant, or, if a party is not represented by counsel, to the last known address of that party~~; and t~~. The clerk shall transmit forthwith a copy of the notice of appeal and of the docket entries to the clerk of the court of appeals named in the notice and the clerk of the district court shall transmit copies of any later docket entries in that case to the clerk of the court of appeals. When an appeal is taken by a defendant in a criminal case, the clerk of the district court shall also serve a copy of the notice of appeal upon the defendant, either by personal service or by mail addressed to the defendant. The clerk shall note on each copy served the date on which

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*New matter is underlined; matter to be omitted is

the notice of appeal was filed and, if the notice of appeal was filed in the manner provided in Rule 4(c) by an inmate confined in an institution, the date on which the notice of appeal was received by the clerk. Failure of the clerk to serve notice shall not affect the validity of the appeal. Service shall be sufficient notwithstanding the death of a party or the party's counsel. The clerk shall note in the docket the names of the parties to whom the clerk mails copies, with the date of mailing.

* * * * *

COMMITTEE NOTE

Note to subdivision 3(d). The amendment requires the district court clerk to transmit to the clerk of the appropriate court of appeals copies of all docket entries in a case following the filing of a notice of appeal. This amendment accompanies the amendment to Rule 4(a)(4) which provides that in a case in which one of the post trial motions enumerated in Rule 4(a)(4) is filed, a notice of appeal filed before the disposition of the motion will become effective upon disposition of the motion. The court of appeals needs to be advised that the filing of a post trial motion has suspended a notice of appeal. The court of appeals also needs to know when the district court has ruled on the motion. Transmitting copies of all docket entries following the filing of a notice of appeal should provide the courts of appeals with the necessary information.

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

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

COMMITTEE NOTE

The amendment conforms the rule to the change in title from magistrate to magistrate judge made by the Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089, 5117 (1990).

Rule 4. Appeal as of right - When taken

(a) *Appeals in civil cases.*-

Insert 4(a)(1) and amend

* * * * *

(2) ~~Except as provided in (a)(4) of this Rule~~ 4, ~~a~~ A notice of appeal filed after the announcement of a decision or order but before the entry of the judgment or order shall be treated as filed after such entry and on the day thereof.

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

(4) If any party makes a timely motion under the Federal Rules of Civil Procedure ~~is filed in the district court by any party~~: (i) for judgment under Rule 50(b); (ii) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (iii) under Rule 59 to alter or amend the judgment; ~~or~~ (iv) under Rule 54 for ~~costs or~~ attorney's fees if a district court under Federal Rule of Civil Procedure 58 enters an order delaying finality ~~entry~~ of judgment and extending the time to appeal from the judgment or order, or part thereof, specified in the notice of appeal,

for appeal; or (v) under Rule 59 for a new trial, or if any party serves a motion under Rule 60 of the Federal Rules of Civil Procedure within 10 days after the entry of judgment, the time for appeal for all parties shall run from the entry of the order ~~denying a new trial or granting or denying any other such motion~~ disposing of the last of all such motions. ~~A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above. No additional fees shall be required for such filing.~~ A notice of appeal filed after entry of the judgment but before disposition of ar of the above motions shall be in abeyance and shall become effective upon the date of the entry of an order that disposes of the last of all such motions. ~~An appeal from~~ Appellate review of an order disposing of any of the above motions requires amendment of the party's previously filed notice of appeal in compliance with Rule 3(c). Any such amended notice of appeal shall be filed within the time prescribed

Add no new fees

by this Rule 4 measured from the entry of the order disposing of the last of all such motions.

* * * * *

(b) *Appeals in criminal cases.*- In a criminal case a defendant shall file the notice of appeal by a defendant shall be filed in the district court within 10 days after the entry of (i) the judgment or order appealed from or (ii) a notice of appeal by the Government. A notice of appeal filed after the announcement of a decision, sentence or order but before entry of the judgment or order shall be treated as filed after such entry and on the day thereof. If a timely motion under the Federal Rules of Criminal Procedure is made: (i) for judgment of acquittal, (ii) for in arrest of judgment, or (iii) for a new trial on any ground other than newly discovered evidence, or (iv) for a new trial based on the ground of newly discovered evidence if the motion is made before or within 10 days after entry of the judgment, has been made an appeal from a judgment of conviction may be taken within 10 days after the entry of an order denying the motion disposing of the last of all such

motions, or within 10 days after the entry of the judgment of conviction, whichever is later. A motion for a new trial based on the ground of newly discovered evidence will similarly extend the time for appeal from a judgment of conviction if the motion is made before or within 10 days after entry of the judgment. A notice of appeal filed after announcement of a decision, sentence, or order but before disposition of any of the above motions shall be in abeyance and shall become effective upon the date of the entry of an order that disposes of the last of all such motions, or upon the date of the entry of the judgment of conviction, whichever is later. Notwithstanding the provisions of Rule 3(c), a valid notice of appeal is effective without amendment to appeal from an order disposing of any of the above motions. When an appeal by the government is authorized by statute, the notice of appeal shall be filed in the district court within 30 days after the entry of (i) the entry of the judgment or order appealed from or (ii) the filing of a notice of appeal by any defendant.

A judgment or order is entered within the meaning of this subdivision when it is entered in the criminal docket. Upon a showing of excusable neglect the district court may, before or after the time has expired, with or without motion and notice, extend the time for filing a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision.

The filing of a notice of appeal under this Rule 4(b) does not divest a district court of jurisdiction to correct a sentence under Fed. R. Crim. P. 35(c), nor does the filing of a motion under Fed. R. Crim. P. 35(c) affect the validity of a notice of appeal filed before disposition of such motion.

(c) *Appeals filed by inmates confined in institutions.* If an inmate confined in an institution files a notice of appeal in either a civil case or a criminal case, the notice of appeal is timely filed if it is deposited in the institution's internal mail system on or before the last day for filing. Timely filing may be shown by

a notarized statement or by a declaration in compliance with 28 U.S.C. § 1746 setting forth the date of deposit and stating that first-class postage has been prepaid. In civil cases in which the first notice of appeal is filed in the manner provided in this paragraph (c), the 14 day period provided in (a)(3) of this Rule 4 for other parties to file notices of appeal shall run from the date the first notice of appeal is received by the district court. In criminal cases in which a defendant files a notice of appeal in the manner provided in this paragraph (c), the 30 day period for the government to file its notice of appeal shall run from the entry of the judgment or order appealed from or from the receipt of the defendant's notice of appeal by the district court

COMMITTEE NOTE

→ Addition re (a)(1)

Note to Subdivision (2). The amendment treats all notices of appeal filed after announcement of decisions or orders but before formal entry of such orders as if the notices of appeal had been filed after such entry. The amendment deletes the language that made subdivision (a)(2) inapplicable to notices of appeal filed after announcement of the disposition of post trial motions enumerated in (a)(4) but before the entry of such orders,

...oo, Acosta v. Louisiana Dept. of Health & Human ...esources, 478 U.S. 251 (1986) (per curiam); and Alerte ...v. McGinnis, 898 F.2d 69 (7th Cir. 1990). Because the ...mendment of subdivision (a)(4) recognizes all notices ...f appeal filed after entry of judgment, even those that ...re filed while the post trial motions enumerated in (a)(4) are pending, the amendment of this subdivision is consistent with the amendment of subdivision (a)(4).

Note to Subdivision (a)(3). The amendment is technical in nature, no substantive change is intended.

Note to Subdivision (a)(4). The 1979 amendment of this subdivision created a trap for unsuspecting litigants who file notices of appeal before post trial motions, or while post trial motions are pending. The 1979 amendment requires parties to file new notices of appeal after disposition of the motions. Unless a new notice is filed, the court of appeals lacks jurisdiction to hear the appeal. Griggs v. Provident Consumer Discount Co., 459 U.S. 56 (1982). Many litigants, especially pro se litigants, fail to file the second notice of appeal and several courts have expressed dissatisfaction with the rule. See, e.g., Averhart v. Arzoomdondo, 773 F.2d 919 (7th Cir. 1985); Marcon Cargo Co. v. D & G Boat Rentals, Inc., 746 F.2d 278 (5th Cir. 1984), cert. denied, 479 U.S. 930 (1986).

The amendment provides that notices of appeal filed before disposition of the specified post trial motions will become effective upon disposition of the motions. A notice of appeal filed before the filing of one of the specified motions or after the filing of a motion but before disposition of the motion, is, in effect, suspended until the disposition of the motion. Upon disposition of the motion, the previously filed notice of appeal becomes effective to grant jurisdiction to a court of appeals. The Committee realizes that holding notices of appeal in abeyance will create a new species of appeal that is not truly "pending" and recommends that for statistical purposes appeals held in abeyance not be counted as pending. A new statistical classification may be appropriate.

Because notices of appeal will ripen into effective appeals upon disposition of post trial motions, in some instances there will be appeals from judgments that have been altered substantially because the motions were granted in whole or in part. Many such appeals will be dismissed for want of prosecution when the appellant fails to meet the briefing schedule. However, the appellee also may move to have the appeal stricken. When responding to such a motion, the appellant would have an opportunity to state that even though some relief sought in a post trial motion was granted, the appellant still plans to pursue the appeal. The appellant's response would provide the appellee with sufficient notice of the appellants' intentions that the Committee does not believe that an additional notice of appeal is needed.

The amendment provides that a notice of appeal filed before the disposition of a post trial tolling motion is sufficient to bring the underlying case to the court of appeals. If the judgment is altered upon disposition of a post trial motion, however, and a party wishes to appeal from the disposition of the motion, the party must amend the notice of appeal to so indicate.

Subdivision (a)(4) also is amended to include motions under Rule 60 that are served within 10 days after entry of judgment among the motions that extend the time for filing a notice of appeal. This eliminates the difficulty of determining whether a post trial motion made within 10 days after entry of a judgment is a motion under Rule 59(e), which tolls the time for filing an appeal, or motion under Rule 60, which historically has not tolled the time. The amendment is consistent with the practice in several circuits that treat all motions to alter or amend judgments that are made within 10 days after entry of judgment as Rule 59(e) motions for purposes of Rule 4(a)(4). See, e.g., Rados v. Celotex Corp., 809 F.2d 170 (2d Cir. 1986); Skagerberg v. Oklahoma, 797 F.2d 881 (10th Cir. 1986); Finch v. City of Vernon, 845 F.2d 256 (11th Cir. 1988). However, to conform to recent Supreme Court decisions, Buchanan v. Stanships, Inc., 485 U.S. 265 (1988), & Budinich v. Becton Dickinson and Co., 486 U.S. 196 (1988), the amendment excludes motions for costs and attorney's fees from the class of motions that extend the filing time unless a district court, acting under

finality

Rule 58, enters an order delaying the ~~entry~~ of judgment and extending the time for appeal. This amendment is to be read in conjunction with the amendment of Fed. R. Civ. P. 58.

Note to subdivision (b). The amendment grammatically restructures the portion of this subdivision that lists the types of motions that toll the time for filing an appeal. This restructuring is intended to make the rule easier to read. No substantive change is intended other than to add motions for judgment of acquittal under Criminal Rule 29 to the list of tolling motions. Such motions are the equivalent of a Fed. R. Civ. P. 50(b) motions for judgment notwithstanding the verdict, which toll the running of time for appeals in civil cases.

The proposed amendment also eliminates an ambiguity from the third sentence of this subdivision. The third sentence currently provides that if one of the specified motions is filed, the time for filing an appeal will run from the entry of any order denying the motion. That sentence, like the parallel provision in Rule 4(a)(4), was intended to toll the running of time for appeal if one of the post trial motions is timely filed. However, in criminal cases the time for filing the motions runs not from entry of judgment (as it does in civil cases), but from the verdict or finding of guilt. Thus, in a criminal case, a post trial motion may be disposed of more than 10 days before sentence is imposed, *i.e.* before the entry of judgment. United States v. Hashagen, 816 F.2d 899, 902 N.5 (3d Cir. 1987). To make it clear that a notice of appeal need not be filed before entry of judgment, the proposed amendment states that an appeal may be taken within 10 days after the entry of an order disposing of the motion, or within 10 days after the entry of judgment, whichever is later. The amendment also changes the language in the third sentence which provides that an appeal may be taken within 10 days after the entry of an order denying the motion and says instead that an appeal may be taken within 10 days after the entry of an order disposing of the last of such motions. (Emphasis added) The change recognizes that there may be multiple post trial motions filed and that although one or more motions may be granted in whole or in part, a defendant may still wish to pursue an appeal.

The amendment also states that notices of appeal filed before disposition of any of the post trial tolling motions shall become effective upon disposition of the motions. In most circuits this language simply restates the current practice, see United States v. Cortes, 895 F.2d 1245 (9th Cir. 1990). However, two circuits have questioned that practice in light of the language of the rule, see United States v. Gargano, 826 F.2d 610 (7th Cir. 1987), and United States v. Jones, 669 F.2d 559 (8th Cir. 1982), and the committee wishes to clarify the rule. The amendment is consistent with the proposed amendment of Rule 4(a)(4).

Subdivision (b) is further amended in light of new Fed. R. Crim. P. 35(c) which authorizes sentencing courts to correct arithmetic, technical, or other clear errors in sentencing within 7 days after the imposition of sentence. The Committee believes that a sentencing court should be able to act under Criminal Rule 35(c) even if a notice of appeal has already been filed and that a notice of appeal should not be affected by the filing of a motion under Rule 35(c) or by correction of sentence pursuant to Rule 35(c).

Note to subdivision (c). In Houston v. Lack, 487 U.S. 266 (1988), the Supreme Court held that *pro se* prisoners' notices of appeal are "filed" at the moment of delivery to prison authorities for forwarding to the district court. The amendment reflects that decision. The language of the amendment is similar to that in Supreme Court Rule 29.2.

Permitting inmates to file notices of appeal by depositing the notices in institutional mail systems requires adjustment of the rules governing the filing of cross appeals. In a civil case the time for filing a cross appeal ordinarily runs from the date on which the first notice of appeal is filed. If an inmate's notice of appeal is filed by depositing it in an institution's mail system, it is possible that the notice of appeal will not arrive in the district court until several days after the "filing" date and perhaps even after the time for filing a cross appeal has expired. To avoid that, subdivision (c) provides that in civil cases when institutionalized persons file notices of appeal by

depositing them in institutions' mail systems, the time for filing cross appeals shall run from the district courts' receipt of the notices of appeal. A parallel provision is made regarding the time for the government to bring appeals in criminal cases.

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

(a) *Petition for Leave to Appeal; Answer or Cross Petition.* - An appeal from a district court judgment, entered after an appeal pursuant to 28 U.S.C. § 636(c)(4) to a district judge ~~of the district court~~ from a judgment entered upon direction of a magistrate judge in a civil case, may be sought by filing a petition for leave to appeal. . . . .

COMMITTEE NOTE

The amendment conforms the rule to the change in title from magistrate to magistrate judge made by the Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089, 5117 (1990).

Rule 10. The record on appeal

* * * * *

(b) *The transcript of proceedings; duty of appellant to order; notice to appellee if partial transcript is ordered.* -

* * * * *

(3) Unless the entire transcript is to be included, the appellant shall, within the 10 days time provided in (b)(1) of this Rule 10, file a statement of the issues the appellant intends to present on the appeal and shall serve on the appellee a copy of the order or certificate and of the statement. If the appellee deems a transcript or other parts of the proceedings to be necessary, the appellee shall, within 10 days after the service of the order or certificate and the statement of the appellant, file and serve on the appellant a designation of additional parts to be included. Unless within 10 days after service of such designation the appellant has ordered such parts, and has so notified the appellee, the appellee may within the following 10 days either

order the parts or move in the district court for an order requiring the appellant to do so.

* * * * *

COMMITTEE NOTE

The amendment is technical and no substantive change is intended.

Rule 25. Filing and service

(a) *Filing.*- Papers required or permitted to be filed in a court of appeals shall be filed with the clerk. Filing may be accomplished by mail addressed to the clerk, but filing shall not be timely unless the papers are received by the clerk within the time fixed for filing, except that briefs and appendices shall be deemed filed on the day of mailing if the most expeditious form of delivery by mail, excepting special delivery, is utilized, and except further that papers filed by inmates confined in institutions are timely filed if they are deposited in the institutions' internal mail systems on or before the last day for filing.

Timely filing of papers by inmates confined in institutions may be shown by notarized statements or declarations in compliance with 28 U.S.C. S 1746 setting forth the date of deposit and stating that first-class postage has been prepaid. If a motion requests relief which may be granted by a single judge, the judge may permit the motion to be filed with the judge, in which event the judge shall note thereon the date of filing and shall thereafter transmit it to the clerk.

* * * * *

COMMITTEE NOTE

The amendment accompanies new subdivision (c) of Rule 4 and extends the holding in Houston v. Lack, 487 U.S. 266 (1988), to all papers filed in the courts of appeals by persons confined in institutions.

Rule 28. Briefs

(a) *Brief of the appellant.*- The brief of the appellant shall contain under appropriate headings and in the order here indicated:

* * * * *

(5) An argument. The argument may be preceded by a summary. The argument shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on. The argument also shall include a concise statement of the applicable standard of review for each issue, which may be presented in the discussion of each issue or under a separate heading preceding the discussion of the issues.

* * * * *

(b) *Brief of the Appellee.*- The brief of the appellee shall conform to the requirements of subdivisions (a)(1)-(5), except that a statements of jurisdiction, of the issues, or of the case, or of the standard of review need not be made unless the appellee is dissatisfied with the statement of the appellant.

* * * * *

COMMITTEE NOTE

Note to subdivision (a)(5). The amendment requires appellants' briefs to state the standard of review applicable to each issue on appeal. Five circuits currently require such statements and those circuits' experience indicates that requiring a statement of the standard of review generally results in arguments being properly shaped in light of the standard.

Rule 34. Oral argument

* * * * *

(c) *Order and content of argument.*- The appellant is entitled to open and conclude the argument. ~~The opening argument shall include a fair statement of the case.~~ Counsel will not be permitted to read at length from briefs, records or authorities.

* * * * *

COMMITTEE NOTE

Subdivision (c). The amendment deletes the requirement that the opening argument shall include a fair statement of the case. The Committee proposed the change because in some circuits the court does not want appellants to give such statements. In those circuits the rule is not followed and is misleading. However, the Committee does not want the deletion of the requirement to indicate disapproval of the practice. Those circuits that desire a statement of the case may continue the practice.

Rule 35. Determination of causes by the court in banc

(a) *When hearing or rehearing in banc will be ordered.*- A majority of the circuit judges who are currently in regular active service and who are not disqualified from participating in the case may order that an appeal or other proceeding be heard or reheard by the court of appeals in banc, except that no in banc hearing or rehearing may be ordered if the number of judges not disqualified is less than a majority of those currently in regular active service. Such a hearing or rehearing is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance.

* * * * *

COMMITTEE NOTE

The circuits are divided as to whether vacancies and recusals are counted in determining whether a majority of the judges in regular active service has ordered a case to be heard or reheard in banc. The amendment establishes a uniform rule that vacancies and recusals

are not counted, *i.e.*, that the base from which the majority is determined consists only of the judges currently in regular active service who are not disqualified. The amendment also establishes a quorum requirement that the number of nondisqualified judges must constitute a majority of the active judges, including those who may be recused. Without such a quorum requirement, if seven of twelve active judges were disqualified, for example, an in banc could be ordered by a three-to-two vote among the five judges available to sit.

TO: Honorable Kenneth F. Ripple, Chair, Members of the Advisory Committee on Appellate Rules, and Liaison Members

FROM: Carol Ann Mooney, Reporter

DATE: April 13, 1992

SUBJECT: Item 92-1, Amendment of Fed. R. App. P. 47 to require uniform numbering of local rules and deletion of all language in local rules that merely repeats the language of the national rules.

At its January 1992 meeting, the Standing Committee asked each of the Advisory Committees to draft amendments to the rules within their purview to require uniform numbering of local rules and deletion of all language in local rules that merely repeats the language of the national rules. In addition, the committees were asked to consider whether the rule should address the proper use of internal operating procedures and standing orders.

With regard to the Appellate Rules, the obvious place to insert such language is in Rule 47, the rule which authorizes the courts of appeals to adopt local rules "not inconsistent with" the Federal Rules of Appellate Procedure. Fed. R. App. P. 47 currently provides:

> **Rule 47. Rules by courts of appeals**
>
> Each court of appeals by action of a majority of the circuit judges in regular active service may from time to time make and amend rules governing its practice not inconsistent with these rules. In all cases not provided for by rule, the courts of appeals may regulate their practice in any manner not inconsistent with these rules. Copies of all rules made by a court of appeals shall upon their promulgation be furnished to the Administrative Office of the United States Courts.

Rule 47 has never been amended and, therefore, does not reflect the changes made in the Rules Enabling Act by Congress in 1988. Among other changes, the 1988 amendments require that courts of appeals appoint advisory committees for the study of the rules of practice and internal operating procedures, 28 U.S.C. § 2077(b), and that courts of appeals may prescribe local rules "only after giving appropriate public notice and an opportunity for comment." 28 U.S.C. § 2071(b). In addition to the changes requested by the Standing Committee, the Advisory Committee should consider whether the 1988 amendments of the Rules Enabling Act suggest the need for further amendment of Rule 47.

Following are two drafts for your consideration. The only significant difference between the drafts is that the second draft states that local rules shall be numbered "in

conformity with any uniform system prescribed by the Judicial Conference" (that approach has been taken by the Bankruptcy Committee in its draft), whereas the first draft requires that local rules shall be numbered to correspond with the most closely related federal rule. The other differences are stylistic.

Draft 1

After giving appropriate public notice and an opportunity for comment, ~~E~~ each court of appeals by action of a majority of the circuit judges in regular active service may ~~from time to time~~ make and amend, ~~from time to time~~, rules governing its practice not inconsistent with these ~~rules~~ Federal Rules of Appellate Procedure. In all cases not provided for by rule, the courts of appeals may regulate their practice in any manner not inconsistent with these federal rules. The courts of appeals shall place directions to parties or their lawyers regarding appellate practice or procedure in local rules and shall not use internal operating procedures for such directions. ~~When a court of appeals prescribes a rule~~ that relates to ~~any~~ a topic covered by the Federal Rules of Appellate Procedure, ~~the court shall~~ give the local rule a number that corresponds to the related federal rule. For example, Rule 27 of these rules governs motions; if a court of appeals prescribes a rule governing motions, the court of appeals shall number the rule in a manner that indicates that the local rule relates to motions, such as Circuit Rule 27 or Local Rule 27.1. A court of appeals' rule that is not related to any other of

these federal rules shall be numbered to correspond to this Rule 47. To the extent possible, rules prescribed by the courts of appeals shall not repeat these federal rules. ~~Copies of all rules made by a court of appeals shall upon their promulgation be furnished to the Administrative Office of the United States Courts.~~ A court of appeals ~~shall~~ must furnish the Administrative Office of the United States Courts with copies of ~~all~~ rules prescribed by the court at the time of ~~their~~ promulgation.

Committee Notes

The primary purpose of these amendments is to make local rules more accessible. The amendments make three basic changes. First, the rule mandates a uniform numbering system under which local rules are keyed to the national rules. If a local rule on a topic covered by the federal rules uses the same number, notice of the existence of the local rule and accessibility to it are improved. In addition, tying the numbers of local rules to the corresponding national rules should eliminate the perceived need for repeating language from the national rules in the local rules.

Second, the rule also requires courts of appeals to delete from their local rules all language that merely repeats the national rules. Repeating the requirements of the national rules in local rules obscures the local variations. Eliminating the repetition will leave only the local variations and the existence of a local rule on a topic will signal a special local requirement. In addition, the restriction prevents the interpretation difficulties that arise when there are minor variations between the wording of national and local rules.

Third, the rule requires the courts of appeals to observe the distinction between rules and internal operating procedures. Internal operating procedures should not contain directives to lawyers or parties; they should deal only with how the court conducts its internal business. Placing a practice oriented provision in the internal operating procedures may cause a practitioner, especially one from another circuit, to overlook the provision.

The opening phrase of the rule regarding publication and a

period for comment before adoption of a rule simply reflects requirements mandated by the 1988 amendment of 28 U.S.C. § 2071.

Draft 2

After giving appropriate public notice and an opportunity for comment, ~~E~~ each court of appeals by action of a majority of the circuit judges in regular active service may ~~from time to time~~ make and amend rules governing its practice ~~not inconsistent~~ consistent with, but not duplicative of, these ~~rules~~ Federal Rules of Appellate Procedure. In all cases not provided for by rule, the courts of appeals may regulate their practice in any manner ~~not inconsistent~~ consistent with these federal rules. The courts of appeals shall place directions to parties or their lawyers regarding the appellate practice or procedure in local rules and shall not use internal operating procedures for such directions. Local rules prescribed by a court of appeals pursuant to this rule shall be numbered or identified in conformity with any uniform system prescribed by the Judicial Conference of the United States. ~~Copies of all rules made by a court of appeals shall upon their promulgation be furnished to the Administrative Office of the United States Courts.~~ A court of appeals shall furnish the Administrative Office of the United States Courts with copies of all rules prescribed by the court at the time of their promulgation.

Committee Note

[Same as above.]

TO: Honorable Kenneth F. Ripple, Chair, Members of the Advisory Committee on Appellate Rules, and Liaison Members

FROM: Carol Ann Mooney, Reporter

DATE: April 13, 1992

SUBJECT: Item 92-2, streamlined procedures for correction of technical or clerical errors in the rules

At its last meeting, the Standing Committee asked each of the Advisory Committee's to consider the possibility of amending the rules within their purview to authorize technical changes without the need for following the full procedures, including Supreme Court and Congressional review. Apparently there have been times when conflict has arisen between the House counsel, who is responsible for preparation of the rules for printing, and the judiciary, resulting in delay in making needed changes.

The current procedures for the conduct of business by the judicial conference committee on rules allow the Standing Committee to eliminate the public notice and comment period for technical or conforming amendments if the Standing Committee determines that notice and comment are inappropriate or unnecessary. However, no current provision allows the periods of Supreme Court and Congressional review to be by-passed. As I understand the Standing Committee's request, the objective is to amend the rules to authorize such a by-pass.

The following language was suggested at the Standing Committee meeting:

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The Judicial Conference of the United States shall have the
power to correct typographical and clerical or other purely
verbal or formal matters in these rules.
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I think the Advisory Committee, as well as the Standing Committee, should consider whether the language allowing correction of "other purely verbal or formal matters" is too broad. The phrase could cause difficulties for a suggestion that might otherwise be viewed as reasonable. In addition, the relationship between this suggestion and the Rules Enabling Act needs to be considered.

The Rules Enabling Act gives the Supreme Court the power to prescribe general rules of practice and procedure for cases in the United States district courts and courts of appeals. 28 U.S.C. § 2072. However, the act also requires the Supreme Court to transmit any rule to be prescribed under section 2072 to Congress for its review. Proposed rules must be submitted no later than May 1 of the year in which they are to become effective. The proposed rules become effective on December 1 of that year unless Congress otherwise provides by law.

How would a rule that authorizes the Judicial Conference to correct typographical and clerical errors without the need for further action by other bodies fit within the statutory scheme embodied in the Rules Enabling Act? The proponents of the change seem to assume that because such a rule would have to be adopted through the normal process, including Congressional review, if Congress approves the rule, Congress is simply delegating its authority to the Judicial Conference.

If the Appellate Rules are the include such a provision, the next question is the appropriate placement of the provision within the rules. I spoke with the Reporter for the Criminal Rules Committee and he is suggesting that it be added to Rule 59 of the Criminal Rules which deals with the effective date of the criminal rules; there is no corollary in the Appellate Rules. Therefore, I suggest an entirely new rule 49.

Draft 1

If the Committee is satisfied with the language suggested at the Standing Committee meeting, the rule could read as follows:

Rule 49. Technical amendments

The Judicial Conference of the United States shall have the power to correct typographical and clerical or other purely verbal or formal matters in these rules.

COMMITTEE NOTE

This rule is added to enable the Judicial Conference to make minor technical amendments to these rules without burdening the Supreme Court or Congress with such changes. This delegation of authority will lessen the delay and administrative burdens that can encumber the rule making process for minor non-controversial, non-substantive matters. For example, this authority would have been useful to make the changes in Rules 3.1 and 5.1 that became necessary when the new title "Magistrate Judge" replaced the title "Magistrate" as a result of a statutory change.

Draft 2

At its late March meeting, the Bankruptcy Rules Committee approved a different draft rule. Other than changing the rule number to the number that would be used in the appellate rules, the rule as passed by the Bankruptcy Committee reads as follows:

Rule 49. Technical amendments

The Judicial Conference of the United States may amend these rules to make them consistent in form and style with statutory changes and to correct errors in grammar, spelling, cross-references, typography, and other similar technical matters of form and style.

Although the intent of both drafts is identical, Draft 2 is more narrowly worded, and perhaps substantively narrower (can "other purely verbal ... matters" be read more broadly than "other similar technical matters of form and style"?).

TO: Honorable Kenneth F. Ripple, Chair, Members of the Advisory Committee on Appellate Rules, and Liaison Members

FROM: Carol Ann Mooney, Reporter

DATE: April 13, 1992

SUBJECT: Item 90-4, Amendment of Fed. R. App. P. 3(c) in light of the Supreme Court's decision in Torres

At its January 1992 meeting, the Standing Committee approved immediate publication, under expedited procedures, of the proposed amendment to Fed. R. App. P. 3(c) and the conforming amendments to Rule 15(a) and Forms 1, 2, and 3. Because the Standing Committee believed that the Torres problem is sufficiently important to justify shortening the usual publication period, the Committee voted to publish the rules and forms immediately and only for a three month period. The three month period will allow the Advisory Committee to consider the comments and submit a report to the Standing Committee for its June meeting.

Although the comment period has not ended yet and there likely will be further comments to consider, I have begun the GAP report summarizing the three comments received to date. The draft pages are attached to this memorandum. As Judge Ripple explained in his February 4 memorandum summarizing the actions taken by the Standing Committee at the January meeting, a telephone conference will be needed to finalize the Advisory Committee's response to all of the comments. However, the Committee may begin the task at the April 30 meeting.

In addition to generally considering the comments submitted on the proposed amendments, the Standing Committee requested that the Advisory Committee continue to explore alternative approaches that would preserve as many appeals as possible. Specifically, the Standing Committee asked the Advisory Committee to consider an approach analogous to that in Supreme Court Rule 12.4.

This memorandum will first discuss the possibility of amending Rule 3(c) along the lines of Sup. Ct. R. 12.4. It will then discuss the other comments submitted on the published draft.

SUPREME COURT APPROACH

Supreme Court Rule 12.4 provides that all parties to a proceeding sought to be reviewed are parties in the Supreme Court unless the petitioner notifies the Court that the petitioner believes that one or more of the parties below has no interest in the outcome of the petition. A party noted as no longer interested may remain a party by notifying the clerk of the party's intention to remain a party. All parties not named in the petition as petitioners are respondents but any respondents who support the position of the petitioner must meet the time schedule for filing papers which is applicable to the

petitioner.

The Advisory Committee briefly considered this approach at its meeting last December, but did not pursue it in depth. See Minutes of the December 4 & 5 meeting at page 11. Although the minutes do not reflect the reason the Advisory Committee rejected the Supreme Court approach, I believe the committee dismissed the approach for the same reason it rejected the suggestion that all parties represented in the court below by the attorney filing the notice of appeal should be appellants -- it would be extremely difficult for the courts of appeals to ascertain the identity of the parties because the courts of appeals have difficulty obtaining district court records.

The Supreme Court addresses that problem by requiring the petitioner to list in the petition for certiorari all parties to the proceeding in the court whose judgment is sought to be reviewed. Sup. Ct. R. 14.1(b). If the petitioner either intentionally or accidentally fails to name a party, the party still is automatically a party to the proceeding in the Supreme Court by reason of Sup. Ct. R. 12.4, if the party so desires.

All parties should receive notice of the filing of a petition for certiorari, and thus of their status as respondents, because a petitioner is required to serve all respondents (i.e. all parties to the proceeding in the court below) with notice of the filing of a petition for certiorari, Sup. Ct. R. 12.1, as well as with a copy of any document notifying the Clerk of the Supreme Court of the petitioner's belief that one or more of the parties below has no interest in the outcome of the petition. Sup. Ct. R. 12.4. If an unnamed party is not so served, "the unnamed party should notify the Clerk and other parties of his intentions as soon as he is otherwise made aware of the filing and, where necessary, obtain an appropriate extension of time from the Clerk, under Rule 29.4 [now Rule 30.4], to file a brief or memorandum stating his position." Robert L. Stern, et al., Supreme Court Practice, 348 n.57 (6th ed. 1986).

So, while the possibility that a petitioner may fail to list all persons who were parties to the proceeding under review creates some uncertainty at the Supreme Court as to the identity of all the parties before the Court, in most cases the rule requiring the petitioner to list all of the parties in the petition will supply the Court with the names of all the parties. In those instances in which a party's name is omitted, the party has not lost the right to be heard.

Judge Easterbrook's comment on the proposed amendments contains a draft amendment of Fed. R. App. P. 3(c) using the Supreme Court Rule as a model. Judge Easterbrook's draft provides:

> (c) Content of the notice of appeal.- The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed

from; and shall name the court to which the appeal is taken. Form 1 in the Appendix of Forms is a suggested form of a notice of appeal. All parties to the proceeding in the court whose judgment is sought to be reviewed shall be parties in the court of appeals, unless any party or counsel notifies the clerk of the court of appeals in writing that a party has no interest in the outcome of the appeal. A person noted as no longer interested may remain a party by promptly notifying the Clerk, with service on the other parties, of desire to remain a party. All parties other than those identified as appellants by name in the caption or body of the notice of appeal shall be appellees, but any appellee who supports the position of an appellant shall be treated as an appellant if that party meets the time schedule for filing briefs established for the appellants. An appeal shall not be dismissed for informality of form or title of the notice of appeal.

With regard to the uncertainty issue, Judge Easterbrook points out in his comments that "[i]n the years before Torres few (maybe no) voices were heard to the effect that "et al." and similar designations prejudiced opponents or burdened judicial administration. Courts across the nation accepted such documents."

Judge Easterbrook's draft would more closely approximate the Supreme Court's practice, and minimize the uncertainty problem, if it also required appellants to list in the notice of appeal the names of all the parties to the proceeding to be reviewed.

Supreme Court Rule 12.4 provides that all parties to the proceeding below are parties in the Supreme Court unless the petitioner notifies the Clerk in writing that the petitioner believes that one or more of the parties below has no interest in the outcome of the petition. Judge Easterbrook's draft allows any party or counsel to so notify the court. I think the alteration makes sense clearly to the extent that it allows a party to

notify the court that it has no interest in the case and will not be participating, and probably also to the extent that it allows a party other than the appellant to notify the court when the party is aware that another party has no continuing interest.

Sup. Ct. R. 12.4 requires service of all such notices on all other parties to the proceeding below. Judge Easterbrook dropped the service requirement from his draft of Rule 3(c) presumably because Fed. R. App. P. 25(b) requires service "of all papers filed by any party . . . on all other parties to the appeal or review." However, it might be better to include a service provision in Rule 3 because an ambiguity may be created by the interplay between Fed. R. App. P. 25 and draft Rule 3(c). Fed. R. App. P. 25 requires service on all parties to the appeal. The draft Rule 3(c) would drop persons noted as no longer interested from the list of parties, unless such persons promptly notify the clerk of their desire to remain parties. It is not clear that Rule 25 would require service of such notice on persons who will be dropped as parties as a result of the notice. (The answer to the question may depend upon whether the provision in lines 6 through 10 of the draft are seen as self-executing. However, it would be a simple matter to clarify the question by rule.)

Therefore, if the Committee is interested in pursuing this approach, I suggest the following amended draft:

Amended Draft

(c) Content of the notice of appeal.- The notice of appeal shall specify the party or parties taking the appeal; shall list all the parties to the proceeding in the district court whose judgment is to be reviewed; shall designate the judgment, order, or part thereof, appealed from; and shall name the court to which the appeal is taken. Form 1 in the Appendix of Forms is a suggested form of a notice of appeal. All parties to the proceeding in the court whose judgment is to be reviewed shall be parties in the court of appeals, unless any party or counsel notifies the clerk of the court of appeals in writing that a party has no interest in the outcome of the appeal. A copy of the writing shall be served on all parties to the proceeding in the district

court. A person noted as no longer interested may remain a party by promptly notifying the clerk, with service on the other parties, of desire to remain a party. All parties other than those identified as appellants by name in the caption or body of the notice of appeal shall be appellees, but any appellee who supports the position of an appellant shall be treated as an appellant ~~if that party meets the time schedule for filing briefs established for the~~ appellants. An appeal shall not be dismissed for informality of form or title of the notice of appeal.

The Court of Appeals Clerks and Chief Deputy Clerks met in late February. Mr. Strubbe, the liaison between the clerks and the Advisory Committee, reserved time on the clerks' meeting agenda to discuss FRAP amendments being considered by the Advisory Committee. Judge Ripple asked Mr. Strubbe to discuss the possibility of amending Rule 3(c) along the lines of Sup. Ct. R. 12.4. Following the meeting Mr. Strubbe wrote to Judge Ripple stating the following:

> One thing all clerks and chief deputies agreed upon is that we should not adopt a rule similar to Supreme Court Rule 12.4. Everyone agreed that such a rule could create confusion and potentially lead to the filing of numerous additional documents to notify clerks that parties noted by the appellants as no longer interested in the litigation still have the intention to remain parties. This system, to us, appears unnecessarily complex and unwieldy.

Judge Ripple also spoke to Mr. Frank Lorson, Deputy Clerk of the Supreme Court of the United States, about the operation of the Supreme Court rule. Mr. Lorson reported that, in the context of Supreme Court practice, the rule works well with only occasional problems. There are, on occasion, problems with party interveners. There are also occasional problems with enforcing time limitations for filing on respondents who, for purposes of filing, must follow the time limitations imposed on the petitioner because they really support the side of the petitioner. Finally, Mr. Lorson noted that there have been occasional problems with appeals from three judge district courts. In these cases, it is somewhat more difficult to ascertain the proper alignment of the parties. These appeals are filed under Supreme Court Rule 18.2.

Other Comments

Magistrate Judge Rosenberg suggested the rule should require that notices of appeal list the names of the parties in the body and that naming parties in the caption should not be sufficient because captions may be used as a matter of course and without conscious review. The published draft clearly provides that naming parties in either the caption or the body is sufficient because, although the aim of the published draft is clarity, it seems to create an unnecessary trap to treat the names in the caption as insufficient.

Judge Ginsburg questions the adequacy of the portion of the amendment dealing with class actions. She suggests that the rule should require the designation of at least one person qualified to take the appeal.

Although the published rule ordinarily requires a notice of appeal to name each party taking the appeal, it states that "[i]n class actions, whether or not the class has been certified, it shall be sufficient for the notice to state that it is filed on behalf of the class." For obvious reasons, the draft does not require the naming of all actual or potential class members. And because putative class members may appeal an order denying class certification if the named plaintiffs choose not to appeal, the rule avoids requiring that a "party" be named as class representative.

Judge Ginsburg's suggestion is that the rule should require that a notice of appeal be brought in the name of at least one person qualified to take the appeal. Along with her suggestion, she forwarded a copy of the D.C. Circuit opinion in Walsh v. Ford Motor Co., 945 F.2d 1188. In that case, Jack Walsh was the only party specified in a notice of appeal seeking review of the district court's denial of class certification. Prior to the filing of the notice of appeal, Mr. Walsh had entered a settlement agreement with Ford in which Walsh released Ford from "any and all actions or causes of action, suits, claims, counterclaims" that Walsh had against Ford. The court determined that because Walsh had relinquished "any and all" of his claims against Ford, he could not appeal. The court then concluded that it did not have authority to review the class certification denial because without Walsh as an appellant, no party was adequately "specified" as required by Fed. R. App. P. 3(c).

One possible response to Judge Ginsburg's suggestion is that the proposed change in Rule 3(c) eliminates the need for "specifying" a party in notices of appeal in class actions. Indeed, the Supreme Court has already modified that rule by finding in United Airlines, Inc. v. McDonald, 432 U.S. 385 (1977), that a putative class member (who is not a named party) may appeal an adverse class determination order.

In McDonald, however, the notice of appeal was brought in the name of a particular putative class member, who sought to intervene, and not simply on behalf of unnamed putative class members. Perhaps a better way to analyze Judge Ginsburg's

suggestion is to consider whether Article III requires a notice of appeal to name at least a class member or putative class member as representative of the others. Without the naming of at least one person qualified to bring the appeal, the appeal actually would be brought by the attorney seeking to represent the class.

Requiring that a notice of appeal in class actions name at least one person qualified to bring the appeal as representative of the others provides some assurance that there is still a justiciable controversy. Although the constitutional requirement of a case-or-controversy exists, the Supreme Court has recognized that a legally cognizable interest in the traditional sense rarely exists with respect to a class certification claim. United States Parole Comm'n v. Geraghty, 445 U.S. 388, 402 (1979). In Geraghty, the Supreme Court stated that the "right" to have a class certified "is more analogous to the private attorney general concept than to the type of interest traditionally thought to satisfy the 'personal stake' requirement." Id. at 403. Therefore, the Court held that even a party whose claim has become moot may appeal a ruling denying class certification so long as the named representative will fairly and adequately protect the interests of the class. Id. at 406.

If the proper focus is whether the person filing a notice of appeal will fairly and adequately protect the interests of the class, as to an appeal from a ruling denying class certification it may be appropriate for the attorney seeking to represent the class to bring the notice of appeal. Once a class is certified, however, and the focus shifts to the merits of the claim, someone eligible to press the class claims must act as representative.

The portion of the published rule in question deals generally with notices of appeal in class actions and not simply with appeals from class certification rulings. Unless there is to be a distinction between the two types of appeals, Article III may require that at least one person qualified to appeal be named in the notice of appeal. This question should be discussed by the committee. If the conclusion is that a person qualified to bring the appeal should be specified, the draft should be revised.

The sentence in question could be revised to state:

1 In class actions, whether or not the class has been
2 certified, it shall be sufficient for the notice to name as
3 representative of the class one person qualified to bring
4 the appeal.

List of Commentators
Proposed Amendment to Fed. R. App. P. 3(c)
and Conforming Amendments to Fed. R. App. P.
15 and to Forms 1, 2, and 3

Honorable Frank H. Easterbrook
United States Circuit Judge
319 South Dearborn Street
Chicago, Illinois 60604

Honorable Ruth Bader Ginsburg
United Stated Circuit Judge
United States Court of Appeals
Washington, D.C. 20001

Honorable Paul M. Rosenberg
United States Magistrate Judge
244 U.S. Courthouse
101 W. Lombard Street
Baltimore, Maryland 21201-2675

COMMENTS ON PROPOSED AMENDMENT OF FED. R. APP. P. 3(C)

Honorable Frank H. Easterbrook
United States Circuit Judge
319 South Dearborn Street
Chicago, Illinois 60604

Judge Easterbrook notes that the proposed amendment clarifies the level of specificity needed to identify the parties taking an appeal so that any lawyer who reads the rule can file an effective notice of appeal. However, Judge Easterbrook notes that the clarity achieved by the change would come at the expense of parties whose lawyers do not read the rule and thus fail to follow it. He suggests that a different approach be adopted. Unless there is evidence that such an approach causes prejudice to other parties or disrupts the administration of the courts, Judge Easterbrook advocates adopting a rule that will protect meritorious claims to the greatest extent possible. He suggests amending Rule 3(c) along the line of Supreme Court Rules 12.4 and 18.2 so that all parties to the proceeding in the court whose judgment is to be reviewed are automatically parties in the court of appeals.

Judge Easterbrook favors the amendments to Rule 15, because it makes sense to require identification - for the first time in *any* court - of the persons contesting an administrative decision.

Honorable Ruth Bader Ginsburg
United Stated Circuit Judge
United States Court of Appeals
Washington, D.C. 20001

Judge Ginsburg questions the adequacy of that portion of the amendment dealing with class actions. She suggests that the rule should require the designation of at least one person qualified to take the appeal.

Honorable Paul M. Rosenberg
United States Magistrate Judge
244 U.S. Courthouse
101 W. Lombard Street
Baltimore, Maryland 21201-2675

Magistrate Judge Rosenberg believes that the rule should require the parties to be named in the body of a notice of appeal and not in the caption because the caption may be used as a matter of course.

III-A. Items 89-5 & 90-1

TO: Honorable Kenneth F. Ripple, Chair, Members of the Advisory Committee on Appellate Rules, and Liaison Members

FROM: Carol Ann Mooney, Reporter

DATE: April 22, 1992

SUBJECT: Items 89-5 and 90-1, amendment of Fed. R. App. P. 35(c) to treat suggestions for rehearing in banc like petitions for panel rehearing so that a request for a rehearing in banc will also suspend the finality of the court's judgment and thus toll the period in which a petition for certiorari may be filed.

A petition for panel rehearing suspends the finality of a court of appeals judgment until the rehearing is denied or a new judgment is entered on the rehearing. Therefore, the time for filing a petition for certiorari runs from the date of the denial of the petition or the entry of a subsequent judgment. In contrast, a suggestion for rehearing in banc does not toll the running of time for seeking certiorari.

Although the distinction between a petition for rehearing and a suggestion for rehearing in banc is clear in the rules, the distinction eludes some lawyers and litigants. The confusion may be caused by the fact that a suggestion for rehearing in banc has the same filing deadline as a petition for panel rehearing and it is common practice in many circuits to file a single document that requests both a panel rehearing and a rehearing in banc.

When a suggestion for rehearing in banc is filed without a petition for rehearing litigants often wrongly assume that the filing time for a petition for certiorari is extended and delay filing a petition for certiorari until the time for filing has passed. In prior discussions, the Advisory Committee favored amending the rules so that a suggestion for a rehearing in banc would also suspend the finality of a court of appeals' judgment and thus extend the time for filing a petition for certiorari.

At last December's meeting, the committee considered draft amendments that would make such a change. One problem the drafts made clear is that if a suggestion for rehearing in banc is to toll the time for filing a petition for certiorari, there must be a date certain from which the time begins to run anew. Under current culture, courts have no obligation to vote or otherwise act upon suggestions for rehearing in banc. To require any sort of action within a time certain would disturb that culture, which could have an undesirable impact upon collegiality and the give and take process of shaping opinions. Therefore, the committee abandoned the course it had earlier adopted.

The committee also considered requiring every suggestion for rehearing in banc to be accompanied by a simultaneous petition

for panel rehearing. If both requests were placed before a court, the court would be likely to dispose of both simultaneously and start the running of the time for petitioning for a writ of certiorari. That approach was rejected because it could require the pro forma filing of a petition that the parties know is useless and because it would not guarantee the elimination of the trap unless courts could be compelled to dispose of both requests simultaneously.

Ultimately, the committee decided rather than change the effect of a suggestion for rehearing in banc, the most straightforward approach would be to insert language in Rule 35(c) stating that the pendency of a suggestion for rehearing in banc does not extend the time for filing a petition for certiorari. In short, the committee decided to make the trap obvious rather than eliminate it.

Although it was suggested at the December meeting that the language of Supreme Court Rule 13.4 might serve as a model for this amendment, the language is not adaptable for this purpose. (A copy of Sup. Ct. R. 13.4 is appended.)

DRAFT

Rule 35. Determination of causes by the court in banc

(c) Time for suggestion of a party for hearing or rehearing in banc; suggestion does not stay mandate.- If a party desires to suggest that an appeal be heard initially in banc, the suggestion must be made by the date on which the appellee's brief is filed. A suggestion for a rehearing in banc must be made within the time prescribed by Rule 40 for filing a petition for rehearing, whether the suggestion is made in such petition or otherwise. The pendency of such a suggestion whether or not included in a petition for rehearing shall not affect the finality of the judgment of the court of appeals, extend the time for filing a petition for certiorari, or stay the issuance of the mandate.

Committee Note

Subdivision (c). The amendment makes no substantive change; it simply includes within the text of the appellate rules the rule enunciated in Supreme Court Rule 13.4. It is the committee's hope that inclusion of this language will alert litigants and lawyers to the fact that although a petition for panel rehearing suspends the finality of a court of appeals judgment and extends the time for filing a petition for certiorari, a suggestion for rehearing in banc does not extend the time for filing a petition for certiorari.

Rule 13. Review on Certiorari; Time for Petitioning

.1. A petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by a state court of last resort, a United States court of appeals, or the United States Court of Military Appeals shall be deemed in time when it is filed with the Clerk of this Court within 90 days after the entry of the judgment. A petition for a writ of certiorari seeking review of a judgment of a lower state court which is subject to discretionary review by the state court of last resort shall be deemed in time when it is filed with the Clerk within 90 days after the entry of the order denying discretionary review.

.2. A Justice of this Court, for good cause shown, may extend the time to file a petition for a writ of certiorari for a period not exceeding 60 days.

.3. The Clerk will refuse to receive any petition for a writ of certiorari which is jurisdictionally out of time.

.4. The time for filing a petition for a writ of certiorari runs from the date the judgment or decree sought to be reviewed is rendered, and not from the date of the issuance of the mandate (or its equivalent under local practice). However, if a petition for rehearing is timely filed in the lower court by any party in the case, the time for filing the petition for a writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) runs from the date of the denial of the petition for rehearing or the entry of a subsequent judgment. A suggestion made to a United States court of appeals for a rehearing in banc pursuant to Rule 35(b), Federal Rules of Appellate Procedure, is not a petition for rehearing within the meaning of this Rule.

.5. A cross-petition for a writ of certiorari shall be deemed in time when it is filed with the Clerk as provided in paragraphs .1, .2, and .4 of this Rule, or in Rule 12.3. However, a cross-petition which, except for Rule 12.3, would be untimely, will not be granted unless a timely petition for a writ of certiorari of another party to the case is granted.

.6. An application to extend the time to file a petition for a writ of certiorari must set out the grounds on which the jurisdiction of this Court is invoked, must identify the judgment sought to be reviewed and have appended thereto a copy of the opinion and any order respecting rehearing, and must set forth with specificity the reasons why the granting of an extension of time is thought justified. For the time and manner of presenting the application, see Rules 21, 22, and 30. An application to extend the time to file a petition for a writ of certiorari is not favored.

TO: Honorable Kenneth F. Ripple, Chair, Members of the Advisory Committee on Appellate Rules, and Liaison Members

FROM: Carol Ann Mooney, Reporter

DATE: April 13, 1992

SUBJECT: Item 91-27, amendment of the FRAP rules requiring the filing of copies of documents to authorize local local rules that require a different number of copies

At the Advisory Committee's December meeting, the Committee discussed the "number of copies" problem. The Local Rules Project identified several local rules that conflict with the federal rules because the local rules require parties to file numbers of copies of documents that differ from the numbers required by the federal rules.

The Committee discussed two different approaches to the problem. First it considered, but ultimately rejected, the possibility of deleting all numbers from the national rules. An advantage of this approach is that practitioners would know that they always must consult the local rules to ascertain the required number of copies. A disadvantage of this approach is that a circuit that thinks uniformity of practice is important has no focal point from which to work.

The Committee adopted the second approach and decided that it would leave "default" numbers in the rules but authorize local variations. Minutes at 7. The Committee further decided that each of the rules that requires copies to be filed should authorize local options rather than relying upon a single such authorization in Rule 25. Minutes at 8.

I have drafted amendments to each of the rules requiring the filing of copies and the drafts follow. You will note the rules generally set a default number and then authorize the courts of appeals to require a different number by local rule or by order in a particular case. That language is taken from the current language used in Rules 30 and 31. I am uncertain whether it is desirable to include the second half of the authorization, that a court may change the number by order in a particular case. Rule 2 already gives the courts authority to "suspend the requirements or provisions of any of these rules in a particular case." Arguably, the word "suspend" does not include the authority to require a party to do more than the rules require and thus does not authorize the courts to require more copies than the rules require. However, if the authority given in Rule 2 has been more broadly interpreted, is there a danger that the specific authorization to change the number of copies <u>by order</u> will give rise to a negative inference that the courts' ability to otherwise alter the requirements of the rules in particular cases should be narrowly construed?

Rule 3. Appeal as of right - How taken

(a) Filing the notice of appeal. - An appeal permitted by law as of right from a district court to a court of appeals shall be taken by filing a notice of appeal with the clerk of the district court within the time allowed by Rule 4. At the time of filing, the appellant shall furnish the clerk with sufficient copies of the notice of appeal to enable the clerk to comply promptly with the requirements of (d) of this Rule 3. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal. Appeals by permission under 28 U.S.C. § 1292(b) and appeals in bankruptcy shall be taken in the manner prescribed by Rule 5 and Rule 6 respectively.

Committee Note

Subpart (a). The amendment requires that when a party files a notice of appeal, it shall be accompanied by a sufficient number of copies for service on all the other parties.

[Reporter's Note to the Advisory Committee: This rule and Rule 13 do not set a "default" number and then authorize local variation. The number of copies needed will vary with each case, depending upon the number of parties who must be served. Therefore, the rule simply requires parties to files sufficient copies to allow the court to make service.]

Rule 5. Appeals by permission under 28 U.S.C. § 1292(b)

* * *

(c) Form of papers; number of copies. - All papers may be typewritten. Three copies shall be filed with the original~~, but the court may require that additional copies be furnished~~ unless the court requires the filing of a different number by local rule or by order in a particular case.

Committee Note

Subpart (c). The amendment clarifies that a different number of copies may be required by either rule or order in the individual case. The number of copies of any document that a court of appeals needs varies depending upon the way in which that particular court conducts business. The internal operation of the courts of appeals necessarily varies from circuit to circuit because of differences in the number of judges, the geographic area included within the circuit, and other such factors. Uniformity could be achieved only by setting the number of copies artificially high so that parties in all circuits file enough copies to satisfy the needs of the court requiring the greatest number. Rather than do that, the Committee decided to make it clear that local rules generally may require a greater or lesser number of copies and that if the circumstances of a particular case indicate the need for a different number of copies in that case, the court may so order.

Rule 5.1. Appeals by ~~P~~permission ~~U~~under 28 U.S.C.§ 636(c)(5)

(c) Form of Papers; Number of Copies. - All papers may be typewritten. Three copies shall be filed with the original~~, but the court may require that additional copies be furnished~~ unless the court requires the filing of a different number by local rule or by order in a particular case.

Committee Note

Subpart (c). The amendment clarifies that a different number of copies may be required by either rule or order in the individual case. The number of copies of any document that a court of appeals needs varies depending upon the way in which that particular court conducts business. The internal operation of the courts of appeals necessarily varies from circuit to circuit because of differences in the number of judges, the geographic area included within the circuit, and other such factors. Uniformity could be achieved only by setting the number of copies artificially high so that parties in all circuits file enough copies to satisfy the needs of the court requiring the greatest number. Rather than do that, the Committee decided to make it clear that local rules generally may require a greater or lesser number of copies and that if the circumstances of a particular case indicate the need for a different number of copies in that case, the court may so order.

Rule 13. Review of decisions of the Tax Court

(a) How obtained; time for filing notice of appeal. - Review of a decision of the United States Tax Court shall be obtained by filing a notice of appeal with the clerk of the Tax Court within 90 days after the decision of the Tax Court is entered. At the time of filing the appellant shall furnish the clerk with sufficient copies of the notice of appeal to enable the clerk to comply promptly with the requirements of Rule 3(d). If a timely notice of appeal is filed by one party, any other party may take an appeal by filing a notice of appeal within 120 days after the decision of the Tax Court is entered.

. . .

Committee Note

Subpart (a). The amendment requires that when a party files a notice of appeal, it shall be accompanied by a sufficient number of copies for service on all the other parties.

Rule 21. Writs of mandamus and prohibition directed to a judge or judges and other extraordinary writs

* * *

(d) Form of papers; number of copies. - All papers may be typewritten. Three copies shall be filed with the original~~, but the court may direct that additional copies be furnished~~ unless the court requires the filing of a different number by local rule or by order in a particular case.

Committee Note

Subpart (d). The amendment clarifies that a different number of copies may be required by either rule or order in the individual case. The number of copies of any document that a court of appeals needs varies depending upon the way in which that particular court conducts business. The internal operation of the courts of appeals necessarily varies from circuit to circuit because of differences in the number of judges, the geographic area included within the circuit, and other such factors. Uniformity could be achieved only by setting the number of copies artificially high so that parties in all circuits file enough copies to satisfy the needs of the court requiring the greatest number. Rather than do that, the Committee decided to make it clear that local rules generally may require a greater or lesser number of copies and that if the circumstances of a particular case indicate the need for a different number of copies in that case, the court may so order.

Rule 25. Filing and service

* * *

(e) Number of copies. - Whenever these rules require the filing or furnishing of a number of copies, a court may require the filing of a different number by local rule or by order in a particular case.

Committee Note

The number of copies of any document that a court of appeals needs varies depending upon the way in which that particular court conducts business. The internal operation of the courts of appeals necessarily varies from circuit to circuit because of differences in the number of judges, the geographic area included within the circuit, and other such factors. Uniformity could be achieved only by setting the number of copies artificially high so that parties in all circuits file enough copies to satisfy the needs of the court requiring the greatest number. Rather than do that, the Committee decided to make it clear that local rules generally may require a greater or lesser number of copies and that if the circumstances of a particular case indicate the need for a different number of copies in that case, the court may so order.

A party must consult local rules to determine whether the court requires a different number than that specified in the national rules. If a party fails to do so and does not file the required number of copies, the failure does not create a jurisdictional defect. Rule 3(a) states: "Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate . . ."

Rule 26.1 Corporate disclosure statement

Any non-governmental corporate party to a civil or bankruptcy case or agency review proceeding and any non-governmental corporate defendant in a criminal case shall file a statement identifying all parent companies, subsidiaries (except wholly owned subsidiaries), and affiliates that have issued shares to the public. The statement shall be filed with a party's principal brief or upon filing a motion, response, petition or answer in the court of appeals, whichever first occurs, unless a local rule requires earlier filing. Whenever the statement is

filed before a party's principal brief, three copies of the statement shall be filed with the original unless the court requires the filing of a different number by local rule or by order in a particular case. The statement shall be included in the front of the table of contents in a party's principal brief even if the statement was previously filed.

Committee Note

The amendment requires the filing of three copies of the disclosure statement whenever the statement is filed before the party's principal brief. Because the statement is included in each copy of the party's brief, there is no need to require the filing of additional copies at that time. A court of appeals may require the filing of a greater or lesser number of copies by local rule or by order in a particular case.

Rule 27. Motions

* * *

(d) Form of papers; number of copies. - All papers relating to motions may be typewritten. Three copies shall be filed with the original~~, but the court may require the additional copies be furnished~~ unless the court requires the filing of a different number by local rule or by order in a particular case.

Committee Note

Subpart (d). The amendment clarifies that a different number of copies may be required by either rule or order in the individual case. The number of copies of any document that a court of appeals needs varies depending upon the way in which that particular court conducts business. The internal operation of the courts of appeals necessarily varies from circuit to circuit because of differences in the number of judges, the geographic area included within the circuit, and other such

factors. Uniformity could be achieved only by setting the number of copies artificially high so that parties in all circuits file enough copies to satisfy the needs of the court requiring the greatest number. Rather than do that, the Committee decided to make it clear that local rules generally may require a greater or lesser number of copies and that if the circumstances of a particular case indicate the need for a different number of copies in that case, the court may so order.

Rule 30. Appendix to the briefs

(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. Except where they have independent relevance, memoranda of law in the district court should not be included in the appendix. 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.

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 the 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~~ requires the

filing or service of a different number by local rule or by order in a particular case ~~direct the filing or service of a lesser number~~.

Committee Note

Subpart (a). The only substantive change is to allow a court to require the filing of a greater number of copies of an appendix as well as a lesser number.

Rule 31. Filing and service of briefs

* * *

(b) Number of copies to be filed and served. - Twenty-five copies of each brief shall be filed with the clerk, ~~unless the court by order in a particular case shall direct a lesser number,~~ and two copies shall be served on counsel for each party separately represented unless the court requires the filing or service of a different number by local rule or by order in a particular case. If a party is allowed to file typwritten ribbon and carbon copies of the brief, the original and three legible copies shall be filed with the clerk, and one copy shall be served on counsel for each party separately represented.

Committee Note

Subpart (b). The amendment allows a court of appeals to require the filing of a greater as well as a lesser number of copies of briefs. The amendment also allows the required number to be prescribed by local rule and well as by order in a particular case.

Rule 35. Determination of causes by the court in banc

* * *

(d) Number of copies. - The number of copies that shall be filed with the original may be prescribed by local rule and may be altered by order in a particular case.

Committee Note

Subpart (d). The amendment authorizes the courts of appeals to prescribe the number of copies of suggestions for hearing or rehearing in banc that must be filed. Because the number of copies needed depends directly upon the number of judges in the circuit, local rules are the best vehicle for setting the required number of copies.

TO: Honorable Kenneth F. Ripple, Chair, Members of the Advisory Committee on Appellate Rules, and Liaison Members

FROM: Carol Ann Mooney, Reporter

DATE: April 22, 1992

SUBJECT: 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.

Fed. R. App. P. 21 provides that a judge actually be named as a party and be treated as a party with respect to service of papers. Nine circuits have local rules according to which a petition for mandamus shall not bear the name of the district judge. Six of these rules also provide that unless otherwise ordered, if relief is requested of a particular judge, the judge shall be represented pro forma by counsel for the party opposing the relief who appears in the name of the party and not of the judge. Although Rule 21 anticipates that a judge may not wish to appear in the proceeding, the rule requires the judge to so advise the clerk and all parties by letter. Six of the local rules reverse the presumption and require a judge who wishes to appear to seek an order permitting the judge to appear. (Copies of the local rules are attached to this memorandum.)

The Local Rules Project suggested that the Advisory Committee consider amending Rule 21 to reflect the presumptions in the local rules. At the December meeting the Advisory Committee discussed the suggestion and favored amending Rule 21 and asked that a draft be prepared for the spring meeting.

DRAFT

Rule 21. Writs of mandamus and prohibition directed to a judge or judges and other extraordinary writs

(a) Mandamus or prohibition to a judge or judges; petition for writ; service and filing. - Application for a writ of mandamus or of prohibition directed to a judge or judges shall be made by filing a petition therefor with the clerk of the court of appeals with proof of service on the ~~respondent~~ judge or judges and on all parties to the action

in the trial court. The petition shall be entitled simply, In re _____, Petitioner. The petition shall contain a statement of the facts necessary to an understanding of the issues presented by the application; a statement of the issues presented and of the relief sought; a statement of the reasons why the writ should issue; and copies of any order or opinion or parts of the record which may be essential to an understanding of the matters set forth in the petition. Upon receipt of the prescribed docket fee, the clerk shall docket the petition and submit it to the court.

(b) Denial, order directing answer. - If the court is of the opinion that the writ should not be granted, it shall deny the petition. Otherwise, it shall order than an answer to the petition be filed by the respondents within the time fixed by the order. The order shall be served by the clerk on the judge or judges ~~named respondents~~ to whom the writ would be directed, if granted, and on all other parties to the action in the trial court. All parties below other than the petitioner shall ~~also~~ be deemed respondents for all purposes. Two or more respondents may answer jointly. ~~If the judge or judges named respondents do not desire to appear in the proceeding, they may so advise the clerk and all parties by letter, but the petition shall not thereby be taken as admitted.~~ To the extent that relief is requested of a particular judge, unless otherwise ordered, the judge

shall be represented pro forma by counsel for the party opposing the relief, who shall appear in the name of the party and not that of the judge. The clerk shall advise the parties of the dates on which briefs are to be filed, if briefs are required, and of the date of oral argument. The proceeding shall be given preference over ordinary civil cases.

* * *

Committee Note

Subdivision (a) is amended so that a petition for a writ of mandamus or prohibition does not bear the name of the judge.

Subdivision (b). The amendment provides that even if relief is requested of a particular judge, the judge shall be represented pro forma by counsel for the party opposing the relief who appears in the name of the party and not of the judge. A judge who wishes to appear, may seek an order permitting the judge to appear.

D.C. Circuit Rule 7(j)

(j) **Petitions for Special Writs**

(1) A petition for a special writ to the district court or an administrative agency shall be treated as a motion for purposes of these Rules, except that no responsive pleading shall be permitted unless requested by this Court; no such petition shall be granted in the absence of such a request.

(2) A petition for a writ of mandamus or a writ of prohibition to the district court shall not bear the name of the district judge, but shall be entitled, "In re _____ _____, Petitioner." Unless otherwise ordered, the district judge shall be represented *pro forma* by counsel for the party opposing the relief, who shall appear in the name of such party and not that of the judge.

1st Cir. Rule 21

Loc.R. 21 PETITIONS FOR SPECIAL WRITS. A petition for writ of mandamus or writ of prohibition shall be entitled simply, In re _____, Petitioner. To the extent that relief is requested of a special judge, unless otherwise ordered, the judge shall be represented pro forma by counsel for the party opposing the relief, who shall appear in the name of the party and not that of the judge.

2nd Cir Rule 21

§ 21. Petitions for Writs of Mandamus and Prohibition

A petition for writ of mandamus or writ of prohibition pursuant to Rule 21 shall not bear the name of the district judge, but shall be entitled simply, In re _____, Petitioner. To the extent that relief is requested of a particular judge, unless otherwise ordered, the judge shall be represented pro forma by counsel for the party opposing the relief, who shall appear in the name of the party and not that of the judge.

Local Rule 21. Petitions for Special Writs.

A petition for a writ of mandamus or writ of prohibition shall not bear the name of the district judge, but shall be entitled simply "In re _____, Petitioner." To the extent that relief is requested of a particular judge, unless otherwise ordered, the judge shall be represented pro forma by counsel for the party opposing the relief, who shall appear in the name of the party and not that of the judge.

I.O.P.-21.1. Petitions for Mandamus or Prohibition. An application for an extraordinary writ pursuant to 28 U.S.C. § 1651 is originated by filing an original and three copies of the petition with the Clerk of the Court of Appeals. Proof of service on the respondent judge or judges and on all parties in the trial court is required. The clerk will dismiss the petition if, within a reasonable time, the petitioner has not paid the prescribed docket fee of $100.00, payable to the Clerk, U.S. Court of Appeals, or submitted a properly executed application for leave to proceed in forma pauperis. The parties are required to submit Disclosure of Corporate Affiliations and Other Entities with a Direct Financial Interest in Litigation statements with the petition and answer. See FRAP 26.1, Local Rule 26.1, and Form A. Strict compliance with the requirements of FRAP 21 is required even from pro se litigants.

After docketing, the clerk shall submit the application to a three-judge panel. If the Court believes the writ should not be granted, it will deny the petition without calling for an answer. Otherwise the Court directs the clerk to request an answer. All parties to the action in the trial court other than petitioner who oppose the relief requested are deemed respondents and shall be responsible for filing a requested answer within the time fixed by the clerk. After an answer has been filed, the Court ordinarily will decide the petition on its merits on the materials submitted without oral argument. Occasionally, however, briefs may be requested and the matter set for oral argument.

5th Cir Rule 21

Rule 21.* Writs of Mandamus and Prohibition Directed to a Judge or Judges and Other Extraordinary Writs

Petition for Writ. A petition for writ of mandamus, writ of prohibition, or other extraordinary writ shall not bear the name of the District Judge, but shall be entitled, In re:....., Petitioner. To the extent that relief is requested of a particular Judge, unless otherwise ordered, the Judge shall be represented pro forma by counsel for the party opposing the relief, who shall appear in the name of the party and not that of the Judge.

The petition shall contain a certificate of interested persons as described in Loc.R. 28.2.1.

The application shall be accompanied by a copy of any memorandum or brief filed in the district court in support of the application to that court for relief and any memoranda or briefs filed in opposition thereto as well as a statement by petitioner of any oral reasons assigned by the district judge for his action complained of.

8th Cir Rule 21F

Rule 21A. Petitions for Writs of Mandamus and Prohibition

A petition for writ of mandamus or writ of prohibition against a federal judge, bankruptcy judge, or federal magistrate under FRAP 21 shall not bear the name of the judge or magistrate. It shall be entitled:

In re _____, Petitioner.

Within 15 days after the filing of the petition or as the court orders, the court shall either dismiss the petition or direct that an answer be filed. A judge may indicate a desire not to appear as FRAP 21(b) provides.

9th Cir Rules 21-1 and 21-2 and 21-3 and 21-4

Rule 21–1.* Writs of Mandamus, Prohibition, Other Extraordinary Writs

Petitions for writs of mandamus, prohibition or for other extraordinary relief shall conform to and be filed in accordance with the provisions of FRAP 21(a).

Rule 21–2.* Captions

Petitions for writs of mandamus, prohibition or other extraordinary relief directed to a judge or magistrate or bankruptcy judge shall bear the title of the appropriate court and shall not bear the name of the district judge or judges, magistrate, or bankruptcy judge as respondent in the caption. Petitions shall include in the caption: the name of each petitioner; the name of the appropriate court as respondent; and the name of each real party in interest. Other petitions for extraordinary writs shall include in the caption: the name of each petitioner; and the name of each appropriate adverse party below as respondent.

Rule 21–3.* Certificate of Interested Parties

Petitions for writs of mandamus or prohibition, and for other extraordinary writs, shall include the certificate as to interested parties required by Circuit Rule 28–2.1 and the statement of related cases required by Circuit Rule 28–2.6.

Rule 21–4.* Answers to Petitions

No answer to such a petition may be filed unless ordered by the Court. Except in emergency cases, the Court will not grant a petition without a response.

11 Cir. Rule 21-1

Rule 21–1.* Writs of Mandamus and Prohibition Directed to a Judge or Judges and Other Extraordinary Writs

(a) A petition for writ of mandamus, writ of prohibition, or other extraordinary writ shall not bear the name of the district judge but shall be entitled, "In re [name of petitioner]." To the extent that relief is requested of a particular judge, unless otherwise ordered, the judge shall be represented pro forma by counsel for the party opposing the relief and this counsel shall appear in the name of the party and not the name of the judge.

(b) As part of the required showing of the reasons why the writ should issue, the petition should include a showing that mandamus is appropriate because there is no other adequate remedy available.

(c) The petition shall include a Certificate of Interested Persons and Corporate Disclosure Statement as described in FRAP 26.1 and the accompanying circuit rules.

(d) The petition must be served on the respondent (including any judge named as respondent) and all parties to the action in the district court. Service is the responsibility of the petitioner, not the clerk.

Fed. Cir. Rule 21

Local Rule 21. Writs of mandamus and prohibition directed to a judge or judges and other extraordinary writs

(a) *Title; copies; fee; answer.*—A petition for writ of mandamus or writ of prohibition shall be entitled simply: "In Re [Name of Petitioner] , Petitioner." Four copies shall be filed with the original, but the court may direct that additional copies be furnished. The fee prescribed by Federal Circuit Rule 52(a)(1) shall accompany the petition. No answer shall be filed by any respondent unless ordered by the court.

(b) *Length of petition, answer; briefs.*—A petition for writ of mandamus or writ of prohibition, or answer if one is ordered, shall not exceed 25 double-spaced pages. Separate briefs supporting or answering petitions shall not be filed.

(c) *Service of order denying petition.*—If the petition is denied, the petitioner shall serve a copy of the order denying the petition upon all persons served with the petition unless such a person has entered an appearance in the proceeding or has been sent a copy of the order by the clerk.

TO: Honorable Kenneth F. Ripple, Chair, Members of the Advisory Committee on Appellate Rules, and Liaison Members

FROM: Carol Ann Mooney, Reporter

DATE: April 22, 1992

SUBJECT: Item 91-11, amendment of Rule 42 regarding the authority of clerks to return or refuse documents that do not comply with national or local rules.

This is one of the topics that the Local Rules Project referred to the Advisory Committee for consideration. Seven circuits have rules that permit the clerk to return or refuse to file documents if the clerk determines that the documents do not comply with the federal or local rules. The Local Rules Project recommended amendment of Fed. R. App. P. 45 to state that the clerk does not have authority to return or refuse documents.

The committee briefly discussed the topic at its December meeting and decided that the item should be assigned high priority because granting clerks authority to refuse documents can have jurisdictional implications.

Effective December 1, 1991, Fed. R. Civ. P. 5(e) was amended. The last sentence of that rule now states: "The clerk shall not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or any local rules or practices." This rule also applies to adversary proceedings in bankruptcy, by virtue of Rule 7005 of the Bankruptcy Rules. The Committee Note accompanying the 1991 change states:

> Several local district rules have directed the office of the clerk to refuse to accept for filing papers not conforming to certain requirements of form imposed by local rules or practice. This is not a suitable role for the office of the clerk, and the practice exposes litigants to the hazards of time bars; for these reasons, such rules are proscribed by this revision. The enforcement of these rules and of the local rules is a role for a judicial officer. A clerk may of course advise a party or counsel that a particular instrument is not in proper form, and may be directed to so inform the court.

The Local Rules Project recommended that Rule 45 be amended to make it clear that a clerk does not have authority to refuse to accept nonconforming documents. Rule 45 governs the clerks' duties and thus is a possible location for such a proscription. The Civil Rules Committee placed its provision in the rule on filing and service, Rule 5. The prohibition is more likely to

come to the attention of parties and their lawyers in the filing rule than in the rule describing clerks' duties. For that reason, as well as consistency with the Civil Rules, I recommend that if the committee wants to include such a prohibition in the appellate rules, it should be placed in Fed. R. App. P. 25(a).

The following draft simply insert the language added to Civil Rule 5(e) in FRAP Rule 25(a).

(a) **Filing**. - Papers required or permitted to be filed in a court of appeals shall be filed with the clerk. Filing may be accomplished by mail addressed to the clerk, but filing shall not be timely unless the papers are received by the clerk within the time fixed for filing, except that briefs and appendices shall be deemed filed on the day of mailing if the most expeditious form of delivery by mail, excepting special delivery, is utilized. If a motion requests relief which may be granted by a single judge, the judge may permit the motion to be filed with the judge, in which event the judge shall note thereon the date of filing and shall thereafter transmit it to the clerk. A court of appeals may, by local rule, permit papers to be filed by facsimile or other electronic means, provided such means are authorized by and consistent with standards established by the Judicial Conference of the United States. The clerk shall not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or by any local rules or practices.

Committee Note

Subdivision (a). Several circuits have local rules that authorize the office of the clerk to refuse to accept for filing papers that are not in the form required by these rules or by local rules. This is not a suitable role for the office of the clerk and the practice exposes litigants to the hazards of time bars; for these reasons, such rules are proscribed by this amendment. The enforcement of both national and local rules is a role for a judicial officer. A clerk may advise a party or counsel that a particular document is not in proper form and may be directed to so inform the court.

The January 1992 Court Administration Bulletin indicates that the amendment of Civil Rule 5(e) "has raised a number of issues concerning what kinds of deficiencies are matters of 'form' and whether there are now any grounds on which the clerk may still refuse to accept a document." The General Counsel's response to the inquiries has been that the clerk may refuse only documents that are not accompanied by the required filing fee, or by a petition to proceed in forma pauperis. The General Counsel also recommends that "the clerk should date stamp everything upon receipt, whether it is filed immediately or not." The General Counsel further notes that if the clerk notices a deficiency in a document that is accepted, the clerk may call the deficiency to the attention of a judicial officer before it is filed, and the judicial officer may issue the same type of deficiency notice that the clerks' offices formerly sent to litigants. (A copy of the relevant portions of the bulletin is attached to this memorandum.)

I do not think that the concerns noted above are sufficient to delay action by the appellate rules committee, nor do I think that they indicate the need for further refinement of the language of Civil Rule 5(e) or the draft of Appellate Rule 25(a).

incorporates recent statutory changes, amendments to the Federal Rules of Bankruptcy Procedure which were effective in August, 1991, and amendments to the Federal Rules of Civil Procedure which were effective in December, 1991. The second edition also reflects the comments of clerks who have given suggestions for changes and additions to the manual after using the first edition on a daily basis.

The manual was designed to serve as a basic research tool and training guide for newly-appointed clerks and as a convenient reference work for more experienced clerks. During the last year and a half, the Administrative Office has received enthusiastic reactions to the manual from many courts and it is apparent that the manual can be of considerable assistance on a daily basis in clerks' offices.

The approach of the manual is to identify legal requirements found in the statutes, rules, and Judicial Conference resolutions and to emphasize practicality and common sense in applying them. Preparation of the manual was a cooperative, national project, drawing upon the expertise of clerks and deputy clerks, who submitted documents and ideas to CAD, offered procedural guidance, and reviewed draft chapters. Other Divisions of the AO, most notably the Bankruptcy Division and the Office of General Counsel, provided invaluable assistance in reviewing and commenting on the revised draft.

A number of courts have requested and received additional copies of the manual since the initial distribution in 1990. The cover letter from the Director, which accompanies the second edition, asks that those courts which received these additional copies and now require replacement pages, contact Philip R. Argetsinger in CAD on 202/FTS 633-6221. Extra copies of the text of the manual have been printed; however, a limited number of the three-ring binders and divider tabs are available. Courts requesting additional copies of both the present edition and binders should contact Mr. Argetsinger by letter or memorandum and specify the number of copies required. Due to the limited supply of binders, CAD may be unable to fill all requests, and courts may wish to consider providing their own binders and divide tabs for large orders.

AMENDMENT TO CIVIL RULE 5(e) CONCERNING ACCEPTANCE OF DOCUMENTS FOR FILING

The General Counsel has received man questions and comments from clerks of cou about the 1991 amendment to Rule 5(e) of th Federal Rules of Civil Procedure. The las sentence of that rule, as amended effectiv December 1, 1991, states: "The clerk shall nc refuse to accept for filing any paper presented fc that purpose solely because it is not presented i proper form as required by these rules or an local rules or practices." This rule also applies t adversary proceedings in bankruptcy, by virtue c Rule 7005, Federal Rules of Bankruptc Procedure.

This amendment has raised a number of issue concerning what kinds of deficiencies are matter of "form" and whether there are now any ground on which the clerk may still refuse to accept document. For example, what if a document i wholly or partially illegible, or the party does nc tender the proper number of copies required b local rule, or the document is not accompanie by a certificate of service required by Rule 5(d Federal Rules of Civil Procedure (as amende effective December 1, 1991)?

Although not presently prepared to address a these issues, the General Counsel's Office ca offer guidance on the following questions th many clerks have raised. It is the opinion of th Administrative Office that:

1. The clerk **may refuse** to accept document that is not accompanied by th appropriate filing fee or an affidavit ar petition to proceed *in forma pauperis*. Th fees are prescribed by statute or resolution of the Judicial Conferen pursuant to statute; therefore, t requirement of a filing fee is beyond t scope of Civil Rule 5(e) because it is not

matter of "form as required by [the Federal Rules of Civil Procedure] or any local rules or practices."

2. The clerk should **date-stamp everything** upon receipt, whether it is filed immediately or not. This will preserve the earliest possible filing date for the litigant, as contemplated by the Advisory Committee Note to the 1991 amendment to Civil Rule 5(e).

3. If the clerk notices a deficiency in a document that is accepted, the clerk may call the deficiency to the attention of a judicial officer (district judge, bankruptcy judge, or magistrate judge) before it is filed. Any judicial officer may sign the same type of deficiency notice that the clerk's office used to send to the litigant, giving the litigant a grace period in which to correct the deficiency, in order to obtain the earliest possible filing date.

Please direct any questions to the General Counsel on 202/FTS 633-6127 *[see MEMO Burchill, Dec. 27, 1991 & **CAB**, Nov. 1991 at 2].* ■

FORUM ON CIVIL JUSTICE REFORM ACT

Mark D. Shapiro
Attorney [CAD] 202/FTS 633-6221

On December 17, 1991 the Association of the Bar of the City of New York, in conjunction with the ABA Section on Litigation, conducted a forum on the Civil Justice Reform Act (CJRA). The meeting was designed as a general discussion of CJRA with particular emphasis on the work and reports of the Advisory Groups appointed in the Southern and Eastern Districts of New York.

The forum, a panel discussion attended by approximately 75 people, was moderated by David M. Brodsky, co-chair of the Trial Practice Committee and member of the Federal Courts Committee of the Association of the Bar of the City of New York. The speakers were the Honorable Thomas C. Platt, Chief Judge of the Eastern District of New York; Honorable Charles L. Brieant, Chief Judge of the Southern District of New York; Honorable Thomas P. Griesa of the Southern District of New York; Edwin J. Wesely, Chair, Eastern District Advisory Committee; Professor Margaret A. Berger, member Eastern District Advisory Committee; and Stacey J. Moritz, Benito Romano, and Shira A. Scheindlin, members of the Southern District Advisory Committee.

The evening began with a brief overview of CJRA and its legislative history delivered by Mr. Brodsky and continued with brief opening remarks by Chief Judge Platt and Judge Griesa. The majority of the time was consumed by the answers of individual panel members to questions posed by Mr. Brodsky and concluded with a brief question and answer period.

In his opening remarks Chief Judge Platt announced that the Eastern District of New York had, earlier that day, adopted a Civil Justice Expense and Delay Plan. He added that the plan was nearly identical to that proposed by the District Advisory Group with the only significant difference being what Chief Judge Platt referred to as a "savings clause". The "savings clause" allows any judge with good cause shown to "modify or suspend any one or more or all of the provisions of [the] plan." Judge Platt lamented the heavy burden criminal cases put on the Court and echoed the oft heard pleas for more judges, more facilities, and suspension or modification of the Speedy Trial Act. He highlighted the elements of the District's plan including automatic disclosure and settlement conference with the presiding judge.

Judge Griesa summed up the theme of the Southern Districts' Plan as "Judicial Management." The most sweeping innovation in the Southern District's plan is the switch from the Case Management Conference to a Case Management Plan. A second focus of the plan, according to Judge Griesa was viewing the court as a single institution versus several individual courts. To this end the district attempted to reduce and

TO: Honorable Kenneth F. Ripple, Chair, Members of the Advisory Committee on Appellate, and Liaison Members

FROM: Carol Ann Mooney, Reporter

DATE: April 22, 1992

SUBJECT: Item 91-7, regarding appeals of district court orders remanding cases to state courts

This item has been placed on the Agenda for the April 30 meeting as a discussion item. The enclosed materials are self-explanatory. You will note that Judge Keeton directed that Mr. Nelson's suggestion be circulated to all of the advisory committees because the suggestion bears upon Appellate, Civil, and Bankruptcy Rules.

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

ROBERT E. KEETON
CHAIRMAN

JOSEPH F. SPANIOL, JR.
SECRETARY

CHAIRMEN OF ADVISORY COMMITTEES
KENNETH F. RIPPLE
APPELLATE RULES
SAM C. POINTER, JR.
CIVIL RULES
WILLIAM TERRELL HODGES
CRIMINAL RULES
EDWARD LEAVY
BANKRUPTCY RULES

September 19, 1991

Craig R. Nelson, Esquire
Hulse, Nelson & Wanek
610 Baronne Street
New Orleans, Louisiana 70113

RE: Appeal of Remand Orders

Dear Mr. Nelson:

As Judge Robert E. Keeton stated in his letter to you of September 9, 1991, I am sending a copy of your letter to each member of the Standing Committee, and to the Chairmen and Reporters for the Advisory Committees.

If I can be of further assistance, please let me know.

Sincerely,

for Joseph F. Spaniol, Jr.
Secretary

cc: Honorable Robert E. Keeton
Standing Committee Members
Chairmen and Reporters to the
Advisory Committees

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

ROBERT E KEETON
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JAMES E MACKLIN JR
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WILLIAM TERRELL HODGES
CRIMINAL RULES
EDWARD LEAVY
BANKRUPTCY RULES

September 9, 1991

Craig R. Nelson, Esquire
Hulse, Nelson & Wanek
610 Baronne Street
New Orleans, Louisiana 70113

Dear Mr. Nelson:

Thank you for your letter of August 29th regarding appeal of remand orders.

I am asking Mr. Spaniol, as Secretary of the Standing Committee on Rules of Practice and Procedure, to send copies of your letter to the Members of the Standing Committee, and as well to the Chairmen and Reporters for the Advisory Committees since in some respects the ideas you suggest may bear upon Appellate, Civil, and Bankruptcy Rules, as well as proposed legislation on jurisdiction issues that may be beyond rulemaking authority.

We are grateful for your interest and suggestions.

Sincerely,

Robert E. Keeton

cc: Senator Joseph R. Biden, Jr.
Joseph F. Spaniol, Jr., Secretary ✓
Committee on Rules of Practice and Procedure

SEP RECD

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JAMES A OSWALD
DIANE K O'HARA
LISA A CONDREY
ROGER D MARLOW
DAVID J KNIGHT

COUNSEL
CHRISTINA P FAY

August 29, 1991

John W. McCormack Post Office
and Courthouse
Room 306
Boston, Massachusetts 02109

Attn: Honorable Robert E. Keeton

RE: Appeal of Remand Orders

Dear Judge Keeton:

I have been corresponding some time now with Senator Joseph R. Biden regarding an Act of Congress and/or amendment of the Federal Rules of Civil Procedure which would allow an appeal of remand orders. As you know the jurisprudence mandates any remand based upon lack of jurisdiction, even if clearly erroneous, cannot be reviewed by an appeal, mandamus, or otherwise. Tillman v. CSX Transportation, Inc., 929 F.2d 1023. In fact the only time the issuance of a writ of mandamus by the Appellate Court is appropriate is when the district court enters a remand order on grounds not found in the remand statute. In Re: Allied-Signal, Inc., 919 F.2d 277 (CA 5th, 1990). The Fifth Circuit's position is based upon the Supreme Court decision of Thermtron Products, Inc. v. Hermansdorfer, 423 U.S. 336, 96 S.Ct. 584, 46 L.Ed. 2d 542 (1976). Until this decision is either overruled by the current court or by an act of Congress, litigators who represent foreign corporations will never have the opportunity to have remand orders, as a practical matter, heard by the Court of Appeal. Seldom if ever do they grant writs on this issue. I don't know of the statistics but in dozens of cases where I have been directly involved in as counsel for a corporate defendant

that has removed a case from the State court, the district judges in Louisiana are constantly remanding cases back to the state courts. When they do this they are frequently using the skimpiest of reasons/evidence to do so which in turn subjects the corporations to the hostile climate of the State's judicial system.

I am writing you to ask if Congress has ever considered passing such a statute or amending the rules of Federal Civil Procedure which would allow such appeal as a matter of right rather than relegate them to writ applications. If not, I would like to talk to you further if I could regarding this issue. It is very important to my clients because virtually all of my cases that are tried in Federal court, the results are far more favorable on liability and quantum issues that we get in the state system.

Thank you for your consideration and I look forward to hearing from you in the near future.

Cordially,

Craig R. Nelson

CRN:pfm

cc: Senator Joseph R. Biden, Jr.

IV-E. Local Rules

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

April 13, 1992

To: Advisory Committee on the Federal Appellate Rules

Dear Colleagues:

I am attaching Professor Squier's analysis of the Eleventh Circuit's reaction to the Local Rules of Appellate Procedure. Professor Mooney will review this material and we will place the matter on the agenda as an additional discussion item.

Warm regards,

Kenneth F. Ripple

KFR:tw
Enclosure

COMM. TEE ON RULES OF PRACTICE AND . ROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

ROBERT E KEETON
CHAIRMAN

JOSEPH F SPANIOL JR
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CRIMINAL RULES
EDWARD LEAVY
BANKRUPTCY RULES

Memorandum

TO: Kenneth F. Ripple, Circuit Judge

FROM: Mary P. Squiers

RE: Eleventh Circuit Preliminary Comments on the Local Rules of Appellate Practice

DATE: April 9, 1992

The Preliminary Comments from the Court of Appeals for the Eleventh Circuit is from Gerald Tjoflat, Chief Judge. He notes that the rules were amended effective April 1, 1991; he explains that his written comments indicate whether a particular rule was amended in April 1991 and are based on the rules as they currently read.

Numbering System

The local rules for the Eleventh Circuit are already numbered in conformance with the national rules.

Possible Local Rule Inconsistencies

Chief Judge Tjoflat indicates at the outset that, while he agrees that an Appellate Rule "addressing a specific matter preempts a conflicting circuit rule," he believes that a supplementation and clarification of the Appellate Rules by the circuit rules is permitted by Appellate Rule 47. Cover letter to Preliminary Comments, p. 1 (emphasis in original). He explains:

> The benefit of such circuit rules is that they provide detailed guidelines to counsel and parties which is sometimes absent from the Federal Rules of Appellate Procedure, and they allow circuit courts to tailor procedures to local needs and circumstances and to become laboratories for experimentation to discover more effective and efficient procedures. *Id.*

What follows is a brief discussion of issues set forth in the court's Preliminary Comments with which the Project disagrees, using the numbering of the court's Rules and Internal Operating Procedures (hereinafter IOPs).

IOP 26: This directive requires that papers be filed in a timely fashion "except upon submission of documentary evidence of extraordinary circumstances (*e.g.*, court dockets or calendars which establish insoluble conflicts, medical evidence of illness)." Prior to April 1991 this IOP read: "[The court requires timely filing] except ... where it is shown to be impossible to file the necessary document on time." Appellate Rule 26(b) states that a motion to enlarge time may be granted "for good cause shown." Fed. R. App. P. 26(b). It is the court's view that its standard provides more guidelines than the Appellate Rule and "is not a more stringent standard." Preliminary Comments. To the extent this standard is equivalent to the "good cause" standard in Rule 26(b), it simply repeats that Rule and is unnecessary. To the extent, however, that the directive applies a different standard, it is inconsistent with the Appellate Rule. *See also* discussion in Report on the Local Rules of Appellate Practice (hereinafter Report).

IOP 28: This directive permits the clerk to reject for filing non-conforming documents. The Preliminary Comments indicate that the Eleventh Circuit believes this directive defines the clerk's actions sufficiently such that it is an appropriate supplement to the Appellate Rules. It is the Project's position that rules that permit the clerk to return or refuse to file certain documents if the clerk determines that they fail to comply with the Federal Rules of Appellate Procedure and the court's respective local rules are inconsistent with the Appellate Rules. Report, pp. 83-84; *see e.g.*, Fed. R. App. P. 25(a), 45(a), 21(a), 38. In fact, Appellate Rule 45, outlining the duties of the clerk, does not give the clerk any authority to exercise discretion on any issue. *See* Fed. R. App. P. 45. This local directive still gives the clerk discretion to determine whether a document is in compliance with existing rules and is, accordingly, still in conflict with the Appellate Rules. The Project suggested that, because seven circuit courts in addition to the Eleventh Circuit, have such a directive, the Advisory Committee on Appellate Rules consider amending Appellate Rule 45 to state clearly that the clerk does not have this authority. *See* Report, p. 84.

Another portion of this directive was found by the Project to be inconsistent with a portion of Appellate Rule 28; this portion remains intact and was not discussed in the Preliminary Comments. It states that

> an attorney representing more than one party in an appeal may only file one principle brief ... which will include argument as to all of the parties represented by that attorney in that appeal.

This IOP conflicts with subsection (i) of Appellate Rule 28 which states that multiple appellants or appellees "either may join in a single brief ... or ... may adopt by reference any part of the brief of another." Fed. R. App. P. 28(i); Report, p. 48.

IOP 29: *See* discussion of IOP 28, *supra*, concerning the clerk's refusal to accept documents for filing.

Local Rule 9-1: Local Rule 9-1 requires that motions for release or for modification of the conditions of release include specific supporting documents. The Eleventh Circuit indicates that these papers are "essential portions of the record to permit determination of an application for release."

Preliminary Comments. It is the Project's position that this directive is inconsistent with both subsections (a) and (b) of Appellate Rule 9. *See* Report, pp. 16-17; Fed. R. App. P. 9(a) ("heard without the necessity of briefs ... upon such papers, affidavits, and portions of the record as the parties shall present."), 9(b) ("determined ... upon such papers, affidavits, and portions of the record as the parties shall present.").

Local Rule 18-1: This rule identifies the parts of the record, specifically a copy of the decision or order and any opinion or finding of the agency, that must be included with motions for stays or injunctions pending review. The Eleventh Circuit states that this rule is more descriptive than the Federal Rules of Appellate Procedure. The Project maintained that this directive was inconsistent with Appellate Rule 18 which sets forth the documents needed with the motion. Report, p. 29; Fed. R. App. P. 18. If, in fact, this directive only restates, albeit with different words, the content of Appellate Rule 18, then it is repetitious and should be rescinded.

Local Rule 32-2: *See* discussion of IOP 28, *supra*, concerning the clerk's refusal to accept documents for filing.

Local Rule 32-3: This rule contains a detailed discussion on the size of type and the number of lines per page allowed in briefs.. To the extent this directive only intends to repeat Appellate Rule 32(a), it is superfluous. To the extent, however, that it intends to change or add to the requirements of that Rule, it is inconsistent and should be rescinded. Report, p. 59.

See also discussion of IOP 28, *supra*, concerning the clerk's refusal to accept documents for filing.

Local Rule 42-1: *See* discussion of IOP 28, *supra*, concerning the clerk's refusal to accept documents for filing.

In addition, there were four other local rules of the Eleventh Circuit that the Project believed to be inconsistent with existing law. Local Rules 21-1, 31-1, 35-1, 40-1. Judge Tjoflat indicated that these rules still exist but that he favored amendment through the Advisory Committee process of the respective Appellate Rules to authorize local rules on these subjects.

Judge Tjoflat discussed Appellate Rule 35, respecting en banc determinations and agreed with the Project's recommendation that local rules be authorized concerning the particular number of copies of suggestions for rehearing that need be filed. He went on to suggest "that Fed. R. App. P. 35 be amended to authorize local rulemaking on the subject of page limitations for suggestions of en banc rehearing (similar to that provided for in Fed. R. App. P. 40(b) with respect to petitions for rehearing)."

<u>Possible Local Rule Repetitions</u>

Judge Tjoflat did not agree that repetition of Appellate Rules and other federal law in IOPs and local rules was problematic:

> [T]here is sometimes value in limited repetition or duplication in local rules of important concepts, both because this

emphasizes critical elements and because it sometimes pulls diverse elements together into a complete and comprehensible whole. Internal Operating Procedures, in particular, sometimes perform these two roles for readers who are unfamiliar with procedures or appellate practice (either generally or specifically) within this circuit. Cover Letter to Preliminary Comments.

The Preliminary Comments from the Eleventh Circuit do not indicate that any attempt was made to reduce the number of repetitions in existing local rules. A quick tally by me of those rules and Internal Operating Procedures that were originally reviewed by the Project and that still exist indicate that there are approximately twenty Internal Operating Procedures that repeat, in some measure, existing rules and twenty-four local rules that also repeat existing law.

Local Rule 28-2 is a good example of this Circuit's view toward repetition. This local rule requires each brief to contain "a concise statement of the statutory or other basis of the jurisdiction of this court." As Judge Tjoflat explains:

> Pursuant to amendments to the Federal Rules which took effect on December 1, 1991, a 'statement of subject matter and appellate jurisdiction' is required to be included in appellant's brief. Our Rule anticipated this change.

New Provisions in the Current Rules

What follows is a very brief discussion of those rules and Internal Operating Procedures that were added to the local rules of the Eleventh Circuit in April 1991. These rules were not evaluated with the other rules of the court. The assessment is brief and intended, generally, to refer you to the place in the Report where similar rules were discussed.

Local Rule 5-2: This rule requires that a Certificate of Interested Persons and Corporate Disclosure Statement accompany the petition and answer when appealing pursuant to 28 U.S.C. §1292(b). This directive is appropriately the subject of local rulemaking. *See* Report, pp. 42-44.

Local Rule 5.1-1: This rule requires that a Certificate of Interested Persons and Corporate Disclosure Statement accompany the petition and answer when appealing pursuant to 28 U.S.C. §636(c)(5). This directive is appropriately the subject of local rulemaking. *See* Report, pp. 42-44.

Local Rule 15-2: This rule requires that each petition or application have attached a copy of the order sought to be enforced or reviewed. Appellate Rule 15 does not mandate that any additional documents be submitted with either the petition for review or the application for enforcement. *See* Fed. R. App. P. 15(a) and (b). There are requirements, however, in both subsections for identifying the order and its content:

Memorandum on Elevent Circuit Report
April 9, 1992

> The petition shall specify the parties seeking review and shall designate the respondent and the order or part thereof to be reviewed....
>
> The application shall contain a concise statement of the proceedings in which the order was entered, the facts upon which venue is based, and the relief prayed.
> *Id.*

In addition, Form 3 in the Appendix of Forms, which is a sample petition for review, has no notation of any attachments. *Id.* at Appendix. A local rule mandating that particular additional documents be filed with the petition is inconsistent with Appellate Rule 15 in requiring more than that Rule contemplated and with other Appellate Rules which recognize that indicating an intention to appeal should be relatively easy. *See* Fed. R. App. P. 3(a), 4(a), 5, 5.1, 6(a).

Local Rule 15-3: Each of the two sentence in this local rule is inconsistent with existing law. The first sentence reads:

> an answer to an application for enforcement may be served on the petitioner and filed with the clerk within 21 days after the application is filed.

Appellate Rule 15(b) on this subject reads:

> Within 20 days after the application is filed, the respondent shall serve on the petitioner and file with the clerk an answer to the application.
> Fed. R. App. P. 15(b).

The second sentence of the local rule reads:

> A motion for leave to intervene or other notice of intervention authorized by applicable statute may be filed within 35 days of the date on which the petition for review is filed.

Appellate Rule 15(d) reads:

> A motion for leave to intervene or other notice of intervention authorized by an applicable statute shall be filed within 30 days of the date on which the petition for review is filed.
> Fed. R. App. P. 15(d).

Local Rule 17-2: This local rule provides that the agency may file the record

> within 42 days after service upon it of the petition ... unless a different time is provided by the statute authorizing review.

This directive is inconsistent with Appellate Rule 17 which reads, in relevant part:

> The agency shall file the record ... within 40 days after service ... unless a different time is provided by the statute authorizing review.
> Fed. R. App. P. 17(a).

Local Rule 24-2: This local rule requires that a motion for leave to proceed on appeal *in forma pauperis* be filed within 35 days after service of the notice of the district court denying leave to proceed. This is inconsistent with Appellate Rule 24 which mandates a 30 day appeal period. *See* Fed. R. App. P. 24(a).

IOP 25: The third paragraph of this Internal Operating Procedure, setting forth the hours and activities of the clerk's office, is appropriate as an Internal Operating Procedure. *See* Report, pp. 76-77.

IOP 26: The second paragraph of this Internal Operating Procedure, setting forth the procedure for filing in the event of inclement weather or other extraordinary circumstances which render the clerk's office inaccessible, is appropriate as an Internal Operating Procedure. *See* Report, pp. 76-77.

Local Rule 26.1-1: This directive describes the content of the Certificate of Interested Persons and Corporate Disclosure Statement. As such, it is appropriate as a local rule. *See* Report, pp. 42-44.

Local Rule 26.1-2: This directive describes when the Certificate of Interested Persons and Corporate Disclosure Statement should be filed. The time for filing is appropriate as a local rule.

The last sentence of this directive, however, is problematic. It states that the clerk

> is not authorized to file and submit to the court any brief ... which does not contain the certificate, but may receive and retain the papers unfiled pending supplementation of the papers with the required certificate.

This issue of whether the clerk is authorized to use discretion in refusing to file documents arose in other Eleventh Circuit rules *See* discussion under IOP 28, *supra*. It is the Project's position that the clerk does not have such discretion. *See* Report, pp. 83-84.

Local Rule 26.1-3: This directive explains the form of the certificate and its location in the brief. The first sentence of this rule repeats Appellate Rule 26.1, that the statement be included in front of the table of contents, and is unnecessary. The remainder of this rule explains that the persons and entities on the certificate must be listed alphabetically, in one column, on double spaced pages, on sequentially numbered pages, and with a particular heading at the top of each page. While this directive is probably permitted by Appellate Rule 26.1, the Advisory Committee Notes on that rule may suggest caution in making cumbersome rules:

> If a Court of Appeals wishes to require additional information, a court is free to do so by local rule. However, the committee

> requests the courts to consider the desirability of uniformity and the burden that varying circuit rules creates on attorneys who practice in many circuits.
> Fed.R.App.P. 26.1 Advisory Committee Notes.

IOP 28: Two portions of this Internal Operating Procedure are recent amendments. The first states that the adoption by reference of a party of a brief by another pursuant to Appellate Rule 28(i)

> does not fulfill the obligation of a party to file a separate brief which conforms to 11th Cir.R. 28-2, except upon written motion granted by the court.

The second provides that, in consolidated cases, the party who filed the first notice of appeal is considered the appellant unless the parties otherwise agree or the court orders otherwise. Both of these directives are appropriate as local rules.

IOP 30: This provision requires the use of indexing tabs on record excerpts. This seems to be an appropriate subject for a local rule. It is difficult to understand, however, why it is an Internal Operating Procedure. It certainly regulates attorney practice since they are the people charged with using the indexing tabs. Calling this an Internal Operating Procedure may cause an attorney to think it outlines an activity taken by the clerk's office.

Local Rule 31-1: This rule sets forth time limits for submission of briefs which are inconsistent with, or repetitious of, those in Appellate Rule 31: 1. Appellant shall file within 42 days after the date on which the record is filed (Fed. R. App. P. 31(a): 40 days); 2. Appellee shall file within 35 days after service of appellants brief (Fed. R. App. P. 31(a): 30 days); and, 3. Appellant may file a reply brief within 14 days after service of the brief (Fed. R. App. P. 31(a): 14 days "but, except for good cause shown, a reply brief must be filed at least 3 days before argument.") This rule should be rescinded.

Local Rule 36-2: This rule, which discusses the use of unpublished opinions, is appropriate as a local rule. *See* Report, pp. 66-68.

Local Rule 41-2: This rule, explaining that the order of dismissal will be used rather than a mandate when an appeal is dismissed for lack of jurisdiction, is appropriate as a local rule.

IOP 41: These directives, concerning the return of the original record and exhibits to the district court or agency with the mandate, is appropriate as an Internal Operating Procedure.

Local Rule 47-6: This local rule explains that "no employee of the court shall engage in the practice of law." Although this may be acceptable as a local directive, it seems more appropriate as an Internal Operating Procedure.

United States Court of Appeals
Eleventh Judicial Circuit

Gerald Bard Tjoflat
Chief Judge
Jacksonville, Florida 32201

December 18, 1991

The Honorable Kenneth F. Ripple
Chairman of Advisory Committee on Appellate Rules
208 U.S. Courthouse
204 South Main Street
South Bend, Indiana 46601

Dear Judge Ripple:

Re: Preliminary Comments to the Report on the Local Rules of Appellate Practice

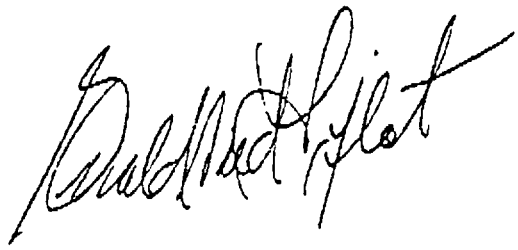
Enclosed are preliminary comments to the Report on the Local Rules of Appellate Practice. As requested in your letter of April 19, 1991, I indicate my views regarding the Eleventh Circuit rules that have been identified as possibly inconsistent with the Federal Rules of Appellate Procedure, comment on aspects of the Report with which we disagree, and recommend subjects for further study. As you are probably aware, this Circuit last amended its Rules effective April 1, 1991, subsequent to the completion of the Local Rules Project Report. My comments also indicate whether a particular Rule was amended in April 1991, and my responses are based upon the Rule as it currently exists.

In addition to the attached comments, I offer two general observations. First, I agree that a Federal Rule of Appellate Procedure addressing a specific matter preempts a conflicting circuit rule, and this is specifically provided for in Fed.R.App.P. 47. Likewise, I believe that Rule 47 permits circuit rules to supplement (or clarify) aspects of practice when the federal rules are silent or when they address a subject generally. The benefit of such circuit rules is that they provide detailed guidance to counsel and parties which is sometimes absent from the Federal Rules of Appellate Procedure, and they allow circuit courts to tailor procedures to local needs and circumstances and to become laboratories for experimentation to discover more effective and efficient procedures.

Second, there is sometimes value in limited repetition or duplication in local rules of important concepts, both because this emphasizes critical elements and because it sometimes pulls diverse elements together into a complete and comprehensible whole. Internal Operating Procedures, in particular, sometimes perform these two roles for readers who are unfamiliar with procedures of appellate practice (either generally or specifically) within this circuit.

I appreciate this opportunity to offer preliminary comments on the Report.

Sincerely,



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Enclosure

Eleventh Circuit

Preliminary Comments to the Report on the Local Rules of Appellate Procedure

1. I.O.P. 12 (accompanying Fed.R.App.P. 12):

We will amend the I.O.P. to more accurately reflect the Federal Rules of Appellate Procedure.

2. I.O.P. 26 (accompanying Fed.R.App.P. 26):

This I.O.P. describes for counsel the manner in which "good cause" may be demonstrated to the satisfaction of this Court. We believe that it provides more guidance than the Federal Rules of Appellate Procedure and is not a more stringent standard.

3. I.O.P. 28 (accompanying Fed.R.App.P. 28):

The Court has determined that the Clerk ought to be permitted to review papers tendered for filing and reject those that do not comply with either the Federal Rules of Appellate Procedure or local circuit rules. This is an important aspect of determining whether papers are in fact "required or permitted to be filed in a court of appeals" (Fed.R.App.P. 25(a)) and of whether the tendered paper constitutes a "proper paper" (Fed.R.App.P. 45(a)). We suggest that when a circuit by local rule defines the procedure to be employed by the Clerk when "improper" papers are tendered, and defines the conditions upon which the Clerk shall dismiss an appeal, such rules establish "such action as the court of appeals deems appropriate, which may include dismissal of the appeal." (Fed.R.App.P. 3(a)).

4. I.O.P. 29 (accompanying Fed.R.App.P. 29):

This I.O.P. was amended in April 1991. Our response to this item is explained in comments concerning I.O.P. 28, supra, at Item No. 3.

5. 11th Cir. Rule 9-1:

The Court has determined that the specified papers are essential portions of the record to permit determination of an application for release.

6. 11th Cir. R. 18-1:

The Circuit Rule identifies the "parts of the record" which this Court considers "relevant to the relief sought." We believe that it is more descriptive than the Federal Rules of Appellate Procedure.

Eleventh Circuit

7. **11th Cir. R. 21-1:**

We agree that this subject should be reviewed by the Advisory Committee, and suggest that the Federal Rules of Appellate Procedure be amended to reflect the position adopted by nine of the circuit courts.

8. **11th Cir. R. 25-1:**

The Circuit Rule reflects this circuit's case law (see, e.g., Palazzo v. Gulf Oil Corp., 764 F. 2d 1381 (11th Cir., 1985). It is important to the proper operation of the court and to an effective decision-making process.

9. **11th Cir. R. 28-2:**

Subsection (e) was added in April 1991. The language in subsection (f) was not amended in April 1991. That subsection was, however, renumbered (it was formerly subsection (e)). Each requirement is important to the Court's functioning and is discussed separately below.

11th Cir. Rule 28-2(c): The Circuit Rule appears consistent with Fed.R.App.P 34(a) by including a statement regarding oral argument in the brief.

11th Cir. Rule 28-2(e): The Circuit Rule appears consistent with Fed.R.App.P. 28(i) by requiring that such a statement be included in a particular and identifiable section of the brief.

11th Cir. Rule 28-2(f): Pursuant to amendments to the Federal Rules which took effect on December 1, 1991, a "statement of subject matter and appellate jurisdiction" is required to be included in appellant's brief. Our Rule anticipated this change.

10. **11th Cir. Rule 30-1:**

This Rule was amended in April 1991. Fed.R.App.P. 30(f) provides that "A court of appeals may by rule applicable to all 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 portions thereof, as the court may require." (emphasis added). Record excerpts consist of such relevant portions of the record.

Eleventh Circuit

11. 11th Cir. Rule 30-2:

This Rule was amended in April 1991. Our response to this item is explained in comments concerning 11th Cir. Rule 30-1, supra, at Item No. 10.

12. 11th Cir. Rule 31-1:

The Rule was renumbered in April 1991 and is now designated as 11th Cir. R. 31-2. We agree with the recommendation by the Local Rules Project to authorize local rulemaking on this subject.

13. 11th Cir. Rule 32-2:

Our response to this item is explained in comments concerning I.O.P. 28, supra, at Item No. 3.

14. 11th Cir. Rule 32-3:

Our Rule clarifies the interpretation of the Rule given by this Court.

15. 11th Cir. Rule 32-3:

Our response to this item is explained in comments concerning I.O.P. 28, supra, at Item No. 3.

16. 11th Cir. Rule 35-1:

This Rule was amended in April 1991. We agree with the recommendation that Fed.R.App.P. 35 should be amended to authorize local rulemaking on this subject.

17. 11th Cir. Rule 35-8:

This Rule was amended in April 1991. We agree with the Project's recommendation, and further suggest that Fed.R.App.P. 35 be amended to authorize local rulemaking on the subject of page limitations for suggestions of en banc rehearing (similar to that provided for in Fed.R.App.P. 40(b) with respect to petitions for rehearing).

18. 11th Cir. Rule 40-1:

We agree with the Project's conclusion that a lesser number of petitions are appropriate and that each circuit should be permitted to regulate this by local rule.

19. 11th Cir. Rule 42-1:

Our response to this item is explained in comments concerning I.O.P. 28, supra, at Item No. 3.

Court of Appeals for the Eleventh Circuit

LR or IOP		Problem	Location
Intro		Local Variation	Rule 1
Intro		Possible Repetition	Rule 2
IOP	3	Possible Repetition	Rule 3
IOP	3.1	Possible Repetition	Rule 3.1
IOP	4	Possible Repetition	Rule 4
IOP	5	Possible Repetition	Rule 5
IOP	5.1	Possible Repetition	Rule 5.1
IOP	6	Possible Repetition	Rule 6
IOP	8	Possible Repetition	Rule 8
IOP	10	Local Variation	Rule 10
IOP	11	Possible Repetition	Rule 11
IOP	11	Local Variation	Rule 11
IOP	12	Possible Repetition	Rule 3
IOP	12	Possible Inconsistency	Rule 12
IOP	13	Possible Repetition	Rule 13
IOP	15	Possible Repetition	Rule 15
IOP	15	To Advisory Committee	Rule 15
IOP	15	Local Variation	Rule 15
IOP	18	Possible Repetition	Rule 18
IOP	21	Possible Repetition	Rule 21
IOP	24	Local Variation	Rule 22
IOP	25	Possible Repetition	Rule 25
IOP	26	Possible Repetition	Rule 26
IOP	26	To Advisory Committee	Sanctions
IOP	26	Possible Inconsistency	Rule 26
IOP	27	Local Variation	Rule 27
IOP	28	Possible Inconsistency	Sanctions
IOP	28	Possible Inconsistency	Rule 28
IOP	28	Local Variation	Rule 28
IOP	28	Possible Repetition	Rule 28
IOP	28	To Advisory Committee	Sanctions
IOP	29	To Advisory Committee	Sanctions
IOP	29	Local Variation	Rule 29
IOP	29	Possible Inconsistency	Sanctions
IOP	32	Possible Repetition	Rule 32
IOP	34	Local Variation	Case Assignment
IOP	34	Local Variation	Rule 34
IOP	34	Possible Repetition	Rule 34
IOP	35	Local Variation	Rule 35

Court of Appeals for the Eleventh Circuit

LR or IOP		Problem	Location
IOP	36	To Advisory Committee	Rule 36
IOP	39	Local Variation	Rule 39
IOP	40	Local Variation	Rule 40
IOP	41	Possible Repetition	Rule 41
IOP	45	Local Variation	Rule 45
IOP	46	Local Variation	Rule 46
IOP	47	To Advisory Committee	Rule 26.1
IOP	47	Local Variation	Court Employees
IOP	47	Local Variation	Rule 26.1
IOP	47	Local Variation	Rule 45
IOP	47	Possible Repetition	Rule 26.1
IOP	47	Local Variation	Judicial Conference
IOP	47.4	Local Variation	Library
IOP	47.4	Possible Repetition	Rule 5
LR	5 - 1	Possible Repetition	Rule 8
LR	8 - 1	Possible Inconsistency	Rule 9
LR	9 - 1	Possible Repetition	Rule 10
LR	10 - 1	Local Variation	Rule 10
LR	10 - 1	Local Variation	Rule 11
LR	11 - 1	Local Variation	Rule 11
LR	11 - 2	Possible Repetition	Rule 11
LR	11 - 3	Local Variation	Rule 11
LR	11 - 3	Local Variation	Rule 15
LR	15 - 1	Local Variation	Rule 17
LR	17 - 1	Possible Repetition	Rule 18
LR	18 - 1	Possible Inconsistency	Rule 18
LR	18 - 1	To Advisory Committee	Rule 21
LR	21 - 1	Possible Repetition	Rule 21
LR	21 - 1	Possible Inconsistency	Rule 22
LR	21 - 1	Possible Repetition	Rule 22
LR	22 - 1	Local Variation	Rule 22
LR	22 - 2	To Advisory Committee	Rule 24
LR	22 - 3	Local Variation	Rule 45
LR	24 - 1	Possible Inconsistency	Rule 26
LR	25 - 1	Local Variation	Rule 27
LR	26 - 1	Possible Repetition	Rule 27
LR	27 - 1	Local Variation	Rule 28
LR	27 - 1	Local Variation	Rule 28
LR	28 - 1	Possible Inconsistency	
LR	28 - 2		

Court of Appeals for the Eleventh Circuit

LR or IOP		Problem	Location
LR	28 -2	Local Variation	Rule 26.1
LR	28 -2	Possible Repetition	Rule 28
LR	28 -2	To Advisory Committee	Rule 26.1
LR	28 -3	Possible Repetition	Rule 28
LR	29 -1	Possible Repetition	Rule 26.1
LR	29 -1	Possible Repetition	Rule 27
LR	30 -1	To Advisory Committee	Rule 30
LR	30 -1	Possible Inconsistency	Rule 30
LR	30 -2	Possible Inconsistency	Rule 30
LR	30 -2	To Advisory Committee	Rule 30
LR	31 -1	Possible Repetition	Rule 31
LR	31 -1	Possible Inconsistency	Rule 31
LR	32 -1	Possible Repetition	Rule 32
LR	32 -2	Possible Inconsistency	Sanctions
LR	32 -2	To Advisory Committee	Sanctions
LR	32 -2	Possible Repetition	Rule 32
LR	32 -3	To Advisory Committee	Sanctions
LR	32 -3	Possible Repetition	Rule 32
LR	32 -3	Possible Inconsistency	Rule 32
LR	32 -3	Possible Inconsistency	Sanctions
LR	34 -1	Local Variation	Sessions of Court
LR	34 -2	Local Variation	Case Assignment
LR	34 -3	Possible Repetition	Rule 34
LR	34 -3	Local Variation	Rule 34
LR	34 -4	Local Variation	Rule 34
LR	34 -4	Possible Repetition	Rule 34
LR	35 -1	Possible Inconsistency	Rule 35
LR	35 -1	To Advisory Committee	Rule 35
LR	35 -10	Local Variation	Rule 35
LR	35 -11	Local Variation	Rule 35
LR	35 -2	Local Variation	Rule 35
LR	35 -3	Possible Repetition	Rule 35
LR	35 -4	Possible Repetition	Rule 35
LR	35 -5	To Advisory Committee	Rule 35
LR	35 -6	Local Variation	Rule 35
LR	35 -7	Possible Repetition	Rule 35
LR	35 -8	Possible Inconsistency	Rule 35
LR	35 -8	To Advisory Committee	Rule 35
LR	35 -9	Local Variation	Rule 35

IV-F. Rule 35 Rehearing

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

April 13, 1992

Janice L. Calabresi, Esquire
Special Counsel to the
Assistant General for the
Civil Division
United States Department of Justice
Washington, D.C. 20530

Dear Ms. Calabresi:

Thank you for your letter of March 27 and the accompanying suggestion for a change in the Federal Rules of Appellate Procedure. The item shall be placed on the docket of the Committee.

The agenda for the meeting of April 29 has already been established and circulated to the Committee. However, I shall be pleased to add this matter as an additional discussion item.

Sincerely,

Kenneth F. Ripple

KFR:tw

cc: Honorable Kenneth W. Starr
Robert Kopp, Esquire
Professor Carol Ann Mooney
Joseph F. Spaniol, Jr., Esquire w/attachment

U.S. Department of Justice

Washington, D.C. 20530

March 27, 1992

The Honorable Kenneth F. Ripple
U.S. Court of Appeals for the Seventh Circuit
208 Federal Building
204 South Main St.
South Bend, Indiana 46601

Dear Judge Ripple:

I am contacting you regarding a proposed change to Rule 35 of the Federal Rules of Appellate Procedure (see attached). We were wondering whether it would possible to get this proposed change on the agenda to be circulated for the April 29th Advisory Committee meeting. If you need further details or a different format I would be happy to provide either.

Thank you for your consideration.

Sincerely,

Janice L. Calabresi

Janice L. Calabresi
Special Counsel to the
Assistant Attorney General
for the Civil Division

Attachment

COMMENTARY ON PROPOSED CJR AMENDMENT TO RULE 35 OF THE FEDERAL RULES OF APPELLATE PROCEDURES

Rule 35 of the Federal Rules of Appellate Procedure would be amended to delete the rule that rehearing in banc is disfavored. The amended rule (subdivision (2)) would authorize rehearing in banc when a decision of the court is in conflict with the decision of another federal court of appeals or resolves a federal question so as to conflict with a state court of last resort.

AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE TO IMPLEMENT THE AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA

Rule 35 CJR Recommendation 32

Introduction

Proposed additions to Rule 35 of the Federal Rules of Appellate Procedure to Implement Recommendation 32 of the Agenda for Civil Justice Reform in America are underlined below and deletions to the present rules are bracketed.

Rule 35. Determination of Causes by the Court in Banc

(a) **When Hearing or Rehearing In Banc Will be Ordered.** A majority of the circuit judges who are in regular active service may order that an appeal or other proceeding be heard or reheard by the court of appeals in banc. Such a hearing or rehearing [is not favored and] ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, (2) when a decision of the court is in conflict with the decision of another federal court of appeals on the same matter or resolves a federal question in a way in conflict with a state court of last resort, or [(2)] (3) when the proceeding involves a question of exceptional importance.

JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

CHIEF JUDGE JOHN F. GERRY
Chairman, Executive Committee

TELEPHONE:
COM. (609) 757-5454
FTS: 488 5454

March 24, 1992

MEMORANDUM TO ALL JUDICIAL CONFERENCE COMMITTEE CHAIRMEN

SUBJECT: Reevaluation of Committees

In December, 1986, Chief Justice Rehnquist appointed a committee to reexamine the operations and organization of the Judicial Conference and its committees. The recommendations of this Special Committee to Study the Judicial Conference were adopted by the Conference at its September 1987 session, and resulted, among other things, in the restructuring of the Conference committee organization. See Report of the Proceedings of the Judicial Conference of the United States, September 21, 1987, pp. 57-60.

Included among the Special Committee recommendations which were adopted by the Conference in 1987 was the following:

> Every five years, each committee must recommend to the Executive Committee, with a justification for the recommendation, either that the committee be maintained or that it be abolished.

Accordingly, since the five year mark occurs in September 1992, I request that each committee take up this matter this spring/summer and make a recommendation to the Executive Committee for consideration at its August 1992 meeting.

John F. Gerry

Rule in form submitted to Standing Committee - July 1991

Rule 4. Appeal as of right - When taken

(a) *Appeals in civil cases.*-

* * *

(2) ~~Except as provided in (a)(4) of this Rule 4, a~~ A notice of appeal filed after the announcement of a decision or order but before the entry of the judgment or order shall be treated as filed after such entry and on the day thereof.

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

(4) If any party makes a timely motion under the Federal Rules of Civil Procedure ~~is filed in the district court by any party~~: (i) for judgment under Rule 50(b); (ii) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (iii) under Rule 59 to alter or amend the judgment, other than for award or determination of costs or attorney's fees; or (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order ~~denying a new trial or granting or denying any other such motion~~ disposing of the last of all such motions. If a motion under Rule 60 of the Federal Rules of Civil Procedure is served within 10 days after the entry of the judgment, the motion shall be treated as a motion under Rule 59 for purposes of this paragraph (a)(4). A

~~notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above. No additional fees shall be required for such filing.~~ A notice of appeal filed after entry of the judgment but before disposition of any of the above motions shall be in abeyance and shall become effective upon the date of the entry of an order that disposes of the last of all such motions. An appeal from an order disposing of any of the above motions requires amendment of the party's previously filed notice of appeal in compliance with Rule 3(c). Any such amended notice of appeal shall be filed within the time prescribed by this Rule 4 measured from the entry of the order disposing of the last of all such motions.

* * *

(b) *Appeals in criminal cases.*- In a criminal case a defendant shall file the notice of appeal ~~by a defendant shall be filed~~ in the district court within 10 days after the entry of (i) the judgment or order appealed from or (ii) a notice of appeal by the Government. A notice of appeal filed after the announcement of a decision, sentence or order but before entry of the judgment or order shall be treated as filed after such entry and on the day thereof. If a timely motion under the Federal Rules of Criminal Procedure is made: (i) for judgment of acquittal, (ii) for ~~in~~ arrest of judgment, ~~or~~ (iii) for a new trial on any ground other than newly discovered evidence, or (iv) for a new trial

based on the ground of newly discovered evidence if the motion is made before or within 10 days after entry of the judgment, ~~has been made~~ an appeal from a judgment of conviction may be taken within 10 days after the entry of an order ~~denying the motion~~ disposing of the last of all such motions, or within 10 days after the entry of the judgment of conviction, whichever is later. ~~A motion for a new trial based on the ground of newly discovered evidence will similarly extend the time for appeal from a judgment of conviction if the motion is made before or within 10 days after entry of the judgment.~~ A notice of appeal filed after announcement of a decision, sentence, or order but before disposition of any of the above motions shall be in abeyance and shall become effective upon the date of the entry of an order that disposes of the last of all such motions, or upon the date of the entry of the judgment of conviction, whichever is later. Notwithstanding the provisions of Rule 3(c), a valid notice of appeal is effective without amendment to appeal from an order disposing of any of the above motions. When an appeal by the government is authorized by statute, the notice of appeal shall be filed in the district court within 30 days after ~~the entry of~~ (i) the entry of the judgment or order appealed from or (ii) the filing of a notice of appeal by any defendant.

A judgment or order is entered within the meaning of this subdivision when it is entered in the criminal docket. Upon a showing of excusable neglect the district court may, before or after the time has expired, with or without motion and notice,

extend the time for filing a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision.

The filing of a notice of appeal under this Rule 4(b) does not divest a district court of jurisdiction to correct a sentence under Fed. R. Crim. P. 35(c), nor does the filing of a motion under Fed. R. Crim. P. 35(c) affect the validity of a notice of appeal filed before disposition of such motion.

(c) *Appeals filed by inmates confined in institutions.*- If an inmate confined in an institution files a notice of appeal in either a civil case or a criminal case, the notice of appeal is timely filed if it is deposited in the institution's internal mail system on or before the last day for filing. Timely filing may be shown by a notarized statement or by a declaration in compliance with 28 U.S.C. § 1746 setting forth the date of deposit and stating that first-class postage has been prepaid. In civil cases in which the first notice of appeal is filed in the manner provided in this paragraph (c), the 14 day period provided in (a)(3) of this Rule 4 for other parties to file notices of appeal shall run from the date the first notice of appeal is received by the district court. In criminal cases in which a defendant files a notice of appeal in the manner provided in this paragraph (c), the 30 day period for the government to file its notice of appeal shall run from the entry of the judgment or order appealed from or from the receipt of the defendant's notice of appeal by the district court.

Rule 58. Entry of Judgment

Subject to the provisions of Rule 54(b): (1) upon a general verdict of a jury, or upon a decision by the court that a party shall recover only a sum certain or costs or that all relief shall be denied, the clerk, unless the court otherwise orders, shall forthwith prepare, sign, and enter the judgment without awaiting any direction by the court; (2) upon a decision by the court granting other relief, or upon a special verdict or a general verdict accompanied by answers to interrogatories, the court shall promptly approve the form of the judgment, and the clerk shall thereupon enter it. Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered as provided in Rule 79(a). Entry of the judgment shall not be delayed ~~for the taxing of costs~~, *nor the time for appeal extended, in order to tax costs or award fees, except that, when a timely motion for attorneys' fees is made under Rule 54(d)(2), the court, before a notice of appeal has been filed and become effective, may order that the motion have the same effect under Rule 4(a)(4) of the Federal Rules of Appellate Procedure as a timely motion under Rule 59*. Attorneys shall not submit forms of judgment except upon the direction of the court, and these directions shall not be given as a matter of course.

COMMITTEE NOTES

Ordinarily the post-judgment filing of a motion for attorney's fees under Rule 54(d)(2) will not affect the time for appeal from the underlying judgment. Particularly if the claim for fees involves substantial issues or is likely to be affected by the appellate decision, the district court may prefer to defer consideration of the claim for fees until after the appeal is resolved. However, in many cases it may be more efficient to decide fee questions before an appeal is taken so that appeals relating to the fee award can be heard at the same time as appeals relating to the merits of the case. This revision permits, but does not require, the court to delay the finality of the judgment for appellate purposes until the fee dispute is decided. To accomplish this result requires entry of an order by the district court before the time a notice of appeal becomes effective for appellate purposes. If the order is

entered, the motion for attorney's fees is treated in the same manner as a timely motion under Rule 59.

Rule 54. Judgments; Costs

* * * *

(d) Costs; *Attorneys' Fees.*

(1) Costs Other than Attorneys' Fees. Except when express provision therefor is made either in a statute of the United States or in these rules, costs *other than attorneys' fees* shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Such ~~c~~Costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court.

(2) Attorneys' Fees.

(A) Claims for attorneys' fees and related nontaxable expenses, including fees sought under Rule 11, 16, 26, or 37, and under 28 U.S.C. § 1927, shall be made by motion unless the substantive law governing the action provides for the recovery of such fees as an element of damages to be proved at trial.

(B) Unless otherwise provided by statute or directed by the court, the motion shall be filed and served not later than 14 days after entry of judgment, shall specify the judgment and the statute, rule, or other grounds entitling the moving party to the award, and shall state the amount or provide a fair estimate of the fees sought. If directed by the court, the motion shall also disclose the terms of any agreement with respect to fees to be paid for the services for which claim is made.

(C) On request of a party or class member, the court shall afford an opportunity for adversary submissions with respect to the motion in accordance with Rule 43(e) or Rule 78. The court may determine issues of liability for fees before receiving submissions bearing on issues of evaluation of services for which liability is imposed by the court. The order shall set forth the court's findings and conclusions as provided in Rule 52(a) and shall be expressed in the form of a judgment as provided in Rule 58.

(D) By local rule the court may establish (i) an appropriate schedule by which the value of legal services performed in the district is ordinarily to be measured, and (ii) special procedures by which issues relating to such fees may be resolved without extensive evidentiary hearings. In addition, the court may refer issues relating to the value of services to a special master under Rule 53 without regard to the provisions of subdivision (b) thereof and may refer a motion for attorneys' fees to a magistrate judge under Rule 72(b) as if a dispositive pretrial matter.

COMMITTEE NOTES

Subdivision (d). This revision adds paragraph (2) to this subdivision to provide for a frequently recurring form of litigation not initially contemplated by the rules--disputes over the amount of attorneys' fees to be awarded in the large number of actions in which prevailing parties may be entitled to such awards. This revision seeks to harmonize and clarify procedures that have been developed through case law and local rules, as well as provide a mechanism by which through local rule a court could adopt schedules presumptively specifying the prevailing hourly rates for attorneys in the locality.

Paragraph (1). Former subdivision (d), providing for taxation of costs by the clerk, is renumbered as paragraph (1) and revised to exclude applications for attorney's fees.

Paragraph (2). This new paragraph establishes a procedure for presenting claims for attorneys' fees. It applies also to requests for reimbursement of expenses not taxable as

costs to the extent recoverable under governing law. Cf. West Virginia Univ. Hosp. v. Casey, ___ U.S. ___ (1991) (expert witness fees not recoverable under 42 U.S.C. § 1988). As noted in subparagraph (A), it does not apply to fees recoverable as an element of damages, as when sought under the terms of a contract; such damages typically are to be claimed in a pleading and may involve issues to be resolved by a jury.

Subparagraph (B) provides a deadline for motions for attorneys' fees--14 days after final judgment unless the court or a statute specifies some other time. One purpose of this provision is to assure that the opposing party is informed of the claim before the time for appeal has elapsed. Prior law did not prescribe any specific time limit on claims for attorneys' fees. White v. New Hampshire Dep't of Employment Sec., 455 U.S. 445 (1982). In many nonjury cases the court will want to consider attorneys' fee issues immediately after rendering its judgment on the merits of the case. Note that the time for making claims is specifically stated in some legislation, such as the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(B) (30-day filing period).

The provisions of paragraph (2) apply in general to requests for fees as sanctions authorized or mandated in the rules. In many circumstances such requests should be made at or shortly after the time of the conduct complained of, and not be delayed until the conclusion of the case. The 14-day period stated in subparagraph (B) should be understood not as authorizing parties to delay such requests, but as establishing an outer limit for such motions.

Prompt filing affords an opportunity for the court to resolve fee disputes shortly after trial, while the services performed are freshly in mind. It also enables the court in appropriate circumstances to make its ruling on a fee request in time for any appellate review of a dispute over fees to proceed at the same time as review on the merits of the case.

Filing a motion for fees under this subdivision does not affect the finality or the appealability of a judgment. If an appeal on the merits of the case is taken, the court may rule on the claim for fees, may defer its ruling on the motion, or may deny the motion without prejudice, directing under subdivision (d)(2)(B) a new period for filing after the appeal has been resolved. A notice of appeal does not extend the time for filing a fee claim based on the initial judgment, but the court under subdivision (d)(2)(B) may effectively extend the period by permitting claims to be filed after resolution of the appeal. A new period for filing will automatically begin upon entry of a new judgment following a reversal or remand by the appellate court.

The rule does not require that at the time of filing the motion be supported with the evidentiary material bearing on the fees. This material must of course be submitted in due course, according to such schedule as the court may direct in light of the circumstances of the case. What is required is the filing of a motion sufficient to alert the adversary and the court that there is a claim for fees and the amount of such fees (or a fair estimate).

If directed by the court, the moving party is also required to disclose any fee

agreement, including those between attorney and client, between attorneys sharing a fee to be awarded, and between adversaries made in partial settlement of a dispute where the settlement must be implemented by court action as may be required by Rules 23(e) and 23.1 or other like provisions. With respect to the fee arrangements requiring court approval, the court may also by local rule require disclosure immediately after such arrangements are agreed to. E.g., Rule 5 of United States District Court for the Eastern District of New York; cf. In re "Agent Orange" Product Liability Litigation (MDL 381), 611 F. Supp. 1452, 1464 (E.D.N.Y. 1985).

In the settlement of class actions resulting in a common fund from which fees will be sought, courts have ordinarily required that claims for fees be presented in advance of hearings to consider approval of the proposed settlement. The rule does not affect this practice, as it permits the court to require submissions of fee claims in advance of entry of judgment.

Subparagraph (C) assures the parties of an opportunity to make an appropriate presentation with respect to issues involving the evaluation of legal services. In some cases, an evidentiary hearing may be needed, but this is not required in every case. The amount of time to be allowed for the preparation of submissions both in support of and in opposition to awards should be tailored to the particular case.

The court is explicitly authorized to make a determination of the liability for fees before receiving submissions by the parties bearing on the amount of an award. This course may be appropriate in actions in which the liability issue is doubtful and the evaluation issues are numerous and complex.

The court may order disclosure of additional information, such as that bearing on prevailing local rates or on the appropriateness of particular services for which compensation is sought.

On rare occasion, the court may determine that discovery under Rules 26-37 would be useful to the parties. Compare Rules Governing Section 2254 Cases in the U.S. District Courts, Rule 6. See Note, Determining the Reasonableness of Attorneys' Fees--the Discoverability of Billing Records, 64 B.U.L. Rev. 241 (1984). In complex fee disputes, the court may use case management techniques to limit the scope of the dispute or to facilitate the settlement of fee award disputes.

Fee awards should be made in the form of a judgment under Rule 58 since such awards are subject to review in the court of appeals. To facilitate review, the paragraph provides that the award contain findings and conclusions in conformity with Rule 52(a), though in most cases this explanation could be quite brief.

Subparagraph (D) explicitly authorizes the court by local rule to establish procedures facilitating the efficient and fair resolution of fee claims. Under Rule 83 such local rules must be submitted to the judicial council of the circuit.

Clause (i) authorizes the court to establish by local rule a schedule of standard hourly rates suitable for use when the substantive law governing fee awards requires consideration of such rates. These rates should be uniform among the judges in any district, and a published standard should facilitate the settlement of disputes involving the value of legal services performed. The schedule would specify prevailing hourly rates (or ranges of rates) customarily charged within the district, taking into account such factors as the experience of counsel. Such standards should be regularly reconsidered in light of experience and changing circumstances. The parties would be permitted to show that hourly rates different from those in the schedule would be appropriate in the circumstances of the case, as when an attorney from another locality should be compensated in accordance with rates prevailing in that other locality, or, indeed, that the substantive law does not require consideration of such rates.

Clause (ii) authorizes the court by local rule to establish special procedures for resolving disputes regarding fee awards without extensive evidentiary hearings. Such a rule, for example, might call for matters to be presented through affidavits, or might provide for issuance of proposed findings by the court, which would be treated as accepted by the parties unless objected to within a specified time.

Subparagraph (D) also explicitly permits, without need for a local rule, the court to refer issues regarding the amount of a fee award in a particular case to a master under Rule 53. The district judge may designate a magistrate judge to act as a master for this purpose or may refer a motion for attorneys' fees to a magistrate judge for proposed findings and recommendations under Rule 72(b). This authorization eliminates any controversy as to whether such references are permitted under Rule 53(b) as "matters of account and of difficult computation of damages" and whether motions for attorneys' fees can be treated as the equivalent of a dispositive pretrial matter that can be referred to a magistrate judge.