TENTATIVE AGENDA
MEETING OF THE ADVISORY COMMITTEE ON APPELLATE RULES
DENVER, COLORADO
APRIL 25, & 26, 1994

I. TESTIMONY ON RULES PUBLISHED FOR COMMENT, OCTOBER 1993

A. Paul Stack, Esquire
Stack, Filpi & Kakacek
Chicago, Illinois 60603-5298
(Vice-President and General Counsel of Monotype Typography, Inc.)
Re: Rule 32

B. Mr. William Davis
Vice-President, Monotype Typography, Inc.
Chicago, Illinois
Re: Rule 32

C. Ms. Sarah C. Leary
Microsoft Corporation
One Microsoft Way
Redmond, Washington 98052-6399
Re: Rule 32

D. Mr. John Vail
Microsoft Corporation
One Microsoft Way
Redmond, Washington 98052-6399
Re: Rule 32

II. APPROVAL OF MINUTES OF SEPTEMBER 1993 MEETING

Note Mr. Rabiej's letter of March 3, 1994 re: transmittal of committee approved minutes to West Publishing Company for WESTLAW

III. RECONSIDERATION OF THE RULES PUBLISHED FOR COMMENT.

A. Rule 4 (Amendments changing the words "makes" and "served" to "files" and "filed" in conjunction with amendment of Fed. R. Civ. P. 50, 52, and 59; also amendment of (a)(4)(F) to conform to amendment of Fed. R. Civ. P. 60. Additional amendment under item 92-10, providing that a party who wants to obtain review of an alteration or amendment of a judgment on disposition of a posttrial motion must either file a notice of appeal or amend a previously filed notice.)

B. Rule 8 (Item 93-2, amendment conforms subdivision (c) to previous amendments to Fed. R. Crim P. 38.)

C. Rule 10 (Item 92-9, amendment conforms subdivision (b)(1) to amendments made to Rule 4(a)(4). The amendment suspends the 10-day period for ordering a transcript if a timely postjudgment motion is made and a notice of appeal is suspended under Rule 4(a)(4).)

D. Rule 21 (Item 91-14, amendment of mandamus rule so that the trial judge is not named in the petition and is not treated as a respondent. The amendments also provide that the judge shall be represented *pro forma* by counsel for the party opposing the relief. The judge is, however, permitted to appear to oppose issuance of the writ.)

E. Rule 25 (Item 92-5, amendment provides that in order to file a brief using the mailbox rule, the brief must be mailed by first-class mail.)

F. Rule 32 (Item 91-4, the typeface amendments)

G. Rule 47 (Item 92-1, amendments require local rules to follow uniform numbering system and delete repetitious language. Amendments also protect against loss of rights in enforcement of local rules relating to matters of form.)

H. Rule 49 (Item 92-2, permits the Judicial Conference to make technical amendments to the rules without participation of the Supreme Court or of Congress.)

IV. ACTION ITEMS

A. Item 86-23, concerning the receipt of mail by institutionalized persons. (Consideration of the responses received from the circuits to draft rule) Initial discussion of Item 93-7 will follow discussion of item 86-23. Item 93-7 deals with the Houston v. Lack issue in the context of a petition for review of an administrative decision.

B. Item 91-24, page limits for and contents of amicus briefs.

C. Item 91-25, amendment of Rule 35 to specify contents of suggestion for rehearing in banc, and
Item 92-4, amendment of Rule 35 to include intercircuit conflict as ground for seeking in banc consideration.

D. Item 91-28, updating Rule 27 governing motions.

V. DISCUSSION ITEMS

A. Item 93-1, conflict between Fed. R. Civ. P. 9(h) and 28 U.S.C. § 1292(a)(3) re: interlocutory appeal of admiralty cases with non-admiralty claims. (See Reporter's memorandum of September 4, 1993)

B. Item 93-3, amendment of Rule 41 re: expansion of the 7 day period for issuance of mandate
& Item 93-6, amendment of Rule 41 re: effective date of mandate (See Reporter's memorandum of September 6, 1993)

C. Item 93-4, amendment of Rule 41 re: length of time for stay of mandate (See Reporter's memorandum of September 11, 1993)

D. Item 93-5, amendment of Rule 26.1 re: use of the term affiliates (See Reporter's memorandum of September 13, 1993)

VI. REPORT ITEMS

A. Item 93-8, fax filing standards and model local rules as approved by the Standing Committee.

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ORAL PRESENTATIONS

AGENDA ITEM - II
Denver, Colorado
April 25-26, 1994

L. RALPH MECHAM
DIRECTOR

CLARENCE A. LEE, JR.
ASSOCIATE DIRECTOR

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
CHIEF, RULES COMMITTEE
SUPPORT OFFICE

March 3, 1994

MEMORANDUM TO CHAIRS AND REPORTERS OF ADVISORY COMMITTEES

SUBJECT: Publication of Minutes

West Publishing Company has agreed to place minutes of each advisory and standing committee meeting on line (i.e. WESTLAW). West requests that the minutes be transmitted in a WordPerfect format on a diskette. West also will include minutes of past meetings beginning January 1, 1992.

In light of the growing interest in the rulemaking process and the increased number of inquiries regarding the rules, Judge Stotler would like to take advantage of West's offer and transmit committee-approved minutes starting with the meetings held in the fall and winter of 1993. (Minutes will be submitted to West only after the respective committee approves them at their 1994 meetings.) Minutes of past meetings can be transmitted to West in the committee's discretion.

For your information, I have attached a copy of the *Judicial Conference's Guidelines for Access to and Dissemination of Judicial Conference Reports and Committee Materials*. The *Guidelines* are modified, however, by the *Procedures for the Conduct of Business by the Judicial Conference Committees on Rules of Practice and Procedure*. Under the *Procedures*, minutes of all advisory committee meetings are public records.

I will soon send a letter to other major publishing firms advising them of the opportunity to place the same committee minutes on line. If you foresee any problems with these procedures, please contact me.

John K. Rabiej

John K. Rabiej

Attachment

cc: Honorable Alicemarie H. Stotler
Professor Daniel R. Coquillette

JUDICIAL CONFERENCE OF THE UNITED STATES

GUIDELINES FOR ACCESS TO AND DISSEMINATION OF JUDICIAL CONFERENCE REPORTS AND COMMITTEE MATERIALS

On August 23, 1993, the Executive Committee of the Judicial Conference implemented the following guidelines for access to, and dissemination of, Judicial Conference reports and materials. (See JCUS-SEP 92, p. 59 and JCUS-SEP 93, p.)

The public record of the Judicial Conference activity is the *Report of the Proceedings of the Judicial Conference of the United States,* submitted to the Congress by the Chief Justice as required by 28 U.S.C. § 331. Copies are widely distributed throughout the judiciary, the legislative and executive branches and are available on request through the Judicial Conference Secretariat. Likewise, the full texts of Conference Proceedings from 1922 through the most recent sessions are available through WESTLAW, the computer-assisted legal research service of West Publishing Company.

Committee reports are available only to the Conference members, committee chairmen, circuit executives and Conference staff prior to Conference sessions. Conference members have the discretion to share the reports within the judiciary to obtain the views of their colleagues, as they consider appropriate. Beyond that, requests for pre-session release of committee reports (beyond the Conference members and participants) should be addressed to the Chairman of the Executive Committee.

After the Judicial Conference meets, committee reports are available to the public upon request to the Conference Secretary. Background materials, files, minutes and the like, are considered working papers of the Judicial Conference and its committees and generally are not available.

Recipients of Conference committee reports should be made aware that committee reports do not necessarily represent the policy of the Judicial Conference. Conference action may have modified or disapproved a committee's recommendation and such would not be reflected in the committee report. Thus, committee reports should be considered in conjunction with the relevant Conference proceedings.

November 17, 1993

MINUTES OF THE MEETING
OF THE ADVISORY COMMITTEE ON APPELLATE RULES
SEPTEMBER 22 & 23, 1993

Judge Ripple called the meeting to order at 8:40 a.m. in Rooms B and C of the Education Center in the Federal Judiciary Building, in Washington, D.C.. In addition to Judge Ripple the Committee Chair, the following Committee members were present: Judge Danny Boggs, Mr. Donald Froeb, Judge Cynthia Hall, Judge James Logan, Chief Justice Arthur A. McGiverin, Mr. Luther Munford, and Judge Stephen Williams. Mr. Robert Kopp and Mr. Mark Levy attended on behalf of Solicitor General Days. Judge Robert Keeton, Chair of the Standing Committee, and Chief Judge Dolores Sloviter, Liaison from the Standing Committee to the Advisory Committee, were present. Mr. Strubbe, the Clerk of the Seventh Circuit, attended on behalf of the clerks. Professor Mooney, the Reporter, was present. Mr. Peter McCabe - the Secretary, Mr. John Rabiej - Chief of the Rules Support Office, Mr. Paul Zingg - Mr. McCabe's assistant, Mr. John Hennemuth of the Administrative Office, and Mr. Joseph Spaniol were present along with Ms. Judy McKenna of the Federal Judicial Center.

Judge Ripple began by introducing Judge Logan as the chair designate of the Committee. Judge Ripple welcomed Mr. Levy, the Deputy Attorney General representing the Solicitor General. Judge Ripple also welcomed Judge Keeton and Chief Judge Sloviter from the Standing Committee, and Mr. Spaniol, the former Clerk of the Supreme Court of the United States and long time secretary to the rules committees.

Judge Ripple stated that his objective at this meeting was to complete work on as many items on the docket as possible.

Judge Ripple asked Judge Keeton to report on the Judicial Conference meeting held earlier in the week. Judge Keeton reported that Chief Judge Breyer of the First Circuit had placed appellate rules 28, 38, 40, and 41 on the discussion calendar for the Judicial Conference meeting. Both Judge Keeton and Judge Ripple spoke with Chief Judge Breyer prior to the Judicial Conference meeting and convinced him that the Advisory Committee had considered suggestions that he had made early in the development of some of those rules. As a result of those discussions, Chief Judge Breyer was persuaded that it was not necessary to retain the appellate rules on the discussion calendar. The Chief Justice, however, said that the rules could not be removed from the discussion calendar without unanimous consent. Unanimous consent was forthcoming at the meeting as a result of which all appellate rules would be forwarded to the Supreme Court.

Judge Keeton also reported that the Court Administration Committee had urged the Judicial Conference to approve fax filing guidelines so that those courts desirous of permitting fax filings on a routine basis my adopt local rules authorizing such filings. At last summer's Standing Committee meeting, the Committee had discussed fax filing

guidelines prepared by the Court Administration Committee and the Committee on Automation. The Standing Committee was troubled by the initial draft because it contained provisions that ordinarily would be contained in the rules. For example, the guidelines defined "filing" in the context of fax filing. As a result, a rump committee put together by Judge Keeton studied the guidelines and made suggestions for change. It was those revised guidelines that were presented to the Judicial Conference by the Court Administration Committee for approval.

In spite of the revisions made during the Standing Committee meeting, Judge Keeton had urged the Judicial Conference not to approve even the revised guidelines. He noted that the guidelines would impose procedural requirements (such as maintaining an original signed document until the conclusion of the litigation) that are not found in the rules, and that adoption of the guidelines would result in the imposition of those requirements without compliance with the Rules Enabling Act procedures. Judge Keeton had pointed out that in light of the ongoing struggle to convince Congress not to bypass the Rules Enabling Act process by passing direct amendments to the rules, it could prove embarrassing to the Judicial Conference to approve what are in effect rules amendments without following the Rules Enabling Act procedures. As a result of Judge Keeton's arguments, the Judicial Conference passed a motion to delay action on the fax filing guidelines until September 1994.

Judge Keeton pointed out to the Advisory Committee that in order to have a recommendation ready for the Judicial Conference by fall 1994 and to comply with the Rules Enabling Act procedures, any necessary rule amendments would need to be published before the Standing Committee's January 1994 meeting. He further noted that drafts of the further revised guidelines and rule amendments would need to be prepared in the next month or two and approved on an expedited basis for publication.

Judge Keeton stated that the key task of the Advisory Committees would be to modify the guidelines so that they do not conflict with the rules of procedure. Judge Keeton indicated that he had a rough redraft of the guidelines that he would offer for the Committee's consideration later in the meeting.

Judge Keeton further stated that in private conversation with Judge Boyle during the Judicial Conference meeting, Judge Boyle indicated that if fax transmissions to court clerks are going to be regulated, he hoped the rules also would address fax service.

Chief Judge Sloviter, who also had attended the Judicial Conference, stated that she was reasonably convinced that the fax guidelines would have been approved but for Judge Keeton's forceful arguments. In her opinion, the argument that approval of the guidelines would undercut the Rules Enabling Act was the persuasive factor. Both Judge Keeton and Chief Judge Sloviter stated that the Judicial Conference is impatient with the long length of time between generation of an idea and its presentation to the Conference.

Judge Ripple indicated that in light of those developments the Committee would devote whatever time was necessary the following morning to consideration of the guidelines and rule amendments.

Judge Ripple returned to Judge Keeton's opening remarks about the rules placed on the discussion calendar for the Judicial Conference. During discussions preceding the meeting of the Judicial Conference, Judge Ripple learned that there had been some confusion arising from the fact that the Advisory Committee's GAP report did not summarize comments submitted to the Committee when early drafts were circulated to the Chief Judges for comment. When it was explained that a GAP report only summarizes the comments received during the formal comment period and not those generated by initial consultation with the circuits during the process of developing a proposal, Chief Judge Breyer stated that he hoped this experience would not cause the committee to discontinue the process of consultation that it often uses. Judge Ripple stated his belief that the process of consultation with the circuits has been extremely useful to the Committee and should be continued in those instances where the Committee believes it would be appropriate.

Judge Ripple stated that Chief Judge Breyer did express concern, however, about the notice requirements in the proposed amendments to Rule 38. Chief Judge Breyer sees a need for an expeditious way that a court of appeals can bring a misstep to the attention of an attorney without the punitive aspects currently associated with "sanctions." Because imposition of sanctions can have implications for an attorney's career, due process and fairness concerns enter the picture; Chief Judge Breyer, however, believes that there should be some means by which a court can bring matters to the attention of counsel that do not result in a mark against the attorney's professional reputation. Judge Ripple stated that he had promised Chief Judge Breyer that his concerns would be added to the Committee's docket and referred to Judge Boggs' subcommittee on sanctions and would, in due course, be considered by the full committee.

Before turning to the items on the agenda for the meeting, Judge Ripple indicated that items 91-6 and 91-15 had been circulated as possible "dead list" items and that all votes had indicated that no further action was needed. He stated that unless a member voiced objection, both items would be stricken from the docket. No objections were heard.

Item 91-28

Item 91-28 is a proposal to redraft and update Rule 27, the rule governing motions. Judge Ripple indicated that Item 91-28 was being taken out of turn because Judge Williams, who chaired the sub-committee on this item, would need to leave before the close of the meeting that afternoon in order to attend a reception for his colleague Judge Ginsburg.

Judge Ripple indicated that the Department of Justice had prepared a draft for the Committee's consideration and he had assigned the draft to a subcommittee for study and solicitation of the views of the circuits'. Judge Ripple stated that at this meeting the Committee should be ready to make substantive decisions. He and Judge Logan agreed that once the substantive decisions are made the subcommittee should work with the Reporter to come up with a refined text for the Committee's next meeting. Because Judge Williams chaired the subcommittee, Judge Ripple asked him to lead the discussion.

Judge Williams indicated that his memorandum of September 8 was a composite of all the written comments he had received on the draft. The comments were arranged topically and in the order that the topics appear in the draft. Judge Williams proposed that each topic be addressed in turn.

1. Nature of Motions

The first suggestion, appearing at the top of page 3 of the memorandum, was that the rule should state that "an application for . . . relief shall be made by filing a motion." The current appellate rule and the civil rules include such statements. Because the suggestion was Mr. Munford's, Judge Ripple asked him whether something like the first sentence of the existing rule would be sufficient. Mr. Munford replied that it would except that it may not be necessary to include the direction that a motion be accompanied by proof of service because Rule 25 generally requires proof of service to accompany papers presented for filing. After a brief discussion, Mr. Munford moved that the draft be amended to include such a statement; Mr. Kopp seconded the motion. It passed by a vote of 7 in favor, two opposed.

2. The Question of Oral Motions

Judge Williams then asked the Committee to turn to pages 4 and 5 of his memorandum and that portion of the draft rule stating that motions must be in writing except for motions made in open court with opposing counsel present. Judge Williams indicated that there was general approval of the requirement that motions be in writing but that the exception for motions made in open court in the presence of opposing counsel had generated some opposition.

The First Circuit opposed the exception because the tapes of its proceedings are destroyed and the court would have no record of the motion. Judge Williams stated that in his seven years on the court of appeals the only motions made before him in open court have been for an attorney to appeal *pro hac vice*. He further indicated, however, that if a more substantive motion were made in open court, the court would be free to order that the tapes be preserved.

Judge Logan indicated that the Tenth Circuit's experience is that some motions

do not need to be reduced to writing. For example, if at oral argument the court wishes to discuss points not developed in the parties' briefs, counsel often ask permission to file supplemental materials. In such instances the court enters an order setting the date for the filing of such materials; no other writing seems necessary.

Chief Judge Sloviter stated that in the Third Circuit when something such a Judge Logan described occurs, the crier enters minutes and the docket reflects what has occurred.

Mr. Strubbe stated that the Seventh Circuit has a form that is given to the judges' law clerks and the clerks note any order made by the court. The clerk of the court enters the order on the docket so that the clerks' office knows to expect additional documents.

Mr. Munford indicated that in the Fifth Circuit counsel do not have access to the records of the proceedings in court and if a provision as broad as the draft were used, all sorts of motions would be made in open court.

Judge Ripple indicated that there are four possible approaches to the question:

1. no oral motions;
2. oral motions are permitted in open court but discouraged;
3. oral motions are permitted in open court but must be memorialized by submission in writing; or
4. motions must always be in writing.

Judge Sloviter suggested a fifth possibility: that oral motions be permitted only by leave of the panel.

Mr. Levy suggested yet another possibility: that oral motions be limited to housekeeping matters.

Mr. Froeb stated that he has never encountered a problem with oral motions and that the rules should not be cluttered with provisions governing insignificant or non-existent problems.

Judge Ripple indicated that he would like to take a straw vote in order to advance the discussion.

1. The proposal that oral motions would never be permitted was opposed unanimously.
2. The proposal that oral motions be permitted only as to procedural matters was favored by two members and opposed by five.
3. The suggestion that the consent of the court be required for any oral motion was favored by six members and opposed by two.

Mr. Kopp reminded the members that the draft was an attempt to create a national rule. The DOJ draft was prepared in light of the fact that oral motions are permitted in some circuits and reflects a belief that an umbrella rule should accommodate existing practices.

Judge Logan summarized the discussion by noting that there was consensus that there should be some leeway so that trivial oral motions need not be reduced to writing. As an example, he stated that a lawyer's request at oral argument to share argument time with co-counsel typically would be considered and acted upon at that time and there would be no need to create a paper record on that issue. He suggested that the details of the drafting could be left to the sub-committee and that perhaps the problem could be most satisfactorily addressed in the committee notes.

The discussion pointed out that some circuits permit motions for extension of time to be made over the telephone to the clerk. Mr. Munford stated that the 5th Circuit permits such motions to be made over the telephone but must be followed up in writing. Mr. Kopp stated that his draft did not intend to disturb such practices. The committee unanimously agreed that a court should be able to delegate authority to the clerk to handle procedural or housekeeping matters telephonically.

Mr. Munford questioned the need for the opening phrase of the draft rule which says "[e]xcept where otherwise specifically provided by these Rules" motions shall be in writing. Because there are no contrary provisions in the FRAP, he suggested that the phrase may be unnecessary.

3. Documents that Must Accompany a Motion

Judge Williams asked the Committee to turn to pages 6 and 7 of the memorandum dealing that portion of the draft rule governing the documents that must accompany a motion. He noted that Rule 27 currently says that a motion must "set forth the order or relief sought" and that language can be read to imply that a moving party must provide a proposed order along with the motion. The Justice Department's draft deletes the language without stating that a proposed order is not desired. Judge Keeton pointed out that the Civil Rules strongly discourage submission of proposed orders unless the court directs otherwise. The Committee agreed that it should be made clear that no proposed order is desired.

With regard to "supporting papers" the DOJ draft includes the following three subparagraphs

(a) Affidavits should contain factual information only. Affidavits containing legal argument will be treated as memoranda of law.
(b) A copy of the lower court opinion or agency decision shall be included as a separately identified exhibit by a moving party seeking substantive relief.

(c) Exhibits attached should be only those necessary for determination of the motion.

Judge Williams asked whether it is appropriate to include such provisions in the national rules or whether they really are simply helpful suggestions to counsel.

Judge Ripple stated that a motion should be a self-contained packet of materials and that if it is necessary to call the clerk's office to get a copy of the lower court opinion etc., the time for deciding a motion may be significantly lengthened.

Mr. Froeb stated that he thought a lawyer would automatically include the necessary supporting papers but that if that is not so, perhaps the sort of directions included in the draft are necessary.

Mr. Kopp stated once again that he attempted to develop a draft that would be complete enough that the circuits would not feel a need to supplement it.

Judge Ripple summarized the options and asked the Committee to express its preliminary preferences.

1. The first option would be to stop after the statement that "[i]f a motion is supported by affidavits or other papers, they shall be served and filed with the motion" and not provide any further instructions. Three members favored that approach.

2. A second option would be to simply direct that all necessary supporting documents should be appended. One member favored that approach.

3. A third option would be to put all such directions in the committee notes. No member favored that approach.

4. A fourth option would be to take the approach taken in the DOJ draft. Five members favored that approach.

Given the preference for the fourth option, Judge Ripple called for a vote on that approach. Retention of the draft language was approved by a vote of six in favor and three opposed.

Judge Williams noted that Mr. Munford had suggested a slight adjustment in the language of the DOJ draft (a)(2)(c) but Mr. Munford requested that his suggestion be referred to the drafting subcommittee.

4. Briefs

Judge Williams directed the Committee's attention to the comments on page 8 concerning briefs. The DOJ draft deletes the language in the current rule stating that a motion may be supported by a brief.

The Federal Circuit commented that it explicitly prohibits the filing of briefs and Mr. Munford had suggested that if the intent is to ban separate briefs, then the rule should so state. Judge Logan said that the Tenth Circuit had discussed this issue and concluded that a motion and supporting arguments should be contained in a single document.

The single document approach was unanimously approved but several members indicated that the committee note should explain that a motion itself may contain supporting arguments. Mr. Spaniol noted that Supreme Court Rule 21 uses the single document approach and that its language might prove helpful in the drafting process.

5. Page Limitation

Judge Williams moved onto the page limitation provisions and comments discussed on pages 9 and 10 of his memorandum. Professor Mooney summarized the status of Rule 32, noting that a new proposal would be published on November 1. The new proposal would include a words per page limitation, although Judge Easterbrook had written to the Committee suggesting that characters per brief or words per brief would be preferable to words per page.

During discussion of the status of Rule 32, Chief Judge Sloviter noted that if the members of the Advisory Committee are confused about where certain rules proposals are in the pipeline, that those circuits that are not represented on the Committee are even more confused. She suggested that the table of agenda items should be circulated to the circuits or at least to the rules committees in the circuits. Both Judge Ripple and Judge Logan agreed that circulation of the table would be helpful. Judge Ripple further suggested that the Chair's letter to the Chief Judge should suggest that it be circulated to the rules committee.

Judge Williams suggested that given the uncertain development of Rule 32, it may be difficult to proceed with such provisions in Rule 27.

Judge Keeton suggested that the problem might be finessed by providing that a motion or response to a motion cannot exceed 1/2 the length permitted for a principal brief under Rule 32 and that a reply to a response cannot exceed 1/4 of that length.

Judge Ripple suggested separating the discussion concerning the length of a reply from that concerning the length of a motion or response. He thought that some

members might take the position that the rule should not authorize a reply to a response and that discussion of replies might muddy the discussion of Judge Keeton's proposal. The Committee concurred.

Judge Hall noted that the Ninth Circuit has reduced the length of a brief from 50 pages to 35 pages. Judge Ripple stated that under Judge Keeton's proposal, to the extent that a circuit has authority to limit the length of its briefs, it would correspondingly limit the length of its motions.

Judge Logan said that when the Tenth Circuit reviewed the DOJ draft, the Tenth thought that the suggested twenty page limit was too long.

Mr. Kopp replied that motions vary from minor to very major (such as a motion for summary affirmance or a motion to dismiss for lack of jurisdiction) so that in some contexts a motion is more important than the brief. The twenty page limit was proposed as a fair compromise. Mr. Kopp stated that Judge Keeton's draft is a good way to finesse the fact that Rule 32 is in flux but Mr. Kopp further noted that if the committee consensus was that the limit on a motion should be 20 pages, one would end up with a awkward fraction.

Chief Judge Sloviter said that the disadvantage of Judge Keeton's proposal is that the motion rule would not be self-contained; one would need to refer to another rule to know the limit. She also said that the number of pages for a motion has never posed the sort of problem that has been encountered with the length limitations on briefs.

Mr. Froeb agreed that the motion rule should be as free-standing as possible. With regard to the specific number of pages, he suggested that the real question is how many motions to exceed the page limits do the courts want to receive. Because there are motions of the type that may decide the appeal, if the page limit is set too low, there will be many requests to exceed the limit. Mr. Froeb suggested that a mid-line number should be settled upon so that there will not be an excessive number of motions to exceed the limit.

Mr. Munford stated that he liked separating the page limit question from the typeface issue. He believes that it is preferable to have the motions rule as self-contained as possible and that it would be good to have the page limit in Rule 27 but that the typeface question could await the Rule 32 resolution.

Judge Hall stated that in her experience there has not been a problem with the length of motions. In her experience, the length of a motion has generally been commensurate with the difficulty of the issues presented. She has been more troubled by the attachments being either excessive or insufficient. She expressed willingness to do without a page limit.

Judge Logan said that the Tenth Circuit was concerned that once a page limit is established, lawyers would tend to use the maximum number of pages permitted. The Tenth Circuit, therefore, favored a shorter limit which would force parties who wish to file a longer motion to seek court permission to file a longer document.

Judge Williams said that lawyers do tend to use the entire 50 pages allowed for briefs whether the issues warrant it or not, but that his experience has been different with motions and that the D.C. Circuit has had a page limit on motions ever since he has been on the court. He further stated that he rarely receives a motion to exceed the page limits.

Mr. Kopp stated that the draft includes a page limitation to eliminate the need for local rules establishing limitations. He also believes that the existence of a limit usually provides an incentive to carefully structure one's writing. He stated, however, that he would rather have no limit than a 15 page limit. In his opinion, too many motions cannot be adequately supported in 15 pages but that 20 or 25 pages is usually sufficient.

Judge Ripple called for a straw vote on the three options posed:
1. Three members favored imposing no limit.
2. Two members favored using Judge Keeton's proportional approach.
3. Four members favored using a twenty page limit.

Given that outcome, Judge Ripple called for a final vote on options one and three. Four members voted for no page limit. Five members voted for a twenty page limit.

Judge Williams noted that the DOJ proposed 27(a)(4), on page 11 of his memorandum, deals with typeface questions. Judge Ripple suggested that the Committee not attempt to deal with that issue until Rule 32 is resolved because Rules 27(a)(4) and 32 should use the same approach. Mr. Spaniol noted that Rule 32(b) purports to establish format requirements for motions. He suggested that the Committee should determine whether the format requirements should be in both rules or only one, and which one and, if they are to be both places, they clearly should use similar or identical language.

Judge Logan suggested that Rule 27(a)(4) should simply cross-reference Rule 32(b). Mr. Munford countered by suggesting that it would be preferable to include the formatting information for motions in Rule 27 and to eliminate Rule 32(b). Judge Ripple responded, however, that Rule 32(b), deals with petitions for rehearing and other documents as well as with motions. There was discussion about whether a cross-reference to 32(b) would make the binding and cover requirements of Rule 32(a) applicable to motions. Judge Williams suggested that removing motions from 32(b) might be preferable. Mr. Spaniol suggested using the language of Supreme Court Rule 34 so that a motion would be "stapled or bound at the upper left hand corner." The working out of this problem was left to the drafting subcommittee.

6. Responses that Request Affirmative Relief

Judge Williams asked the Committee to turn to page 13 of the memorandum dealing with responses to motions. He noted that there are two issues that the Committee must address: the first is whether the rule should allow a party to combine a response to a motion with a request for affirmative relief and second, if the answer to the first question is yes, then page limits for such a document must be established.

The DOJ proposal allowing combined documents was based upon a D.C. Circuit Rule. Judge Williams stated, however, that such combined documents are rare and that he could not cite any example where the D.C. rule either caused or solved any problem. Judge Williams said, however, that the rule is useful because there often is substantial overlap of arguments in the response and in the request for affirmative relief.

Mr. Kopp said that when a lawyer is not simply opposing a motion but also is asking for summary affirmance, it is not clear how the documents should be structured. Because the arguments overlap, it is not clear whether the response should be followed by a one page motion or whether the response should conclude with a paragraph asking for summary affirmance. If it is decided to include the request for relief in a response, Mr. Kopp noted that it is important that the caption alert the court to the request for relief.

Mr. Munford stated that in his opinion, the problem is too obscure to address in a national rule.

Judge Ripple called for a straw vote as to whether the rule should provide that a response may include a request for affirmative relief. Four members voted in favor of doing so, and five opposed. Given the opposition, Mr. Kopp suggested that the topic be addressed in the comment saying either that there must be a separate motion for affirmative relief or that the motion may be combined with the response. Mr. Levy pointed out that with a separate motion, the original movant would have the opportunity to respond.

Because the previous vote had been that the rule need not specifically address the combined document question, Judge Ripple asked for a clarifying vote on whether the Committee substantively supports the idea of a combined response and request for cross-relief even though the rule does not speak about it. Seven members indicated that they do support that approach. Therefore, the drafting subcommittee should try to address the matter in the notes to the extent appropriate. Mr. Froeb indicated that in drafting the rule it is important to keep in mind that many lawyers want to be the last party to speak.

7. Replies

Judge Williams asked the Committee to turn to page 15 of his memorandum and to proposed Rule 27(a)(6) dealing with a reply to a response. The DOJ draft allows a reply to be filed within three days after service of a response.

Judge Williams indicated that he finds replies very useful to clarify a point that appears for the first time in the response. He was surprised, therefore, to find opposition to the practice.

Judge Logan said that the Tenth Circuit's opposition was based upon its belief that most motions are relatively simple and that a reply is not needed and simply delays the ruling on the motion.

Mr. Kopp stated that if the rule does not authorize a reply and the party believes that it is needed, the party will file a motion for permission to reply.

Mr. Strubbe said that his circuit has always refused to file a reply to a response to a motion unless the panel wants a reply and orders one.

Mr. Levy said that a movant wants assurance that the court will not act before the movant has a chance to reply or at least to move for permission to reply. He expressed the opinion that it is only fair to provide the moving party with the last word.

Judge Keeton pointed out that although the draft says that a reply must be filed within three days after service, the time for reply is really much longer -- probably a minimum of eight days. Rule 26(c) provides three additional days after service by mail and that in some instances there would be an additional two days because of the week-end. So, the delay is more significant than the draft indicates.

Judge Williams pointed out, however, that the party with the right to reply is the moving party. If there is urgency to decide the motion, the moving party could waive the right to reply or act very quickly or the motion panel could shorten the time.

Judge Ripple asked the Committee to vote on whether the national rule should provide an opportunity to reply. Five members favored having a provision for a reply; four opposed it. Given that vote, he asked the Committee to vote on the three day period for filing a reply; all members voted in favor of that time limit.

Judge Williams pointed out that the DOJ draft, page 9 of his memorandum, proposed a seven page limit on a reply. Judge Williams suggested that if the motion and response are to be limited to 20 pages, that the reply should be one-half of that or 10 pages. Judge Ripple treated the suggestion as a motion and he seconded it; the Committee approved it unanimously.

8. Procedural Relief

The Committee then turned its attention to page 17 of the memorandum dealing with procedural orders. The DOJ draft, like current Rule 27, permits the court to dispose of a motion for procedural relief before a response to the motion is filed. The primary issue addressed in the comments on the draft is how "timely opposition to the motion that is filed after the motion is granted in whole or in part" should be treated. The DOJ draft said that it would be "treated as a motion to vacate the order." The Federal Circuit and the Seventh Circuit treat such responses as moot and the opposing party must file a motion to reconsider if he or she wants to the court to reexamine the appropriateness of the relief granted.

Judge Ripple outlined the possible approaches to the question. First, the response to the motion may be treated as a motion to vacate the order and ruled upon (the DOJ proposal). Second, the response may be treated as moot and not ruled upon. Third, if the party wants to press his or her opposition to the motion, the party must file a motion for reconsideration which addresses the court's order granting the motion. A straw vote was taken and the approach taken in the draft received no support. There was consensus, however, that the rule should address the need to file a motion for reconsideration.

The Committee broke for lunch at noon.

The meeting resumed at 1:20 p.m.

Judge Williams indicated that with regard to the DOJ proposed Rule 27 subdivision (b), governing procedural orders, there were some miscellaneous points to be discussed. Judge Posner had asked whether the language on lines 8 and 9 of the draft requiring "[a]ny party adversely affected by such action" to file a motion for reconsideration, referred only to decisions made by the clerk or to any order on a motion. The Committee generally agreed that it should be clarified that the requirement applies to all orders.

Judge Posner had also suggested that the rule clarify whether a party can suggest an in banc hearing on a motions matter. Rule 35 states that there may be an in banc hearing on an "appeal or other proceeding" and the general consensus of the Committee was that Rule 35 authorizes in banc consideration of a motion. The Committee, however, was hesitant to be more specific about the ability of a party to request in banc consideration either in the text of Rules 35 or 27 or in Committee Notes. The Committee feared that such a change might be taken as an invitation to request in banc consideration of motions. Judge Logan made a motion that the Committee make no changes either in the text or the Committee Notes; Mr. Munford seconded the motion. Six members voted in favor of the motion; no one opposed it.

Mr. Munford withdrew his suggestion (p. 17) that clerks be limited to deciding unopposed motions.

9. Power of a Single Judge to Entertain Motions

Judge Williams directed the Committee's attention to DOJ proposed subdivision 27(c) (p. 19) dealing with the power of a single judge to entertain motions and noted that it had elicited no unfavorable comments. The Committee also had no comments.

10. Number of Copies

Judge Williams asked the Committee to turn to page 20 and DOJ proposed subdivision 27(d) dealing with the number of copies of motion papers that must be filed. The Reporter pointed out that the DOJ prepared its proposal prior to the time that the Committee had generally addressed the number of copies problems. The Committee had made consistent changes in all of the rules dealing with numbers of copies and those amendments, including an amendment to Rule 27(d), were approved by the Judicial Conference earlier in the week and would be forwarded to the Supreme Court for its consideration. The Committee decided that no further changes should be made Rule 27(d).

11. Oral Argument

Judge Williams turned to page 22 of his memorandum and DOJ proposed subdivision 27(e) stating that motions will be decided without oral argument unless the court orders otherwise. Once again, there was no opposition to this proposal and the Committee had no suggestions to offer.

12. Preemption of Circuit Rules

Judge Williams then directed the Committee's attention to page 23 of the memorandum and DOJ proposed subdivision 27(f) concerning preemption. The DOJ draft suggests that the provisions of Rule 27 should preempt local rulemaking on motions. Judge Williams and Mr. Munford noted that the Committee had rejected a similar preemption provision when it was proposed for Rule 32. They said that whether the national rules should preempt local rulemaking is a generic issue and saw no justification for treating it differently in the context of motions than with regard to briefs. Judge Williams moved to delete subdivision (f); Chief Justice McGiverin seconded the motion. Mr. Kopp stated that the issue had been given a thorough airing during the discussions of Rule 32 and that he would defer to the Committee's earlier judgment. The Committee passed the motion unanimously.

Mr. Munford pointed out that the Second Circuit requires that a party file a notice of motion form. He suggested that the Rule be amended to state that a notice of

motion is not required. The members of the Committee generally agreed that it would be a good idea to eliminate that practice. Mr. Munford moved that the Committee proposal include a provision that no notice of motion should be required; he suggested that it might be placed with the provision stating that briefs are not required. Judge Williams seconded the motion and it was approved unanimously.

Judge Ripple thanked Judge Williams for all his work on this item and asked the subcommittee composed of Judge Williams, Mr. Froeb, and Mr. Munford, to remain in place to continue working on Rule 27.

Item 91-23

Item 91-23 is a suggestion that each side file a single brief in consolidated or multi-party appeals. The Reporter had prepared three basic drafts for the Committee's consideration and she briefly explained them as follows:

1. Draft one simply encourages a single brief.

2. Draft two requires a single brief to the greatest extent practicable and requires a party who files a separate brief to include a certificate stating the reasons it was necessary.

3. Draft three requires a single brief unless the court orders otherwise.

In the event that the Committee considers it appropriate to distinguish between civil and criminal cases, she had drafted variations on drafts two and three that gave the parties greater discretion to file separate briefs in criminal cases.

Chief Judge Sloviter stated that the Third Circuit has a variation requiring a party filing a separate brief to pay a separate filing fee.

Mr. Munford opened the discussion by expressing his hesitation to support any of the drafts. He stated that coordinating the preparation of briefs with other parties would be fraught with problems. As an example he stated that in a medical malpractice case where a patient visits four different hospitals and is misdiagnosed in all four, even though all the hospitals are on the same side of the case they will have different interests and their attorneys may have conflict of interest problems. In his experience when parties can file a single brief, they often do so. He suggested that the Committee make no change or adopt the Eleventh Circuit's one lawyer, one brief rule or the Third Circuit's rule that when a joint appeal is filed there be only one brief (a one fee, one brief rule).

Mr. Froeb strongly concurred. He said that he would rather have the number of

pages be divided by the number of parties on one side than be forced to join in a brief that he considered substandard.

Chief Justice McGiverin said that the Iowa Rule of Appellate Procedure 14(j) is the same as FRAP 28(i) and it works very well; therefore, he also favored making no changes.

Mr. Levy agreed. In many cases there are differences in the legal arguments made by parties on the same side, as well as differences of strategies. Furthermore, he indicated that he would be loathe to disclose publicly the reasons why the parties are unable to file a consolidated brief because often they are matters of strategy that the parties should not be required to disclose and upon which the judges should not be asked to rule.

Judge Williams stated his desire to join the practitioners based upon his experience in attempting to do collaborative academic work. He did state that he finds Rule 28(i) a little chilly in that it simply permits joinder in a single brief. For that reason he stated a preference for draft one which encourages the filing of a single brief.

Judge Hall spoke in favor of draft three. The Ninth Circuit currently has a local rule requiring parties in a civil case to file a joint brief to the greatest extent practicable and encouraging the filing of a joint brief in criminal cases. She does not find those provisions helpful and believes that something stronger is needed. She further stated that she believes the problem is even greater in criminal cases than in civil cases.

Judge Ripple noted that in some cases the legal arguments may be virtually identical but the real problem with cooperation is that the abilities of the lawyers are unequal and the reason they do not collaborate is unspoken -- the better lawyer will not give in and allow the weaker one to write any portion of the brief.

Mr. Kopp said that he understands why the court would not want to be drowned in repetitive paper but that good advocates know that it is better to get together because their single brief will have stronger impact. He suggested that there might be ways to address the problem other than by rule. For example, he suggested that if parties file duplicative briefs that both of them would not be awarded full costs. He further suggested that the Committee Note state that the court expects that in the interest of good advocacy parties will cooperate in the preparation of a single brief.

Mr. Munford said that Mississippi tried giving parties a choice between cooperating in the preparation of a single brief or dividing the pages between the parties on the same side. The problem with that approach is that there is nothing to bargain with; if a party wants his or her own pages there is nothing you can do about it. In criminal cases, he believes that the 6th Amendment and the increasingly stringent rules

on conflicts of interest are the driving force that require the defendants to have separate lawyers in the first place. He indicated that it would be ironic for one set of rules to say that each criminal defendant must have his or her own lawyer but when they get to the appellate court the defendants must file only one brief.

Judge Logan moved the adoption of draft one. Judge Boggs seconded the motion. Mr. Kopp asked whether that was the proper juncture to discuss the treatment of the government. He stated that he is not sure that it is appropriate even to encourage the government to file a single brief with a private party because the government is supposed to represent an independent interest. Encouraging the government to file a consolidated brief with a private party would send the message that a private party has a role in shaping the position of the government.

Judge Boggs stated that there are cases in which the government is involved in litigation as a property holder and in those cases the government is not unlike any other private party. In his opinion, draft one would not say anything affirmatively improper.

Mr. Kopp suggested that a Committee Note might cure his hesitation. The note might indicate that because of its duty to represent the public interest, a governmental party might find it inappropriate in most instances to join in a brief with a private party and that must be taken into consideration in applying the language of the rule.

Mr. Levy indicated that even when the government is a private property, it may be inappropriate to treat the government like any other party. There are special limitations upon the government. The government often does not assert certain arguments or defenses that a private party would assert and the process of consultation concerning the arguments that will be made in a government brief is quite different. In his opinion, it would send the wrong signal to encourage the government to join in a brief with other parties.

Judge Hall stated that government briefs are not the problem but noted that there are judges on her circuit who object to any special treatment for the government. For that reason, she believes that it is better to leave it to the court to decide whether the government would be required to join in a brief with a private party rather than flag the special treatment. She stated that draft one is milder than the Ninth Circuit's rule which is ineffective and she questioned whether it is worth making a change.

Judge Logan concurred that it may not be worth going through the whole rulemaking process to change from a rule stating that the parties may file a single brief, to one that encourages filing a single brief. Even after the change the rule would only include precatory language. Judge Logan, therefore, withdrew his motion.

Mr. Munford made a motion to leave the rule as it stands; Mr. Froeb seconded the motion. The motion passed by a vote of five in favor and four in opposition.

Item 91-24

In its response to the Local Rules Project, the Fifth Circuit suggested that the Advisory Committee on Appellate Rules consider amendment of Rule 29 governing a brief of an amicus curiae. The Fifth Circuit suggested that Rule 29 should specify which of the items required by Rule 28 for briefs of parties should be included in an amicus brief; that Rule 29 should establish a page limit for an amicus brief, and that Rule 29 should permit an amicus brief to be filed later than the brief of the party supported by the amicus.

The Reporter prepared two drafts for the Committee's consideration. Draft one was an entire rewriting of Rule 29. In addition to specifying the items that must be included in an amicus brief, draft one provided that an amicus brief may be filed 15 days after the brief of the party supported by the amicus and may not exceed 20 pages. Allowing the amicus to file after the party would avoid needless repetition of the party's arguments in the amicus brief and make the shorter page limits realistic. The rest of the briefing schedule, however, would be extended. Draft two was similar to draft one except that it required the amicus to file its brief at the same time as the party supported.

As a preliminary matter Chief Judge Sloviter asked the Committee to consider whether it wants to continue to permit an amicus brief to be filed with the consent of all parties. Sometimes whether a court will permit participation by an *amicus curiae* is hotly contested and there have been members of her court who have written dissents from decisions to permit participation of an *amicus curiae*. The provision in Rule 35 that permits the filing of an amicus brief upon consent of the parties imposes reading on a court even if there is no receptivity to it.

Mr. Munford also posed a number of questions:

1. He asked whether the rule should include standards for granting leave to participate as an *amicus curiae*. He noted that the Supreme Court Rule suggests that leave will be granted only if the amicus truly has something to add.
2. He noted that the Fifth Circuit rule states that an amicus brief should avoid repetition of facts and legal arguments contained in the principal brief. Since that is the purpose for the delay, he asked whether such language should be included at least in draft one.
3. With regard to draft one, he asked whether the time for the responsive brief should run from the time the court grants the motion for leave to file the amicus brief rather than from the filing date of the brief and motion for leave to file.

Judge Logan noted that the drafts pose four new questions: 1) whether an amicus should be able to file a reply brief;
2) whether there should be a page limitation for an amicus brief; 3) when the brief

should be filed; and,
4) whether the brief should accompany the motion seeking leave to file.

Judge Hall stated that it also would be helpful to establish a standard for accepting an amicus brief. Mr. Munford pointed out that Supreme Court Rules 37.1 and 37.4 attempt to do that. Sup. Ct. R. 37.1 states:

> An *amicus curiae* brief which brings relevant matter to the attention of the Court that has not already been brought to its attention by the parties is of considerable help to the Court. An amicus brief which does not serve this purpose simply burdens the staff and facilities of the Court and its filing is not favored.

Sup. Ct. R. 37.4 requires that the motion for leave to file must:

> concisely state the nature of the applicant's interest and set forth facts or questions of law that have not been, or reasons for believing that they will not be, presented by the parties and their relevancy to the disposition of the case.

Judge Ripple moved the adoption of language similar to Sup. Ct. R. 37.1 as prefatory to FRAP Rule 29. Mr. Munford seconded the motion. The motion passed unanimously.

1. Time for Filing an Amicus Brief

Judge Ripple then suggested that the Committee address the question of the time for filing an amicus brief. Draft one permits an amicus to file its brief 15 days after the principal brief of the party supported. Draft two requires the amicus brief to be filed within the time for filing the party's brief.

Judge Logan expressed a preference for requiring the amicus to file within the same time as the party because that requirement leaves the briefing schedule undisturbed.

Judge Williams said that he had no preference as to the time for filing the brief but he strongly urged that the rule establish a time for filing the motion for leave to file.

Mr. Kopp noted that the 15 day delay in draft one is modeled on the D.C. Circuit Rule which was adopted in an attempt to shorten amicus briefs. If the amicus files after the party, the amicus will know what the party has said and the amicus can focus its brief more closely. The staggered filing schedule permits the court to have a tighter page limit than otherwise would be reasonable.

Judge Logan stated that most amicus briefs do not attempt to cover ground not

covered by the party. Rather, they usually say in effect that there is a major interest group which concurs with the position of the party. Usually they simply state their interest and argue their one major point.

Judge Boggs said that an amicus frequently propounds a legal theory that the litigant does not believe is the most promising theory and as to which the litigant is unwilling to devote space. Judge Ripple agreed and said that in such cases the efforts of the party and the amicus are coordinated. In such cases the 15 day period is not necessary because the party and the amicus are aware of each other's arguments.

Mr. Froeb indicated that in any event, fifteen days is not sufficient time for an amicus to get the party's brief, read it, and write the amicus brief. The focusing that the staggered schedule hopes to achieve may be unrealistic given the short interim period.

Mr. Levy countered by observing that the staggered period gives the party some opportunity to have influence upon the amicus brief -- an opportunity that is effectively foreclosed when both are busy preparing briefs on the same schedule.

Judge Ripple called for a preliminary vote on whether there should be a staggered briefing schedule under which an amicus files later than the party he or she supports. Six members favored a staggered schedule and one member opposed that approach.

Given that vote, Judge Ripple asked the Committee to address the length of the delay. He noted that if the period is 15 days, when an amicus brief is filed in support of an appellee the reply brief would be due before the amicus brief. An appellant would file his or her reply without knowing whether an amicus brief will be filed in support of the appellee and without an opportunity to address the arguments made by the amicus.

Discussion followed about using a 7, 10, or 14 day delay and the effect of Rule 26(a) on time computation and about whether the responding party's time should begin to run from the filing of the motion for leave to file, assuming that the brief must accompany the motion, or from the time the court grants the motion.

Given that the Committee had not yet voted on whether the proposed brief must accompany a motion for leave to file, Judge Keeton suggested that resolution of that issue might ease the discussion about the running of the time for a responsive brief and thence about the length of the stagger. Seven members indicated that if a staggered briefing schedule were used, they would require that the proposed brief be filed with the motion.

Mr. Munford indicated that even with that requirement he believes the time should not begin to run until the court grants the motion. In some circuits leave to file is not routinely granted, the responding party, therefore, needs to know whether the

amicus brief is accepted before the party can finish its brief.

Chief Judge Sloviter expressed strong opposition to any proposal that would delay the briefing schedule. Letting an amicus brief delay the briefing schedule would be, she observed, letting the tail wag the dog.

Mr. Froeb noted that in his state system, the amicus must indicate that all the briefs are in and that the amicus has read them before it moves for leave to file. If the party wants to respond to something said by the amicus, the party must file a motion for leave to respond. He indicated that the system seems to work fine and that there is no delay in the regular briefing schedule.

Mr. Kopp indicated that the staggered system can work but that there should be no more than minimal delay in the briefing schedule. He concluded, therefore, that the responding party's time should begin to run when the motion and proposed brief are lodged.

Mr. Levy pointed out that under that scenario, an appellee may need to respond before the court grants an amicus leave to file. The party may use part of its brief to respond to an amicus brief that may never be accepted.

Judge Logan moved that there should not be any delay in the briefing schedule even though an amicus brief is filed on a staggered schedule. Most of the time the amicus brief will be received early enough for the party to include a response in its brief. If, however, significant new arguments are raised in the amicus brief, the party could file a motion requesting adequate time to respond. Judge Hall seconded the motion. Mr. Munford opposed the motion because the appellee will respond to the principal brief and use the filing of an amicus brief as an excuse to get the last brief in the case. Judge Logan pointed out that the court need not permit the response unless it thinks there is sufficient need for it. Judge Hall stated that in her experience the Ninth Circuit does not permit anyone respond to an amicus brief other than at oral argument.

Judge Ripple pointed out that the purpose of the 15 day stagger period is to let everyone know what everyone else is arguing in the case. If there is a 15 day stagger period but the briefing schedule is not delayed, achievement of that goal is undercut substantially. He suggested that the stagger period may be more accommodating to amicus briefs than is necessary and that the Committee might reconsider the wisdom of the 15 day delay.

Mr. Munford moved that the time for filing a responsive brief should run from the filing of the motion by the amicus for leave to file its brief. Specifically, he suggested that lines 60 through 62 of draft one, page 6, be amended to read: "Unless otherwise ordered, for purposes of Rule 31(a), the time for filing the next brief runs from the filing of the motion for leave to file. Mr. Munford stated that he would like to separate the

stagger issue from the question of whether the briefing schedule is otherwise extended. He would like to retain the stagger even if the briefing schedule is not extended at all. His motion dealt only with the briefing schedule. Mr. Kopp seconded the motion.

Judge Logan, however, moved for reconsideration of the 15 day stagger. He further proposed adding a new sentence at the end of subdivision (e) of draft two on page 10 of the memorandum. Subdivision (e) of the draft states that "[a]n amicus brief must be filed within the time allowed for filing the principal brief of the party supported. If the amicus does not support either party, the brief must be filed within the time allowed for filing the appellant's brief." Judge Logan suggested adding: "A court may permit later filing, in which event it must specify the period within which an opposing party may answer." That would make it clear that if a court permits an amicus to file a brief after the party supported, it can allow additional time for any responsive briefs. Mr. Froeb seconded the motion.

Judge Ripple called for a vote on Mr. Munford's motion. It was defeated; only two members favored the motion and five opposed it.

Judge Ripple then asked the Committee to consider Judge Logan's motion. Mr. Levy asked what would happen if an amicus brief is filed at the same time as the appellant's brief but the motion for leave to file is not granted within the time for filing the appellee's brief. Mr. Levy asked whether the appellee should respond to the arguments made by the amicus. Judge Logan said that if the amicus brief raises an issue that is important enough that a response to the argument is warranted, the appellee should treat the issue in his or her brief even though the court has not yet ruled on the motion for leave to file. He recognized that the court may never admit the amicus brief but stated that if the argument raised by the amicus is important, it needs to be met in any event.

Mr. Munford asked for clarification as to whether Judge Logan intended only to require that the motion for leave be filed within the time for filing the brief of the party supported, or whether he also intended to require the brief to accompany the motion. Judge Logan, responded that he intended the latter.

Mr. Munford also asked about the time for filing an amicus brief in support of a petition for rehearing. He pointed out that the current rule does not tie the time for filing to the principal brief, rather it requires an amicus brief to be filed within the time allowed the party whose position the amicus supports. Judge Logan responded that he intended to require filing within the time allowed for filing the principal brief of the party supported. He said that he has never seen an amicus brief in support of a petition for rehearing and if one were submitted it should be accompanied by a motion for leave to file it.

The discussion having concluded, Judge Ripple called for a vote on the motion. It

passed by a vote of seven in favor and one opposed.

2. Standards

Judge Ripple asked the Committee to consider lines 15 and 16 on page 9 which provide that a motion for leave to file must state "the reasons why an amicus brief is desirable." He suggested that the language from Sup. Ct. R. 37.4 should be substituted for lines 15 and 16. That language is: "The motion shall concisely state the nature of the applicant's interest and set forth facts or questions of law that have not been, or reasons for believing that they will not be, presented by the parties and their relevancy to the disposition of the case." He suggested that the Supreme Court language would provide the judge with some standards and also would guide the lawyer in fulfilling the requirement on lines 15 and 16. Judge Hall seconded the motion.

The Committee discussed the extent to which an amicus can raise new issues. The consensus was that an amicus cannot raise an issue not preserved by a party but that an amicus can provide additional arguments supporting a party's position on an issue. The question before a court of appeals, however, is usually much broader than that before the Supreme Court. Mr. Munford suggested that the language should be altered so that the amicus need only show that the facts or "arguments" have not been "adequately presented" by the party. Judge Keeton pointed out, however, that the Supreme Court will hear only the issues on which it has granted certiorari; whereas, the question before a court of appeals is whether the judgment of the district court is correct. Judge Ripple pointed out that Mr. Munford's language retains the idea that an amicus is subject to the laws of waiver and preservation of issues.

Judge Ripple's motion, as amended, passed unanimously.

3. Page Limitation

The next issue considered was the imposition of a page limit on amicus briefs. Both drafts impose a twenty page limit. Judges Boggs and Hall moved adoption of that limit.

Judge Ripple asked the Justice Department representatives whether 20 pages is long enough. Mr. Kopp said that in most instances it would be but that 25 might be more helpful.

Judge Logan spoke in favor of the motion noting that an amicus brief typically focuses on one issue and 20 pages is sufficient.

The Reporter pointed out that the draft permits the court to order otherwise either by local rule or by order in a particular case. Therefore, local rules such as the D.C. rule that permits 25 pages would not be in conflict with the national rule.

The motion passed by a vote of seven in favor, none in opposition, and one abstention.

4. Contents

Judge Logan requested that the Committee consider the language in the draft at the top of page 10 concerning the items that must be included in an amicus brief. He noted that the draft specifies the items that may be omitted but that he would prefer that the rule state positively those items that should be included.

The Reporter stated that a positive statement could be modeled on Sup. Ct. R. 37.6 which states that an amicus brief generally must comply with the requirements for parties' brief "except that it shall be sufficient to set forth . . ." The Reporter indicated, however, that she probably would advice adding a requirement that an amicus brief should include a table of contents and a table of authorities.

Judge Logan moved that the rule should list the items that should be included in an amicus brief in a fashion similar to that of Sup. Ct. R. 37.6. The items that he wanted included were: the interest of the amicus, the argument, and the conclusion as well as a table of contents and a table of authorities. Mr. Froeb seconded the motion. Judge Ripple suggested that requiring a summary of argument would be helpful in screening the briefs. Judge Logan amended his motion to include a summary of argument.

Mr. Munford remarked that the Sup. Ct. R. is confusing and does not clearly tell an amicus what should be included or excluded. While he had no objection to using a positive approach, he suggested that the rule should make it clear whether an amicus needs to do such things as file a certificate of interest. He thought that the list given was incomplete because it does not cover such topics as covers, typeface, form, etc. The Reporter responded that she understood the motion to include the cross-references in the draft at lines 19 and 20, so that the brief must comply with Rule 26.1, 28 and 32. Mr. Munford suggested that it would be clearer to state that an amicus must comply with 26.1 and 32, but with respect to Rule 28 a brief need only include . . .. Judge Logan and Mr. Froeb agreed to that amendment.

Mr. Levy asked whether an amicus actually needs to comply with Rule 26.1. He asked whether it would be grounds for recusal if a judge had some interest in an amicus or its related businesses? Chief Judge Sloviter stated that if participation of an amicus could cause disqualification of a judge, that may serve as grounds for refusing to allow the amicus to file a brief.

The discussion strayed into the question of whether the membership of a trade association could disqualify a judge if the association participates as an amicus. Mr. Munford suggested that 26.1 was aimed at parties and that a national trade association

with hundreds of members could not be expected to list all of its members every time it files an amicus brief.

Judge Boggs asked whether the recusal rules are applied with respect to an amicus given that the rules are aimed at disqualifying a judge with a financial interest in the outcome of the case. Judge Ripple and Chief Judge Sloviter said that a number of judges in their circuits treat the rules as applicable even though a judge may have no direct financial stake because of the appearance of impropriety that may arise if a judge sits on a case and the judge has an interest in an amicus or one of its affiliates. Of course, there is a difference between the participation of a large association such as the National Association of Manufacturers and the participation of a single corporation or small group of corporations. It is difficult to say that it would be improper for a judge to sit if N.A.M. is the amicus and if the judge owns stock in any U.S. manufacturing corporation. If however, the amicus group is composed of ten corporations and the judge owns stock in one or two of them, the appearance of impropriety may well arise.

Mr. Munford suggested that the issue be delayed until the Committee discusses the "affiliates" issue under 26.1. Chief Judge Sloviter suggested that the Advisory Committee should check with the Ethics Committee. She believes that a ruling has been issued on the question of whether the participation of an amicus may disqualify a judge.

Judge Hall stated that the Ninth Circuit believes that an amicus may disqualify a judge and for that reason she believes it is important to require the amicus to provide a certificate of interest with the brief.

Mr. Spaniol said that Sup. Ct. R. 29.1 exempts amicus briefs from the disclosure requirement. The comment, however, prompted discussion about whether the Supreme Court is required by law to obtain disclosure statements.

Mr. Munford moved that Judge Logan's motion be amended to delete the corporate disclosure requirement for amicus briefs. The motion died for want of a second. Judge Logan stated that he failed to second the motion because Rule 26.1 requires the naming only of parent corporations, subsidiaries, and affiliates. In his opinion the language of the rule does not require the naming of the members of a large trade association.

Judge Ripple called for a vote on Judge Logan's motion that the draft be amended to positively state the items that must be included in an amicus brief. The motion passed unanimously.

Mr. Levy stated that the discussion revealed a difference of opinion with regard to the application of Rule 26.1 to trade associations. Judge Ripple asked the Reporter to add a discussion of that issue to the Committee's docket.

5. Amicus Brief in Support of a Petition for Rehearing

The last issue discussed with respect to amicus briefs was whether a court should accept an amicus brief offered in support of a petition for rehearing. Judge Ripple indicated that his circuit receives such briefs. Little attention may be paid to a case until the court enters its judgment. Thereafter, an amicus may join the party in trying to explain the error of the decision.

Judge Hall asked whether the question should be limited to petitions for rehearing or also should include requests for an in banc hearing or rehearing. Judge Ripple responded that he hoped the Committee would address all such issues.

Mr. Munford suggested amending the draft rule so that it uses the language in the current rule requiring an amicus to file within the time allowed the party supported. There would be no express reference to the party's principal brief or to petitions for rehearing, etc. but the language would be broad enough to encompass all such instances. He further suggested that it is unnecessary to discuss instances in which an amicus supports neither party. Several judges responded, however, that there many instances in which an amicus takes no position as to affirmance. Mr. Munford therefore suggested that the sentence be amended to state that in such instances the amicus must file within the time allowed the appellant -- dropping the reference to the appellant's principal brief.

Judge Logan expressed hesitation to specifically mention that an amicus brief may be filed in support of a petition for rehearing. He feared that any such statement would encourage the filing of such briefs. On the other hand, he expressed support for Mr. Munford's language changes that would make the rule broad enough to cover the timing of such briefs. Judge Ripple suggested that a vote be taken on whether specific mention should be made of the possibility of filing an amicus brief in support of a petition for rehearing, etc. Five members supported that approach and two members opposed it.

Mr. Munford suggested that the language of lines 33 and 34 should be amended in accordance with his earlier suggestion. The Committee agreed. With regard to the second sentence, Mr. Munford noted that there could be difficulty with simply requiring a party that does not support either party to file within the time allowed the appellant. In some situations there is no appellant; for example, in a petition for mandamus. He suggested that the amicus be required to file within the time allowed the appellant or petitioner.

Mr. Froeb asked whether an amicus brief must confine itself to the record. He said that in his experience an amicus often attempts to raise facts that are not part of the record. He asked whether the rule should deter or prohibit the introduction of matters that are not part of the record.

Judge Ripple pointed out that the difference between constitutional facts and adjudicative facts can become quite blurry with an amicus. Discussion of background or contextual facts is permissible but that an amicus should not be talking about adjudicative facts that are part of the cause of action.

Judge Keeton expressed strong hesitation to address the issue. He said that the typical, useful amicus brief deals with constitutional facts or legislative facts -- facts about the economic, social, or political realities that have a bearing on the law making decision. It would be a very complex area to deal with in a rule.

Because she would not be able to attend the meeting the next day and was concluding her term as liaison to the Committee, Chief Judge Sloviter thanked the Committee for its hospitality and Judge Ripple thanked her for her valuable participation.

Judge Keeton distributed documents for the Committee's consideration in connection with the discussion it would have the following morning concerning facsimile filing.

The meeting adjourned at 5:00 p.m..

The meeting resumed at 8:30 a.m. on September 23rd in rooms B & C of the Education Center of the Federal Judiciary Building.

Judge Ripple opened the morning by outlining the matters he hoped to discuss during the remainder of the meeting. He indicated that the first matter for discussion would be the special assignment from the Judicial Conference dealing with filing by facsimile. Upon completion of that discussion, he stated that he would take up items 91-25 and 92-4, both of which deal with Rule 35 and suggestions for rehearing in banc. Because the Committee had already approved some changes to Rule 35, Judge Ripple thought it would be desirable to complete all other items bearing on the in banc rule so that all changes could move forward together. Judge Ripple indicated that he would reserve some time at the end of the meeting for the Reporter to discuss the items listed as "Report Items" on the agenda.

Judge Ripple then asked Judge Keeton to begin the discussion of the facsimile filing materials.

Fax Filing

1. Background

Judge Keeton explained the need to get a proposal ready, if possible, for consideration by the Judicial Conference in September 1994. That meant that if any rule amendments are needed, they must be approved by the Advisory Committee at the September meeting and published by November 1 along with the rules approved by the Standing Committee at its June meeting. Judge Keeton stated that approval for publication of any proposed rule changes bearing on facsimile filing would likely be handled by the Standing Committee by telephone.

In order to facilitate that process Judge Keeton had prepared and distributed the previous evening a redraft of existing Rule 25. He worked from the draft of the rule just approved by the Judicial Conference for submission to the Supreme Court. Judge Keeton's redraft read as follows:

Rule 25. Filing and Service.

(a) Filing.

(1) A paper required or permitted to be filed in a court of appeals must be filed with the clerk. Filing may be accomplished

(A) by mail addressed to the clerk;

(B) by facsimile transmission, by means meeting the standards then in effect under Guidelines for Receiving Facsimile Transmissions promulgated by the Judicial Conference of the United States, if the court of appeals by local rule or by order in a particular case has approved facsimile transmission; or

(C) by filing with a single judge, with that judge's permission, a motion that may be granted by a single judge, in which event the judge must note thereon the filing date and give it to the clerk.

(2) Filing is not timely unless the paper is received by the clerk or the single judge, or the facsimile transmission is received by the clerk, within the time fixed for filing, except that briefs and appendices are treated as filed on the date of mailing if the most expeditious form of delivery by mail, other than special delivery, is used.

(3) A paper filed by an inmate confined in an institution is timely filed if deposited in the institution's internal mail system on or before the last day for filing. Timely filing of a paper by an inmate confined in an institution may be shown by a notarized 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.

(4) The clerk must not refuse to accept for filing any paper presented

for that purposed solely because it is not presented in proper form as required by these rules or by any local rule or practice.

* * * * *

(c) Manner of Service. Service may be personal, by mail, or by facsimile transmission if permitted by the court of appeals by local rule or by order in a particular case. Personal service is complete on delivery of a copy to a clerk or other responsible person at the office of counsel. Service by mail is complete on mailing. Service by facsimile transmission is complete upon electronic acknowledgement of receipt by means meeting the standards then in effect under Guidelines for Receiving Facsimile Transmissions promulgated by the Judicial Conference of the United States.

(d) Proof of Service.

[insert, in line 43 of the draft approved by the Judicial Conference in September 1993, after "Mailing" the words "or facsimile transmission," and in line 44, after "mailed" the words "or transmitted."]

Judge Keeton indicated that he would ask the Committee to focus first on the redraft of Rule 25. He noted, however, that the Committee also must look at the Guidelines for Facsimile Filing that were presented to the Judicial Conference. Judge Keeton stated his belief that the Guidelines need further revision.

Judge Keeton indicated that he would like the Committee to consider whether there are any parts of the Guidelines that should be included in the rules. He stated that it would be desirable to avoid inclusion of material in the rules that does not need to be there. Inclusion in the rules of technical standards governing the types of machinery to be used, etc. would be especially undesirable because amendment of the rules is both cumbersome and time consuming and it would be difficult for the rules to keep pace with technological advancements.

Judge Keeton indicated that authorizing the Judicial Conference to amend the Guidelines without review by the Supreme Court and Congress presents an issue similar to the one the Committee previously discussed concerning delegation to the Administrative Office of printing standards. He indicated, however, that he believes there is a strong argument that establishing technical standards in Guidelines promulgated by the Judicial Conference is not inconsistent with the Rules Enabling Act. Judge Keeton stated, however, that the Committee might want to consider that issue.

In addition to any question about the Rules Enabling Act, Judge Keeton, said that he also was concerned about accessibility of the Guidelines. He indicated that he would like the Guidelines to be printed for public comment at the same time as the proposed rule amendments. He also believes that the Guidelines should be transmitted to both

the Supreme Court and Congress. He further suggested that they might be printed as an appendix to the rules or in the notes.

As a last matter, Judge Keeton suggested that he would like to further amend his redraft of the Guidelines. His original objective had been to remove any mention of "filing" from the Guidelines because he believes that all "filing" rules should be contained in the rules. As a consequence, he had changed the title from "Guidelines for Filing by Facsimile" to "Guidelines for Receiving by Facsimile." He indicated that he thought a better title would be "Guidelines for Facsimile Transmission."

For clarification Judge Logan asked about the origin of the Guidelines. Judge Keeton responded that the original draft had been prepared by the Court Administration Committee. Judge Logan then asked whether it would be appropriate for a rules committee to suggest changes in the Guidelines. Judge Keeton responded that he believes such recommendations would be appropriate. In fact, the draft from which he was working was altered last summer by a working group composed of the advisory committee reporters who redrafted the Guidelines in an attempt to minimize the conflicts between the Guidelines and the rules. Judge Keeton reported that there had been some sentiment at the Standing Committee's June meeting to simply disapprove the draft Guidelines because of the conflicts between the Guidelines and the rules. Judge Keeton had opposed a simple rejection of the Guidelines because he feared that there would be members of the Judicial Conference who favored getting the guidelines in place and might adopt them as originally drafted rather than suffer any further delay. Therefore, he had organized the drafting subgroup during the Standing Committee meeting.

Discussion followed concerning possible problems with the Rules Enabling Act. Judge Keeton believes that delegation by rule to the Judicial Conference of power to fashion guidelines differs from the Committee's earlier problems with delegation of printing standards. In this instance, the Judicial Conference has already promulgated Guidelines. Those Guidelines permit the courts to accept facsimile filings in emergencies. The current proposal is, therefore, simply to amend those Guidelines. So, the Conference has already taken an affirmative position on its power to promulgate guidelines.

With regard to the proposed amendments to Rule 25, Judge Keeton suggested that there be another change to Rule 25(e) to accommodate the fact that parties are often required to provide multiple copies of the document filed. Judge Keeton suggested adding the following language to Rule 25(e):

> "and, when facsimile transmission is permitted, may allow extra copies to be presented within a reasonable time after the facsimile transmission is received."

That addition would allow a clerk to refuse to receive more than one copy by facsimile transmission and require that the party follow the facsimile transmission with hard copies.

Judge Logan asked whether the style subcommittee would be able to review the draft rules before publication. Judge Keeton stated that Mr. Brian Garner and the style subcommittee would be occupied with the Civil Rules Committee until after that committee's meeting in late October. Therefore, the amendments would be prepared for publication without review by the style committee.

Having finished its preliminary discussion, the Committee turned its attention to the task of approving some version of Rule 25 and of the Guidelines.

2. Guidelines vs. Rules

Judge Ripple discussed the importance of the distinction between information that should be in the Guidelines versus that which should be included the national rules. Judge Ripple emphasized that he would like to keep everything that a practitioner needs to know in the rules. In contrast, he stated that provisions regulating court conduct need not be in the rules and, therefore, could appropriately be included in the Guidelines. Judge Ripple questioned whether the material in parts V, VI, and VII of the draft Guidelines should be there. He stated that a requirement that certain items be included on a cover sheet is so basic that it should be found in either the national or local rules.

Judge Keeton suggested the possibility that some of the information in the Guidelines could be placed in a form that would follow the rules. Mr. Munford suggested that placing the Guidelines in an appendix to the rules might also serve the same purpose. Judge Keeton indicated, however, that the drawback of either approach is that amendment of either a form or appendix requires the full procedures under the Rules Enabling Act.

Judge Williams noted that if everything a practitioner needs to know should be in the rules rather than the Guidelines, then even all the technical standards in part III of the draft Guidelines would need to be in the rules.

Mr. Munford pointed out that not all information that practitioners need is included in the rules. With regard to the fee for filing a notice of appeal, the rules simply refer to the statute setting the fee. The amount of the fee is not included in the rules. Judge Keeton stated that the statute actually does not set the fee; the statute authorizes the Judicial Conference to set the fee schedule and, in fact, the fee schedule set by the Conference is not as readily accessible as he would like. Parties and lawyers who are unfamiliar with the fee schedule usually receive the information from the clerk's office.

Judge Ripple argued that the last sentence of existing Rule 25(a) means that the technical standards need not be included in the rule. That sentence states: "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." That sentence was approved by Congress and has the force and effect of law. The intent of that sentence was to authorize the Judicial Conference to establish technical standards. Further, the technical standards do not impact the daily practice of law. Rather, a practitioner acquiring a piece of machinery has a one time question about whether the equipment meets the federal standards. Judge Ripple argued that parts V, VI, VII, and VIII(1) & (2) should be in the rules.

Mr. Froeb and Mr. Munford indicated agreement with Judge Ripple's basic principle that directions to practitioners should be easily accessible. Mr. Froeb asked, however, whether it is important that all the information enumerated in part VII of the Guidelines be on the cover page of a fax transmission. Mr. Strubbe replied that the court probably needs all of that information. Judge Keeton asked whether it is truly necessary that all of the information be included on the fax cover sheet as distinguished from the rest of the document. Judge Keeton suggested that perhaps all of part VII could be omitted.

Judge Logan suggested that both parts V (Original Signature) and VI (Transmission Record) should be included in the national rules but that perhaps all other matters could be covered by local rules.

Mr. Kopp suggested breaking the whole issue down into two tracks. The courts that are interested in permitting fax filings on a routine basis need guidelines so that they can do so. As soon as there are guidelines those courts can proceed by local rule. While there may be some need for uniformity in this area as in others, the only matter as to which there is urgency is the technical standards. Therefore, he suggested that the rules process may proceed to develop uniform national rules but not on such a fast track as the guidelines.

Judge Keeton responded that it would be consistent with the objectives of the Court Administration Committee to have a national rule that authorizes local facsimile filing rules. He expressed continuing concern, however, about the possibility that there might be an intervening standard (the Guidelines) that would restrict a local court's authority to develop such rules. In other words, there remains the possibility that even if a national rule grants broad authority to fashion local rules, the Guidelines could be adopted and narrow the scope of local rulemaking authority on the topic.

Judge Keeton stated that it might be possible to retain parts I, II, and III of the Guidelines, along with Rule 25(a)(1)(B), and recommend that the rest of the matters currently covered by other parts of the Guidelines could be referred to the local courts for adoption as local rules.

Judge Logan agreed. Because Rule 25(a) requires a local rule, it can be the responsibility of the circuit adopting such a rule to include in it all information needed

by a lawyer who files by fax. He suggested, therefore, that the national rule need do nothing more than authorize local rules permitting fax filing. Eventually the Committee may feel ready to establish national standards but because of the newness of the entire process this may be an appropriate topic for local experimentation.

Judge Keeton suggested that if the Committee favors such an approach it should make a recommendation as to the limitations of the guidelines. That is, the Committee should identify that material that it believes is appropriate for the Guidelines and recommend that all other matters be covered either by national or local rule.

Judge Ripple then stated that the first question the Committee should address is whether, as a matter of principle, matters that affect the conduct of practitioners should be in rules rather than the Guidelines. If the vote is that such matters should be incorporated in the rules, then it would be appropriate to discuss whether they should be in the national rules or local rules. If the vote is that it is not necessary to include practitioner related directions in rules, then the Committee could discuss simple coordination of all the information.

To move the discussion along Judge Ripple moved that all matters concerning the conduct of litigation should be in either national or local rules. Judge Logan seconded the motion. Judge Williams asked whether the motion was subject to Judge Ripple's earlier *caveat* on technical requirements such as the type of machines. Judge Ripple replied affirmatively.

Mr. Kopp voiced strong agreement with the motion. He pointed to the original signature provision in the proposed Guidelines. That provision says that if the original signed document is not filed, it must be maintained until the litigation concludes. Mr. Kopp stated that any such requirement should be as accessible as possible and, therefore, should be included in a rule.

Mr. Froeb agreed in principle but argued that there are many matters that practitioners know intuitively and it may not be necessary to have all of the detailed directions currently found in the Guidelines.

The discussion having concluded, Judge Ripple called for a vote on the motion to include directions to practitioners in rules rather than the Guidelines. The motion passed unanimously.

3. National Rule vs. Local Rules

Following the decision-making matrix he had announced earlier, Judge Ripple stated that the next question was whether any necessary directions to practitioners should be in national or local rules. He suggested that Judge Keeton's draft of Rule 25 serve as a starting point and he specifically asked the Committee to focus on draft Rule

25(a)(1)(B). Judge Ripple noted that the language of that subparagraph differs from the corollary provision in current Rule 25(a) and he asked Judge Keeton whether he intended to accomplish something different. Judge Keeton stated that his intent was the same but that he had simply attempted to restructure the rule in the manner of the style subcommittee. Given that understanding, Judge Ripple suggested that the Committee discuss whether some matters should be governed by national rule and whether others (and which ones) could be subject to local variation.

On the basis of prior discussion, Judge Ripple suggested that one possibility would be to recommend that:

1. the national rules simply continue to authorize local rules;
2. the Guidelines include only parts I, II, and III of the current draft guidelines (*i.e.*, all practitioner conduct should be excised from the Guidelines); and
3. local rules be used to regulate practitioner conduct.

Mr. Froeb moved that approach; the motion was seconded by Judge Hall.

Judge Hall suggested that the Committee might expedite the local rules process by sending the circuits a model rule. The suggestion was taken as a friendly amendment to the motion.

Judge Logan expressed support for the motion. He focused upon the original signature requirement. While he had originally thought that such a requirement should be in the national rule, upon reflection he had changed his mind. Because it is necessary to have a local rule authorizing facsimile filing, he thought that it would not be inappropriate for some courts to say that a person who files by fax must file the original by next mail while others might be content to allow the party to simply retain the original until the conclusion of the litigation.

Vote was taken on the motion and it passed unanimously. Judge Ripple summarized the Committee's understanding of that vote as follows: 1) the question of practitioner conduct with respect to facsimile filing should be covered by local rule, at least for the near future; 2) the Committee adopted that approach because local experimentation would provide an opportunity to perfect the local rules before going to a national rule; and 3) the Committee would prepare a model rule or checklist to be used by the circuits in the development of their local rules.

4. The Guidelines

The discussion then turned to the draft Guidelines and an effort to identify those provisions that should remain in the Guidelines and those that should be excised.

Upon examining part I, Mr. Strubbe suggested that part I paragraph (3) might arguably govern attorney conduct and therefore should be excised from the Guidelines. That provision is entitled "Prohibited Documents" and provides:

Papers may not be sent by facsimile transmission to the court for filing unless the court has expressly authorized such transmissions by local rule or by order in a particular case. In addition, bankruptcy petitions and schedules may not be sent by facsimile transmission.

Judge Keeton offered a proposed modification of that provision which he thought could make its retention consistent with the Committee's intent:

A communication by facsimile transmission must not be treated by a clerk as received for filing unless the court has expressly authorized facsimile transmission by local rule or by order in a particular case.

Judge Ripple noted that even the amended provision comes close to the line that the Committee had decided to draw. If the effort is to keep the Guidelines fairly stark, perhaps this could be eliminated from them.

Mr. Munford stated that he believed that any such provision would conflict with the Rule 25 provision prohibiting a clerk from refusing to file a document because it is not in proper form.

Judge Ripple moved that part I paragraph (3) be deleted from the Guidelines. Judge Logan seconded the motion. It passed unanimously.

The discussion moved to part II of the Guidelines. Judge Keeton suggested that his handwritten material be substituted for part II paragraph (2). Judge Keeton's proposed part II paragraph (2) would define "Receive by facsimile" as follows:

(2) "receive by facsimile" means a clerk's receiving by one or the other of the following means:

(A) receiving by a facsimile machine in the clerk's office of a facsimile transmission of a document;

(B) receiving in the clerk's office a printed copy of a document sent by facsimile transmission to a facsimile machine located outside the clerk's office."

Judge Keeton indicated that the latter provision would allow a local rule to receive a document lacking an original signature because it was sent to a fax machine outside the clerk's office and that document was presented for filing.

Mr. Munford asked whether the provision for documents received by a facsimile machine located outside the clerk's office has anything to do with facsimile filing. He stated that in his view it makes no difference whether a document has a facsimile of a signature or an original signature. Mr. Munford further indicated that in his opinion the clerk would not be free to refuse a document under the new provision in Rule 25 prohibiting a clerk from refusing to file a document because it fails to comply with a requirement of form. The Committee discussed the issue and there was clear division of opinion. Judge Ripple concluded that the signature question clearly must be addressed

in the model local rule.

Judge Keeton's redraft of part II subparagraph (2)(B) was amended by deleting the words "printed copy of a" so that it read, "receiving in the clerk's office a document sent by facsimile transmission to a facsimile machine located outside the clerk's office." Having approved that change, part II was unanimously approved for retention in the Guidelines.

The Committee then turned its attention to part III of the Guidelines, the technical requirements provisions. Judge Logan noted that it governs sending as well as court receipt of facsimile transmissions. Judge Ripple noted once again his belief that Rule 25 currently authorizes the Judicial Conference to establish such technical standards and that Judge Keeton's redraft of Rule 25(a)(1)(B) retains that provision.

Because Committee attention had returned to Rule 25, Judge Keeton noted that if the title of the Guidelines is changed to Guidelines for Facsimile Transmission then there would need to be a language change in Rule 25(a)(1)(B). In the second line of that paragraph the word "receiving" should be stricken as well as the "s" at the end of the word transmission in the third line. The same changes were approved in 25(c).

Mr. Kopp asked whether the technical requirements in Part III should apply to transmission to an outside agency as well as those directly to a court. The Reporter stated that clearly some of them should apply even to the outside agency because they affect the quality of the document received. The Committee concluded that the provisions of part III should be retained in the Guidelines.

The Committee considered part IV governing resource availability. Part IV indicates that courts will not receive additional personnel or funds for equipment due to adoption of a fax filing policy. Because that part of the Guidelines is so clearly addressed to the courts and not to practitioners, there was agreement that it belongs in the Guidelines.

Judge Ripple moved that part V -- dealing with original signatures -- be made part of the model rule because it deals with practitioner conduct; Judge Boggs seconded the motion. The motion passed unanimously.

For clarification, Mr. Strubbe asked whether the rules should require, as the Guidelines suggest, that in the absence of a local rule authorizing facsimile transmissions on a regular basis, a court order would be necessary to permit facsimile filing. Mr. Strubbe noted that in his court such requests are currently handled by the clerk's office rather than by a judge. Judge Ripple suggested that when preparing a model local rule, that issue will need to be addressed, but that the Committee's current concern was simply to determine which material should remain in the Guidelines and which should be excised.

Judge Ripple moved that part VI -- dealing with transmission records -- should be deleted from the Guidelines and considered as part of the rulemaking process. The motion was seconded by Mr. Munford. Mr. Froeb suggested that such a requirement would be unnecessary even in the rules. The motion passed unanimously.

Judge Ripple then moved that part VII -- dealing with cover sheets -- should be deleted from the Guidelines and made part of the rulemaking process; Judge Hall seconded the motion. It passed unanimously.

The Committee focused upon part VIII, dealing with collection of filing fees and authorizing additional fees for facsimile filing. Mr. McCabe pointed out that the pertinent statutes, §§ 1913, 1914, 1915, and 1930, say that the Judicial Conference shall prescribe all fees and the clerks may only charge fees authorized by the Judicial Conference. Judge Keeton concluded that the statutory directives make it unnecessary to include the provisions in part VIII in either the national or local rules. Judge Ripple moved that part VIII be left intact and that it be retained in the guidelines; the motion was seconded and passed unanimously.

At 10:30 a.m. the Committee took a 15 minute break.

Judge Ripple continued the discussion of facsimile filing by noting that although the Guidelines make no mention of "service" by fax, some members of the Judicial Conference anticipated that the rules would address the question of service by facsimile. Judge Ripple suggested that in light of the decisions already made by the Advisory Committee, it would be consistent to let local rules govern service by facsimile, at least in the first instance. He asked the Committee, therefore, to turn to Judge Keeton's draft of Rule 25(c) and suggested that the first sentence be adopted. "Service may be personal, ~~or~~ by mail, or by facsimile transmission if permitted by the court of appeals by local rule or by order in a particular case." The last sentence of Judge Keeton's draft of that paragraph was considered unnecessary. Judge Keeton explained that he had drafted the last sentence before the Committee's decision to omit from the Guidelines any matter bearing on an attorney's conduct.

Judge Ripple moved adoption of the first amended sentence. It was seconded by Judge Hall and unanimously approved.

Judge Logan volunteered to head the subcommittee to draft a model local rule. He expressed the desire to complete the work within the next month. He asked the Reporter, Judge Hall, and Judge Boggs to join him on the subcommittee.

Judge Logan asked whether the Committee had adopted the change in 25(c) and the additional sentence in 25(e). Judge Keeton stated that in light of the items taken out of the Guidelines, there were no substantive changes made by his draft except the one sentence in 25(c) dealing with service. Therefore, it was concluded that only the one

sentence change in Rule 25(c) needed to go out for publication.

At the conclusion of the discussion of the fax filing issues there was approximately one hour remaining in the meeting time. Judge Ripple suggested that the Committee spend that time discussing Item 91-25, regarding the contents of a suggestion for rehearing in banc, and Item 92-4, adding intercircuit conflict as a basis for granting hearing or rehearing in banc, because the Committee had recently worked on other amendments to the in banc rule, Rule 35.

Item 91-25

The Local Rules Project recommended that the Advisory Committee examine local rules adopted by nine circuits which outline the form of a suggestion for in banc determination. When responding to the Local Rules Project, the Fifth Circuit recommended that the Advisory Committee consider adoption of 5th Cir. R. 35. The Advisory Committee initially discussed both suggestions at its December 1991 meeting. At that time the Committee expressed no strong interest in specifying the contents of a suggestion for in banc consideration. Since that time, however, two members of the Advisory Committee had indicated interest in the earlier proposals.

The Reporter began the discussion by explaining the two drafts presented in her memorandum. Draft one, found at page 4, involved some reorganization of the rule as well as one major substantive change in subdivision (b). The heart of the draft was a new requirement that a petition for in banc review must begin with a statement demonstrating that the case meets the criteria for in banc consideration. It said that a petition must begin with a statement that either

> (1) the panel decision conflicts with a decision of the United States Supreme Court or of the court to which the petition is addressed (citations to the conflicting case or cases is required) and that consideration by the full court is necessary to secure and maintain uniformity of the court's decisions; or
>
> (2) the appeal involves one or more questions of exceptional importance; each such question must be concisely stated, preferably in a single sentence.

Draft two, beginning at page seven of the memorandum, would require the same statement demonstrating that the case is appropriate for in banc consideration and also added a list of items that must be included in any such petition, for example a corporate disclosure statement, statements of the issues and of the case. It also included a length limitation applicable to all such petitions.

Judge Ripple suggested that the Committee first consider whether it is interested in making the sort of changes suggested in either of the Reporter's drafts and then address the Solicitor General's suggestion.

Judge Logan expressed a preference for draft one if any changes are to be made.

He thinks that the detail specified in draft two is unnecessary. He questioned, however, the need to make any changes. Mr. Munford agreed that the level of detail in draft two is unnecessary.

Judge Hall said that she likes draft one but would like to add to it the page limitation in draft two.

Consensus developed to concentrate on draft one but to include the page limitation in draft two.

With regard to moving the paragraph dealing with length from draft two, it was suggested that subdivision (b) of draft one be structured in the same way as draft two. That is, that subdivision (b) should have two paragraphs: paragraph (1) dealing with the contents of the petition and paragraph (2) dealing with length. It was further suggested that if paragraph (b)(2) (lines 34-38) were moved to draft one, that it be shortened so that it ends after the words "15 pages" on line 35. Several judges indicated, however, that they find a table of contents and authorities important in such petitions and that those items should not count against the page limits.

Judge Ripple indicated that the intent of a limitation on length is to limit the number of pages that a judge must read and consider in deciding the case. He said that the items excepted from the page limit in the draft generally are important to have in a petition for rehearing in banc and help a judge to understand and organize the material in the text. Judge Logan asked whether it would be sufficient to limit the petition to 15 pages "of text." He feared that the explicit exceptions in the draft for corporate disclosure statements, tables of contents, and table of authorities would raise an inference that a petition should contain those items and it is not the practice in the Tenth Circuit to include them.

Mr. Munford suggested using the language in the petition for rehearing rule, Rule 40(b). The limitation does not have any exclusions. It says:

> The petition shall be in a form prescribed by Rule 32(a), and copies shall be served and filed as prescribed by Rule 31(b) for the service and filing of briefs. Except by permission of the court, or as specified by local rule of the court of appeals, a petition for rehearing shall not exceed 15 pages.

The possibility of including no page limit in Rule 35 was also considered on the theory that Rule 40(b) would govern because a request for in banc consideration is, in 99% of the cases, a petition for rehearing. (The other 1% are those cases in which there is a request that the initial hearing be in banc.)

Because Rule 40 focuses heavily on petition for panel rehearing, both Mr. Munford and Judge Williams stated that there should be a separate length limitation in

Rule 35 even if it were only a cross-reference to Rule 40(b). Mr. Munford suggested, however, that Rule 35 may need to require a corporate disclosure statement because new judges will be participating and they need to be informed about the parties affiliates.

Judge Ripple summarized the alternatives before the Committee as follows:

1. the page limitation provisions in draft two could be moved in their entirety to draft one;
2. a petition could be limited simply to fifteen pages;
3. a petition could be limited to fifteen pages of text; or
4. the length provision could simply cross-reference or be modeled upon Rule 40(b).

Judge Ripple called for a straw vote indicating each member's preference. Alternative one received one vote; alternatives two and three each received two votes; and alternative four received four votes.

After additional discussion, a final vote was taken on the options receiving the most support during the discussion, options three and four. On final vote, a limitation to fifteen pages of text received four votes, and a provision modeled on Rule 40(b) received five votes. The provision approved specifically stated that

> Except by permission of the court, or as specified by local rule of the court of appeals, a petition for hearing or rehearing in banc may not exceed 15 pages excluding those pages excluded by Rule 28(g).

Item 92-4

The Committee then addressed the Solicitor General's suggestion that intercircuit conflict should be made an explicit ground for granting an in banc hearing.

Mr. Kopp recounted the history of the proposal which has been narrowed since it was originally submitted by Solicitor General Starr and which, in its present form, has the support of current Solicitor General Days. He noted that four circuits already have rules or internal operating procedures that recognize a conflict with another circuit as a legitimate basis for granting a rehearing in banc. Existing Rule 35(a) provides that a matter of "exceptional importance" is grounds for a rehearing in banc and that language allows a petitioner to argue that intercircuit conflict raises an issue to the level of exceptional importance. Mr. Kopp noted that the proposal would not require a court to grant an in banc hearing whenever there is an intercircuit conflict. It would simply make it clear that the existence of such a conflict is an appropriate consideration weighing in favor of granting in banc review and may help a lawyer to focus his or her argument.

Mr. Kopp also used broader philosophical arguments to support the proposal. The existence of an intercircuit conflict means that federal law is being interpreted differently in different parts of the country simply because there is an administrative

division of the federal courts into circuits. Although the Supreme Court is the institution intended to resolve such conflicts, given the limited ability of the Supreme Court to grant certiorari there are conflicts among the circuits that are not being resolved by the Supreme Court. In an era when significant structural reforms, such as the intercircuit tribunal, are being proposed to deal with this problem, Mr. Kopp argued that it would be better for the existing courts to use every device they have at their disposal to address the problem before there is consideration of major restructuring.

Mr. Kopp moved that the Solicitor's proposal be incorporated in draft one. Judge Ripple seconded the motion.

Judge Logan indicated that he would include a reference to intercircuit conflict in (b)(2) - that an appeal involving one or more questions of exceptional importance may be appropriate for in banc hearing. He indicated, however, that he would not include such a reference in (b)(1) - that when a panel decision is in conflict with a decision of the U.S. Supreme Court or of the court to which the appeal is addressed an in banc rehearing is appropriate. The panel issuing a decision, obviously does not believe that it conflicts with holdings of the United States Supreme Court or of the circuit, because it would be inappropriate to issue such a decision. However, a panel may enter a decision in direct conflict with a decision of another circuit. Because the former are grey and the latter may be clear, Judge Logan stated that he feared inclusion of a reference in (b)(1) to panel decisions in conflict with decisions in other circuits might give rise to an inference that an in banc hearing must be granted whenever a panel decision conflicts with the opinion of another circuit.

Judge Ripple expressed general support for the proposal but agreed with Judge Logan's reservation. Mr. Kopp emphasized that the draft was not intended to make the granting of a hearing in banc mandatory.

Because the draft had been prepared prior to the Item 91-24 drafts, it was not integrated with those new drafts. The Reporter asked Mr. Kopp for clarification as to whether the proposal was to amend Rule 35(a) or (b). Mr. Kopp responded that the proposal is to amend 35(a) but that if it were accepted, some adjustments would need to be made to 35(b). He emphasized again that the proposed amendment to 35(a) was not intended to create any category of mandatory in banc review, and that any such implication should be avoided.

Judge Williams suggested that intercircuit conflict might be treated as a separate category of cases as to which in banc review would be appropriate.

Judge Ripple indicated that there seemed to be a consensus that the Rule should include some reference to intercircuit conflict as grounds for granting rehearing in banc. Given the late hour and the fact that the Committee had decided upon a new draft of Rule 35, he suggested that the Committee take a vote in principle on the suggestion and

ask the Reporter to work out the language for consideration at the next meeting. Judge Boggs so moved and Judge Hall seconded the motion. The motion passed unanimously.

Mr. Strubbe indicated that the caption to (a) probably should be changed from "When Hearing or Rehearing in Banc Will Be Ordered" to "When Hearing or Rehearing in Banc May Be Ordered." Judge Ripple also suggested that on page 6, line 40 probably also needs revision. The provision that "a vote need not be taken to determine whether the cause will be heard or reheard in banc unless a judge requests a vote" could permit a senior judge or a judge sitting by designation to call for a vote on a rehearing in banc.

The Reporter noted that proposed amendments to Rule 35 were forwarded to the Standing Committee last summer and are scheduled to be published this fall. She inquired whether it would be appropriate to request that those proposals not be published at this time but be held until these additional changes to Rule 35 are ready for publication; that would allow all changes to be published at the same time and avoid confusion.

Mr. Rabiej stated that the Standing Committee had given the Chairman discretion to determine the publication date of the proposed amendment so that Judge Keeton had authority to withhold publication of any or all of the rules. Judge Keeton approved the withdrawal of the Rule upon the request of the Advisory Committee.

Miscellaneous

The Reporter circulated the latest version of the "uniform" rules on technical amendments and uniform numbering of local rules. She described the changes that had been made since the last time the Advisory Committee reviewed the rules. The changes were made to conform the appellate version to the versions approved by the Standing Committee last June. She asked that if any members had any strong objections to any of the provisions, they contact her as soon as possible in view of the November 1 publication date.

The Reporter also indicated that the November 1 publication packet would include a FRAP proposal that had not been previously considered by the Advisory Committee. The proposal conforms Rule 4(a)(4) to changes proposed in Civil Rules 52, 59, and 60. Those rules are currently inconsistent as to whether posttrial motions must be "served" within 10 days, "filed" within 10 days, or "served and filed" within 10 days. The Civil Rules Committee will publish proposed amendments requiring that all ten day posttrial motions must be "filed" within 10 days. Conforming amendments to Fed. R. App. P. 4(a)(4) will also be published.

As the Committee prepared to adjourn, Judge Logan expressed his appreciation for Judge Ripple who has served the Committee as Reporter, Member, and Chair, for fourteen or fifteen years. Mr. Froeb was also concluding his six year term on the

Committee, and Judge Logan expressed his gratitude to him for all his work. There was a round of applause for both.

Judge Ripple wished Judge Logan good luck and thanked Mr. Rabiej for all his work. Judge Ripple also thanked Judge Keeton for all of his support and all that he did to make the Rules Committees run smoothly and effectively.

Respectfully submitted,

Carol Ann Mooney

Items III. A-H
Will Be Circulated
At A Later Time.

AGENDA ITEM - IV. A
Denver, Colorado
April 25-26, 1994

TO: Honorable James K. Logan, Chair, and Members of the Advisory Committee on Appellate Rules

FROM: Carol Ann Mooney, Reporter

DATE: March 24, 1993

SUBJECT: Item 86-23, proposed amendments to Rules 25(c) and 26(c) and (d) re: service on inmates

1. Background

The Committee was originally asked to address the problem a prisoner may have in filing a timely objection to a magistrate judge's report. Because a prisoner's receipt of mail is often delayed, a prisoner may not receive a magistrate judge's report until late in the ten day period provided for responding, or even until after the close of the period.

At its October 1992 meeting, the Committee decided that amendment of the appellate rules could not cure the time problem with regard to a magistrate judge's report because trial court rules are involved. There was, however, some thought that the Committee should try to address the general problem of service on institutionalized persons. That problem is the converse of the one addressed by the Committee in response to Houston v. Lack. Houston addressed the problem that a *pro se* prisoner has in timely filing documents because a prisoner has no control over when prison officials place the prisoner's mail in the United States mail -- a problem with outgoing mail. The focus of this item is that an incarcerated person also does not have control over when mail is delivered to him or her -- a problem with incoming mail.

Draft amendments were prepared for the Committee's consideration at its April 1993 meeting. The Committee decided to circulate the drafts to the Chief Judges of the circuits, to the Committee of Staff Attorneys, and to the Advisory Committee of Defenders.

It is the purpose of this memorandum to summarize their responses and make suggestions for the Committee's action.

2. Draft Amendments

The following draft rules and committee notes were circulated:

Rule 25. Filing and Service

* * *

(c) *Manner of Service.*-- Service may be personal or by mail. Personal service includes delivery of the copy to a clerk or other responsible person at the office of counsel. Service by mail is complete on mailing. Service on an inmate confined in an institution is not complete, however, until the copy is delivered to the inmate.

* * *

Committee Note

This rule provides that service is complete upon mailing. In a number of instances a party must act within a certain number of days after being served. To compensate for mailing time, Rule 26(c) provides that whenever a party is required or permitted to respond within a prescribed period after service and service is by mail, three days are added to the time for responding. The rules do not recognize that delivery of mail to an inmate confined in an institution may take longer than the normal time.

The time between depositing a paper in the mail and actual receipt of the paper by an inmate confined in an institution may be longer than the usual mailing time simply because the document must be processed by the institution's internal mail distribution system. Because of the need to screen mail coming into a prison to prevent contraband or weapons from entering the prison and to detect escape plans or to prevent disruptive materials from entering the system, even more delay is likely. In federal prisons properly marked legal mail may be opened only in the presence of the prisoner and arrangements for that process also may cause delay. Extremely long delays between mailing and receipt occur when a prisoner is transferred without notice to the court or the serving party. *See, e.g.,* Grandison v. Moore, 786 F.2d 146 (3d Cir. 1986).

This amendment provides that service on a inmate confined in an institution is not complete until the copy is delivered to the inmate. As the preceding discussion reveals the Committee believes that in most instances, service upon inmates will be by mail. The amendment does not distinguish, however, between personal service or mail service. In either case, service is not complete until the copy is delivered to the inmate.

When service is personal, that is when a copy is left with a responsible party at the institution for delivery to the inmate, there may be delay between leaving the document and its delivery to the prisoner. The need to screen the mail or to have an official open the mail in the inmate's presence may cause delay even when service is "personal." Therefore, the amendment simply provides that service upon an inmate is not complete until the copy is received by the inmate.

Rule 26. Computation and Extension of Time

* * *

(c) *Additional Time After Service by Mail.*-- Whenever a party is required or permitted to ~~do an~~ act within a prescribed period after service of a paper upon that party and the paper is served by mail, 3 days ~~shall~~ are be added to the prescribed period. When a document is mailed to an inmate confined in an institution, no additional time will be added to the prescribed period because such service is not complete upon mailing; it is complete only when the copy is delivered to the inmate.

(d) Timely Responsive Action by an Inmate.-- Whenever an inmate confined in an institution is required or permitted to act within a prescribed period after service of a paper upon the inmate, timely action may be shown by a notarized statement or by a declaration (in compliance with 28 U.S.C. § 1746) setting forth the date the inmate received the paper.

Committee Note

Subdivision (c). This amendment is a companion to the amendment to Rule 25(c). The amendment to Rule 25(c) states that service of a paper upon an inmate confined in an institution is not complete until the copy is delivered to the inmate. This amendment makes it clear that when a copy is mailed to an inmate three days are not added to the time for responsive action because the time for responsive action begins to

run from the date the inmate receives the document, the date service is complete, not from the date of mailing.

Subdivision (d). This new subdivision is also a companion to the amendment to Rule 25(c) which provides that service of a paper upon an inmate is not complete until the copy is delivered to the inmate. This new subdivision provides that an inmate's notarized statement or declaration setting forth the date of service may be used to show the timeliness of an action which must occur within a prescribed period after service upon the inmate. This parallels recent amendments to Rules 4(c) and 25(a) which allow timely filing to be shown by a notarized statement or declaration setting forth the date when an inmate deposited the paper in the institution's internal mail system.

3. Responses

A. Chief Judges

Judge Ripple wrote to the chief judge of each circuit in August 1993 asking for their opinion, and the opinion of each judge on their court, regarding the proposed amendments. Seven circuits responded. Of the seven circuits: three oppose the amendments; three support them; and the sixth circuit judges split rather evenly between those who support and those who oppose the amendments.

Those who oppose the amendments generally do so because they believe that current authority and procedures allow them to adequately protect an inmate's interests and that the proposed amendments will create delay and uncertainty. The problem with the proposed amendments is that there is no mechanism for knowing when an inmate receives a document so both the court and opposing parties will not know when to expect responsive pleadings.

A summary of the comments follows. Copies of the letters are attached to this memorandum.

1. D.C. Circuit The D.C. Circuit requires the Bureau of Prisons to obtain an inmate's signature on an acknowledgement of receipt. In the D.C. Circuit, therefore, there is no problem that requires a rule change. (Reporter's Note: Because the D.C. Circuit deals primarily with persons incarcerated in federal institutions, it is uniquely able to obtain institutional cooperation. Other circuits routinely deal with cases involving both federal and state inmates.)

2. 1st Circuit The problem of delay in prison mail has been handled adequately by granting extensions of time and, when necessary, by reconsideration of a decision and even recall of a mandate.
There are two problems with the proposed amendments:

a. The litigants and the court will not know when an inmate receives a document and, therefore, will not know when a response is due from the inmate.
b. The amendments may indirectly impose additional duties on the clerk in those instances in which the clerk is required to serve papers. Might the clerk have a duty to ascertain that service is actually completed?

3. 6th Circuit The Chief Judge circulated Judge Ripple's letter and individual judges responded.

a. Judge Engel - strongly supports some such rule change but believes that the draft is impractical because the prisoner is the sole determiner of when he received a document. Judge Engel suggests including a 30 day period (or 15, or 45) beyond which the response time cannot be extended on a claim that the copy has not been delivered to the inmate.

b. Judge Kennedy - agrees that the additional three days added to a response time when service is accomplished by mail is often inadequate when the party served is institutionalized. She opposes the draft amendments, however, because they would create uncertainty. She notes that a court cannot require an institution to record the date that a document is actually delivered to an inmate and, even if an institution did so, an interested party might have no access to that information except by deposition. As an alternative, Judge Kennedy suggests that an additional 5 or 7 days be added to an inmate's response time when the inmate has been served by mail.

c. Judge Lively - agrees there is a problem and with the general approach taken in the draft. He wonders if the uncertainty problem could be dealt with by requiring an inmate to sign a receipt at the time of personal delivery.

d. Judge Martin - supports the solution in the proposed draft.

e. Judge Siler - supports the proposed draft but questions "how the return is to be made."

f. Judge Wellford - suggests that the following language be added to the draft of Rule 25(c)

> or to his attorney of record. If service upon an inmate is not effectuated within ten days of mailing to his last known address, it may be effectuated as directed by the district judge or the magistrate judge assigned.

4. 7th Circuit Individual responses were also received from 7th Circuit judges:

a. Judge Cummings - supports the draft amendments.

b. Judge Manion - supports the draft amendment as long as prison officials can act unilaterally without the inmate's cooperation.

c. Judge Posner - prefers the present informal practice under which an inmate's case is not dismissed unless the inmate misses a deadline by far more time than is plausibly attributed to a delay in delivery of a document. He believes that draft amendments would give rise to proof of delivery problems and engender collateral litigation.

d. Judge Rovner - supports the draft amendments.

5. 9th Circuit Opposes the amendments because of the delay and uncertainty they will engender. Also points out that the amendments will cause confusion unless there also is a similar proposal to address instances in which an inmate must respond within a given time from entry of an order rather than from service by a party. The circuit currently uses flexible deadlines and reinstatements to protect the interests of incarcerated litigants and believes that they provide sufficient safeguards.

6. 10th Circuit The majority of the judges approve the draft amendments but suggest that the prisons should be consulted concerning alternatives or problems they see with application of the rule. In addition, they raise some questions:
a. If service cannot be presumed at some point, is the court precluded from closing an appeal?
b. Will the amendments string out the filing of briefs so that the deadlines in Rule 31 are ineffective?
c. Will the change apply to the timeliness of appeals under FRAP 4(a)(6), or is the timeliness of a notice of appeal governed by the civil rules?

Two tenth circuit judges suggest an alternate approach. They suggest that service by mail on an inmate should be presumed complete within 3 days and that the inmate should have the burden of rebutting the presumption when the inmate's responsive filing would otherwise be untimely or when the inmate seeks to set aside or reopen some action on the basis of lack of notice.

Another judge suggests that the time of receipt can be determined if service is by certified mail, return receipt requested. (Reporter's Note: Another commentator states that certified mail receipts are usually signed by prison mail room personnel.)

Another judge questions when, if ever, the new rule would be likely to make a significant difference.

7. Federal Circuit Chief Judge Nies and one other federal circuit judge approve the amendments

B. Staff Attorneys

The Staff Attorneys were consulted because they deal with motions for extension of time and they would likely have a pragmatic reaction to the proposals. Staff attorneys from seven circuits provided responses. They generally oppose the draft amendments because they do not provide a way of knowing when, or whether, service has occurred. Absent that knowledge, the court or an adverse party proceeds with peril. Several of the staff attorneys also point out that if service is not complete until a document is actually delivered to an inmate, a party serving an inmate has no way to assure that timely service will occur. Because of that problem, they suggest that "service" for purposes of satisfying a party's obligation to serve an inmate should be separated from "service" for purposes of triggering an inmate's obligation to respond.

1. D.C. Circuit The staff attorney from the D.C. Circuit says that there is no need for a rule change. The D.C. Circuit requires the Bureau of Prisons to obtain an inmate's signature on an acknowledgement of receipt and in those instances in which there is some doubt as to an inmate's receipt of an order or pleading, the benefit of the doubt is given to the inmate. Another alternative would be to extend the response time for an inmate (to 30 days, or 40, or 45) and assume receipt.

2. 1st Circuit Opposes the proposed amendments because the litigants and the court will not know when an inmate receives a paper (as a result neither the court nor the other parties will know when the inmate's response is due) and the amendment may indirectly impose additional duties on the clerk. As to the latter, if the rules require a clerk to serve the parties (Fed. R. App. P. 3(d), 15(c), 21(b), and 45(c) require a clerk to serve the parties) it is possible that the clerk will have a duty to ascertain whether service is actually completed through delivery. Liberal extensions of time and motions for reconsideration or for recalling the mandate are adequate to deal with the problem of delay in prison mail.

3. 3rd Circuit Opposes the proposed amendments because there is no practical mechanism for determining when service has occurred and neither the other parties nor the court will know when the inmate's responsive pleading is due. As a result there will be an additional burden on the prison system to provide more specific information about mail delivery; that will create a staffing problem for the federal prisons and a federalism problem as to state prisons.

Suggestion: the rule could contain a presumed date of delivery such as 10 or 14 days after service by mail.

4. 7th Circuit Opposes the proposed amendments. When delay in delivery of a paper to an inmate causes a failure to respond in a timely fashion, the problem is better handled by an extension of time or reopening of the period to respond. Prisoners often do not respond to motions or briefs, and absent a response the court will not know when, or whether, the prisoner has been served. Without such knowledge the court may not be able to act. The rules which require or permit action within a certain time after being served include only:

a. Rule 5 (appeal by permission under 28 U.S.C. § 1292(b));
b. Rule 5.1 (appeal by permission under 28 U.S.C. § 636(c)(5));
c. Rule 6(b)(2)(ii) and Rule 10(b)(3) (designation of record on appeal);
d. Rule 24(a) (proceeding *in forma pauperis*);
e. Rule 27(a) (motion)
f. Rule 30(b) (determination of contents of appendix);
g. Rule 31 (brief)
h. Rule 39(d) (objection to bill of costs).

5. 8th Circuit Points out two problems with the proposed amendments:
a. The proposed amendments state that service on an inmate is not complete until the inmate receives the paper. A party with an obligation to serve an inmate within 10 days cannot satisfy that obligation by depositing the paper in the mail on the 10th day because the service is not complete until receipt. In fact, there is no way for the serving party to make certain that service will be timely. Any amendment should separate the issue of timely service (which should be complete upon mailing) and an inmate's time for responding (which may run from some later time).
b. The rule should work both ways and recognize that there are not only delays in delivering mail to inmates but also that when an inmate serves another party by mail, it may take more than 3 days for the paper to leave the institution.
(Reporter's Note: The Rule changes made in response to Houston v. Lack deal with filing of documents by inmates, but not with service of documents by inmates.)

6. 10th Circuit The idea is sound but because the amendments make no provision for determining when service has occurred, they could create chaos. Can a court or an adverse party proceed on the assumption that service has been accomplished without actual knowledge that it has? In order for the amendments to work there must be a simple low-cost method of determining the delivery date.

7. 11th Circuit Approves the concept and agrees that the problem needs to be addressed but expresses two concerns with the draft.
a. The amendments do not protect a party who is obligated to serve an inmate

within a prescribed time; there is no way the party can assure delivery within the time required by the deadline. Like the 8th Circuit, the 11th suggests separating what constitutes service for the person serving an inmate and what constitutes service for purposes of the inmate's response to the paper served.
b. The draft of Rule 26(d) does not make it clear who must provide the notarized statement or declaration.

C. Committee of Defenders

No response was received from the Committee of Defenders.

4. Committee Options

The Committee could decide to take no further action because it concludes that existing authority and procedures allow the courts to adequately protect an inmate's interests and the amendments would place unacceptable burdens on the courts and opposing parties.

If, however, the Committee decides that it should pursue the idea of developing a rule that addresses the difficulties caused by the delay in delivering documents served on prisoners, the existing drafts must be refined or even wholly recast. Upon review of all the comments, it seems clear to me that the existing drafts contain significant problems which must be addressed.

I believe that three of the problems identified can be handled by redrafting. The fourth problem is more difficult and may well lead to the conclusion that the enterprise should be abandoned. I will discuss the three drafting problems first because they will provide some background for discussion of the fourth problem.

1. The draft amendments state that service on an inmate is not complete until the inmate receives the document. A party with an obligation to serve an inmate within a certain number of days cannot satisfy that obligation by depositing the paper in the mail on the last day because the service is not complete until receipt. In fact, there is no way for a serving party to make certain that service will be timely. That is a serious problem. The timeliness of service on an inmate should not be dependent upon the efficiency of the institutional delivery system. Furthermore, if service by mail is generally complete upon mailing, mailing to an inmate within the time allotted should be sufficient to discharge the party's obligation.

That problem can be addressed by separating what the serving party must do to complete service from that which triggers the inmate's duty to respond. Something like

the following might work:

Rule 25. Filing and service

* * *

(c) *Manner of Service.*– Service may be personal or by mail. Personal service includes delivery of the copy to a clerk or other responsible person at the office of counsel. Service by mail is complete on mailing. Service on an inmate confined in an institution is not complete for purposes of the inmate's obligation to respond to the document served, however, until the copy is delivered to the inmate.

* * *

2. The draft amendments provide that service is not complete until the inmate receives the document. Neither the court nor the other parties will know when the inmate receives the document and, therefore, they will not know when the inmate's responsive document is due. This will interfere with the court's ability to schedule its work and, in those instances in which the inmate chooses not to respond, may leave the court and the party in a sort of limbo without knowledge of whether service was ever completed.

Some of the commentators suggest that using certified mail return receipt requested or requiring the inmate to sign a receipt might cure this difficulty. I do not think that either option presents a pragmatic solution.

It is my understanding that personnel in prison mail rooms often sign return receipts and, therefore, the receipts are not a reliable indicator of when the inmate personally receives the document. I fear that if the rules were to direct that a return receipt must be signed by the inmate personally, we would open a can of worms involving postal regulations as well as federalism issues.

As to the alternate suggestion, while the rules might require any inmate involved in federal court litigation to sign a receipt for a court document mailed to the inmate, would it be appropriate for the rules to require the institution, especially a state institution, to return the receipt to the court? If the burden of returning the receipt were placed on the inmate rather than the institution, compliance would likely be spotty. If the receipt stays at the institution, neither the court nor the other parties have any

greater knowledge about the date of delivery than if there were no signed receipt.

Other respondents suggest two alternate approaches. First, rather than tying the time for an inmate's response to the receipt of the document, the time for an inmate's response could be extended for some set period beyond the additional three days provided in Rule 26(b). This approach would recognize that mail delivery to an inmate is typically slower than usual and it would eliminate the uncertainty caused by linking the response time to the inmate's actual receipt of the document. Second, the basic rules could remain unchanged, thus requiring an inmate to respond within the same number of days after service as all other parties, but service by mail on an inmate could be made only presumptively complete within 3 days. If an inmate's responsive filing would otherwise be untimely, the inmate would have the burden of rebutting the presumption.

The first approach, extending an inmate's response time, would require amendment of Rule 26(c) but not amendment of Rule 25. That is, service on an inmate would be complete under Rule 25 when the party mails the document to the inmate both for purposes of the serving party's obligation and for purposes of triggering the inmate's response time. The amendment to Rule 26 would give the inmate additional time to respond. Rule 26 might look something like the following:

Rule 26. Computation and Extension of Time

* * *

(c) *Additional Time After Service by Mail.*-- Whenever a party is required or permitted to ~~do an~~ act within a prescribed period after service of a paper upon that party and the paper is served by mail, 3 days ~~shall be~~ are added to the prescribed period except that when a document is served by mailing it to an inmate confined in an institution 10 days are added to the prescribed period.

If the Committee favors this approach, obviously the number of days is open for discussion.

The second approach, "the presumptively complete" approach is more complex. Rule 25 currently provides that "[s]ervice by mail is complete upon mailing." To state that it is only "presumptively" complete as to inmates reintroduces the first problem, that the serving party loses control over the timeliness of service. If we were to use the proposed solution to the first problem (separating completion for purposes of the party's obligation to serve from the inmate's obligation to respond) and add to it that service is

only "presumptively" complete for purposes of the inmate's obligation to respond, I think we end up with a very fuzzy provision. Rather than amend Rule 25, I think it would be better to amend Rule 26. Something like the following might work:

Rule 26. Computation and Extension of Time

* * *

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

(d) Timely Responsive Action by an Inmate.-- Whenever an inmate confined in an institution is required or permitted to act within a prescribed period after service of a paper upon the inmate, the additional three days provided by subdivision (c) when service is by mail, shall be presumed adequate. An inmate may rebut the presumption by showing that the inmate did not receive the paper within three days after mailing. In such an instance, the court may grant an extension of time to respond.

~~(d)~~ (e) Proof of Service. . . .

Even this approach seems awkward. Subdivision 25(c) does not really create a presumption that three days is adequate, it simply adds three days whenever service is by mail. Moreover, this approach might give rise to questions about the soundness of the three day rule for nonincarcerated parties. Given the unreliability of the mail service, surely it is common for papers to take longer than three days to reach the party served. Why should inmates have the ability to "rebut the presumption" and not other parties?

3. The amendments are one sided in that they recognize that an inmate may need additional time to respond to documents served on the inmate. The other side of the coin is that delays are also likely when an inmate serves a document on another party by depositing the document in the institutional mail system. The amendments make no accommodation for such delays. The first approach taken to the preceding problem might be expanded to take account of such delays as follows:

Rule 26. Computation and Extension of Time

* * *

(c) *Additional Time After Service by Mail.*-- Whenever a party is required or permitted to ~~do an~~ act within a prescribed period after service of a paper upon that party and the paper is served by mail, 3 days ~~shall be~~ are added to the prescribed period except that when a document is served by mailing it to an inmate confined in an institution, or when an inmate confined in an institution serves a document by mailing it, 10 days are added to the prescribed period.

4. The most difficult problem brought to light by the comments is that the amendments deal only with an inmate's obligation to respond following service of a document and do not similarly treat the obligation to act after entry of a judgment or order. Under the existing rules the time to act is determined in like fashion whether the triggering event is service or the court's entry of a judgment or order; the time runs from the date of service or the date of entry of the judgment or order. Confusion and a trap for the unwary is the likely result if the time to act following service runs not from the date of service but from the date of receipt, but the time to act following entry of a judgment or order runs from the date of entry rather than from the date of receipt.

A number of rules require a party to act within a period of time after entry of a judgment or order.[1] In general those rules make no accommodation for the fact that a

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[1] Fed. R. App. P. 4(a)(1), 4(a)(6), and 4(b) (generally the time for filing a notice of appeal runs from the date of entry of the judgment or order appealed from);

Fed. R. App. P. 5(a), (d) (a petition for interlocutory appeal under 28 U.S.C. § 1292(b) must be filed within 10 days after entry of the order appealed from);

Fed. R. App. P. 6(b)(2)(i) (in bankruptcy case in which a motion for rehearing is filed, the time for filing the notice of appeal runs from entry of the order disposing of the motion for rehearing);

Fed. R. App. P. 13(a) (time for filing a notice of appeal from a tax court decision runs from entry of the Tax Court decision);

Fed. R. App. P. 39(d) (bill of costs due within 14 days after entry of judgment); and

Fed. R. App. P. 40(a) (petition for rehearing may be filed within 14 days after entry of judgment) [Reporter's Note: amendments currently before the Supreme Court

party may not receive notice of the entry of the judgment or order.[2] The commentator suggests that if "receipt" of a document served on an inmate is necessary to start the running of the response time, it will cause confusion if the time for acting following a court's entry of judgment starts upon entry rather than upon receipt.[3]

Whether the amendments continue to measure the time for responding from "receipt" of a served document or they add additional days to the response time when a document is served by mail on an inmate, it could be problematic to extend similar treatment to the time for acting after entry of a judgment or order. Four of the six rules[4] in which time limits run from the entry of an order or judgment involve the time for bringing a notice of appeal, the fifth involves the time for filing a bill of costs and the sixth involves the time for filing a petition for rehearing (and by cross-reference the time for filing a suggestion for rehearing in banc). Because of the importance of these filings, it may be difficult to defend extending the time only for inmates rather than for any party who fails to receive timely notice of the entry of the judgment or order.

Expanding the time within which a notice of appeal may be brought (by stating that the time runs from receipt of notice of a judgment or that for inmates the time is "x" days longer) may present other problems as well. Such a change arguably crosses the line from procedure to substance in violation of 28 U.S.C. § 2072(b).[5]

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would change the time to 45 days in civil cases involving the United States.]

[2] Fed. R. App. P. 4(a) is the exception. Rule 4(a)(6) provides that a court may reopen the time for appeal if "a party entitled to notice of the entry of judgment or order did not receive such notice from the clerk or any party within 21 days of its entry and . . . that no party would be prejudiced" thereby. A motion to reopen the time for appeal must be filed within 7 days of receipt of the notice but in no event later than 180 days after entry of the judgment or order.

[3] The confusion may well be aggravated by Fed. R. App. P. 45(c). That rule requires the clerk to "serve a notice of entry by mail to each party to a proceeding" whenever a court of appeals enters an order or judgment.

[4] See note 1 above.

[5] Section 2072 states that the Supreme Court has power to prescribe general rules of practice and procedure for cases in the United States district courts and courts of appeals. Subdivision (b) states: "Such rules shall not abridge, enlarge or modify any substantive right. . . ."

The time within which an appeal must be brought is established by statute.[6] If amendments to the Fed. R. App. P. expand the time for bringing an appeal they arguable expand substantive rights.[7]

The debate about the ability of the rules to expand the time for bringing an appeal beyond the time provided in the statute is ongoing. The provision in Rule 4(a)(6) allowing a court to reopen the time for filing a notice of appeal when a party does not receive timely notice of entry of judgment is a relatively new amendment which became effective December 1, 1991. It expanded the time for bringing an appeal beyond the time established by 28 U.S.C. § 2107. On December 9, 1991, a bill was signed which amended § 2107 to conform to the new rule. Some Congressional staff made it clear that the reason for the statutory amendment was their belief that extensions of the time for bringing appeal require statutory authorization.

In short, expanding the time for filing a notice of appeal is a significant move that may require Congressional cooperation.

If the Committee agrees that the draft amendments would create confusion unless similar amendments are made to the rules that measure the timeliness of an action from the entry of an order or judgment, I believe that the whole topic needs further discussion and study before it can be ready to move forward. I also suggest that any such step should be discussed with and, to the extent possible, coordinated with the Civil Rules Committee.

---

[6] In a civil case 28 U.S.C. § 2107 establishes the general time limits. As to an interlocutory appeal under 28 U.S.C. § 1292(b), that section states that the appeal must be taken within 10 days of entry of the order. Review of Tax Court decisions is governed by 26 U.S.C. § 7483. Review of administrative agency actions is governed by the various statutes applicable to the agencies.

The time for bringing an appeal in a criminal case is set, however, by the rules rather than by statute except that the time for the United States to bring an appeal is established in 18 U.S.C. § 3731.

[7] The contrary argument is that the time within which a right must be exercised is a procedural matter. If a rule expands the time beyond that provided in the statute, 28 U.S.C. § 2072(b) provides that the later adopted rule governs. Section 2072(b) states: ". . . All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect."

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT
UNITED STATES COURTHOUSE
CONSTITUTION AVE. & THIRD ST. N.W.
WASHINGTON, DC 20001-2866

ABNER J. MIKVA
CHIEF JUDGE

(202) 273-0375

September 7, 1993

Honorable Kenneth F. Ripple
United States Court of Appeals
for the Seventh Circuit
208 U.S. Courthouse
204 South Main Street
South Bend, Indiana 46601

Dear Judge Ripple:

I write in response to your letter of August 13, 1993, concerning the possible amending of the appellate rules governing service so that service upon an inmate is complete only when the inmate receives the document.

It has been the D.C. Circuit's practice to require the Bureau of Prisons to obtain an inmate's signature on an acknowledgement of receipt. This practice has worked well. In the rare case when there is some doubt as to whether or not service has been made, the benefit of the doubt is always given to the inmate.

In short, as far as this circuit is concerned, there does not appear to be any problem that needs to be addressed by a rule change.

Very truly yours,

Abner Mikva

Abner J. Mikva

8623

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT
U.S. COURTHOUSE, ROOM 1617
BOSTON, MASSACHUSETTS 02109

STEPHEN BREYER
CHIEF JUDGE

617-223-9014

August 23, 1993

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

Dear Ken,

I enclose a memo from our Staff Attorneys on the proposed FRAP amendments. It seems to me that if the problem varies from circuit to circuit, the solution might also vary from circuit to circuit. In any case, I should appreciate your taking these views into account and letting me know whether or how you might accommodate these concerns.

Best wishes,

Yours sincerely,

Stephen Breyer
Chief Judge

UNITED STATES GOVERNMENT

memorandum

DATE: August 19, 1993

REPLY TO ATTN OF: Kathy Lanza

SUBJECT: Letter from Kenneth Ripple
Proposed Amendments to FRAP 25 and 26

TO: Judge Breyer

Mr. Scigliano and Dan oppose the proposed amendments to FRAP 25 and 26. Vinnie and I agree with their view, which is set forth below.

Presently, service on litigants, including inmates, is complete on mailing, FRAP 25(c), and when a party is required or permitted to act within a specified period after service and service has been by mail, three days are added to the specified period to allow for the delay in mailing, FRAP 26(c). The potential problem, however, is that mail delivery to inmates may take much longer than delivery to non-incarcerated persons, with the result that the period for response may run before the inmate receives the motion or brief. The proposed amendment addresses this problem by providing that "[s]ervice on an inmate confined in an institution is not complete . . . until the copy is delivered to the inmate." In other words, the time for an inmate to respond to a § 1292(b) petition (FRAP 5(b)), a petition for leave to appeal under 28 U.S.C. § 636(c)(5) (FRAP 5.1(b)), a statement of issues, designation of the record, or designation of contents of appendix (FRAP 6(b), 10(b)(3)), motion (FRAP 27), or brief (FRAP 31) would run not from the date of mailing, but from the date the inmate actually receives the filing.

There are at least two problems with this amendment. First,

litigants and the court will not know when the inmate receives something. No longer is there a set time frame for response. How long, for example, should a court wait for a response from an inmate before ruling on a motion filed by a non-inmate? Because we will not know when an inmate received a motion, we will not know when the response time commenced or expired. See Fed. R. App. P. 27(a) ("[a]ny party may file a response in opposition to a motion . . . within 7 days after service of the motion").

Second, will the amendment indirectly impose additional duties on the clerk? Various of the FRAP rules direct the clerk of the district court or court of appeals to serve items. For example, FRAP 3(d) directs the district court clerk to "serve notice of the filing of a notice of appeal by mailing a copy thereof to counsel of record of each party . . . or, if a party is not represented by counsel, to the last known address of that party . . .. When an appeal is taken by a defendant in a criminal case, the clerk shall also serve a copy of the notice of appeal upon the defendant, either by personal service or by mail addressed to the defendant." If, under the proposed amendment to FRAP 25(c) service on an inmate is not complete until the item is delivered to the inmate, a litigious inmate might argue that the clerk has a duty to ascertain whether service was actually completed through delivery. See also FRAP 15(c) ("A copy of a petition for review or of an application or cross-application for enforcement of an order shall be served by the clerk of the court of appeals on each respondent in the manner prescribed by Rule 3(d)); FRAP 21(b) (order directing an answer to

a mandamus petition "shall be served by the clerk . . . on all . . . parties to the action in the trial court"); FRAP 45(c) ("Immediately upon the entry of an order of judgment the clerk shall serve a notice of entry by mail upon each party to the proceeding together with a copy of any opinion respecting the order or judgment . . .."). If service is not complete until delivery, must the clerk ascertain whether an inmate has actually received a court order in order for the clerk to fulfill his duty under FRAP 45(c) to "serve" the inmate?

In the past, we have dealt with delay in prison mail by liberally granting extensions of time, entertaining motions for reconsideration, or recalling mandate, if necessary. These devices are adequate to deal with the problem of delay in prison mail. The amendments are not needed.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
OHIO — MICHIGAN — KENTUCKY — TENNESSEE

CHAMBERS OF
HARRY W. WELLFORD
SENIOR CIRCUIT JUDGE
1176 FEDERAL BUILDING
MEMPHIS, TENNESSEE 38103

August 26, 1993

Honorable Gilbert S. Merritt

Re: Proposed change in Rule 25 (Service on Institutionalized Persons)

Dear Judge Merritt:

I suggest the following addition to the proposed draft of this Rule:

> or to his attorney of record. If service upon an inmate is not effectuated within ten days of mailing to his last known address, it may be effectuated as directed by the district judge or the magistrate judge assigned.

I do this because it has been my experience over many years that inmates may move and fail to notify the court or adversary parties of their change of address. Inmates may be released while in the process of litigation from an institution to some other less onerous type of custody, or simply restored to society. I think it would be unfortunate not to provide some alternative means so that service could be effectuated within a reasonable time.

Yours very sincerely,

HARRY W. WELLFORD

HWW/rb

cc: Honorable Cornelia G. Kennedy

Honorable Kenneth F. Ripple
Committee on Rules of Practice
U. S. Circuit Judge
208 U. S. Courthouse
204 S. Main Street
South Bend, Indiana 46601

Honorable Sam C. Pointer, Jr.
Chief Judge
Committee on Rules of Practice
882 U. S. Courthouse
1729 5th Avenue North
Birmingham, Alabama 35203

Mr. Peter G. McCabe, Secretary
Committee on Rules of Practice & Procedure
Judicial Conference of the United States
Washington, D. C. 20544

86-23

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT
MICHIGAN-OHIO-KENTUCKY-TENNESSEE

CHAMBERS OF
CORNELIA G. KENNEDY
CIRCUIT JUDGE
U. S. COURTHOUSE
DETROIT, MICHIGAN 48226

August 27, 1993

Honorable Kenneth F. Ripple
Chairman of Advisory Committee
Appellate Rules
208 Federal Building
204 S. Main Street
South Bend, Indiana 46601

Dear Judge Ripple:

Chief Judge Merritt circulated your letter to him of August 13, 1993, regarding the proposed amendment to Rule 25 that service on an inmate is not complete until the copy is delivered to the inmate. I agree that the present rule adding three days for service by mail and providing no additional days when left at an institution, is often inadequate in the institutional setting. However, I would urge merely enlarging the time to 5 or 7 days for service on inmates. The court can't require institutions to record when mail is actually received by an inmate and even if they did, how would interested parties find out that date short of a deposition? The uncertainty that will result from the proposed change seems to me to be unacceptable. If no objections are received to a magistrate judge's report and recommendation, when would the court be able to rule on it? There may be some practical uniform method by which opposing parties and the court could ascertain when an inmate actually receives mail, but unless such a method is in place, we should be slow to adopt a rule which requires individualized fact finding for service of every paper.

Very truly yours,

Cornelia G. Kennedy

CGK:lah

cc: Judge Merrit
Judge Boggs

96-23 - 8/31/93

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
KENTUCKY · TENNESSEE · OHIO · MICHIGAN

EUGENE E. SILER, JR.
207 U.S. COURTHOUSE
LONDON, KENTUCKY 40741

(606) 878-6822
FAX (606) 864-3381

August 25, 1993

Honorable Kenneth F. Ripple
Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Washington, D.C. 20544

RE: Proposed Appellate Rules for Service upon an Inmate

Dear Judge Ripple:

Chief Judge Gilbert S. Merritt of our circuit sent copies of your letter of August 13, 1993, to all the judges.

In response to that letter, I think that it is a good step to amend the rule, providing for a need of personal service. We have constant problems of inmates who claim that they have not received service of legal papers. The problem I see in the new rule is how the return is to be made, but perhaps that is answered in your proposed amendment to Rule 26.

Sincerely,

Eugene E. Siler, Jr.

Eugene E. Siler, Jr.

cc: Chief Judge Gilbert S. Merritt
Hon. Kenneth Howe

86-23

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CHAMBERS OF
BOYCE F. MARTIN, JR.
UNITED STATES CIRCUIT JUDGE

September 2, 1993

TELEPHONE
(502) 582-5082
(FTS) 352-5082

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

Dear Ken:

Gil Merritt passed along to me your letter of August 13 regarding the proposed amendment to Rule 25 of the Federal Rules of Appellate Procedure along with Rule 26. I personally feel that this is the absolute best way to solve the problem and certainly, for what it's worth, would strongly urge the Committee to adopt the draft as written. To me it makes great common sense and would be of a practical nature in solving a problem which we seem to face in our circuit frequently.

With my best wishes, I remain

Sincerely yours,

Boyce F. Martin, Jr.

BFM/sc

25

601 WEST BROADWAY, LOUISVILLE, KENTUCKY 40202-2227

86-23

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT
MICHIGAN-OHIO-KENTUCKY-TENNESSEE

CHAMBERS OF
ALBERT J. ENGEL
SENIOR CIRCUIT JUDGE
GERALD R FORD FEDERAL BUILDING
GRAND RAPIDS MICHIGAN 49503

September 1, 1993

Honorable Kenneth F. Ripple
Chairman, Appellate Rules Advisory Committee
Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Washington, D.C. 20544

Dear Ken:

Gil has sent to me, and I trust to other judges, your letter of August 13, 1993, and the enclosed draft of proposed rules 25 and 26, respecting the general problem of service on institutionalized persons.

I strongly recommend some such rule. I know of no area of present federal procedure in which current practices so often result in unfairness. Time and again we find prisoners complaining that by the time they have received actual notice of the time-running document, the time for acting had already passed. With the strict rules against enlargement, this has simply meant that there has been a total deprivation of any practical relief.

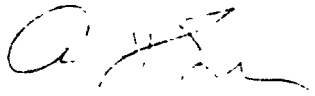
There is, however, a practical problem in the way the rule is drafted. Rule 26(d) as proposed allows the prisoner to be virtually the sole determiner of when he received the critical paper. Prisoners, usually confined for acts of personal dishonesty in the first place, are not always credible in the statements or declarations they may make especially if it is in their personal interest to be otherwise. As Rule 26(d) is drafted, there is no effective way to prevent a prisoner from dishonestly claiming that he received the document some days, weeks, or perhaps even months after he in fact may have received it. Expecting the federal or state government or the institution to hold him criminally liable for swearing falsely under 28 U.S.C. § 1746 is simply not a realistic deterrent, in my judgment.

I am not sure I have considered solutions to this problem adequately myself, but I am quite convinced of the practical necessity of incorporating any changes in Rules 25 and 26. In drafting the proposed rule or any changes, I am sure we have to be most aware of their general application. This is particularly true with respect to the language "confined in an institution." I presume the committee means all institutions or at least all public institutions, whether state, federal, and whether penal, health, or otherwise. Thus, we probably cannot effectively provide for an alternative to what you now have, based upon any proposed norm or procedure adopted by a particular institution in the United States. Tentatively, at least, I believe this leads me to conclude that there should be an ultimate

cutoff date in the operation of Rule 26(c) beyond which the prescribed period cannot be extended on claims that the copy has not been delivered to the inmate. Without it I believe we leave an open-ended invitation to inmates to abuse the rule with little effective deterrent. It seems to me that a period of thirty days ought in the vast majority of cases to be wholly adequate but perhaps the committee or a consultation with experts would suggest a shorter or longer time. Thus, one potential solution would be to amend proposed draft 26(c) by adding at the end thereof: "but in no event shall the prescribed period be extended by more than (15), (30), (45) days."

With kindest personal regards,

Sincerely,



Albert J. Engel

AJE/ymc

cc: Chief Judge Merritt
Senior Judge Lively

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
KENTUCKY • TENNESSEE • OHIO • MICHIGAN

PIERCE LIVELY
SENIOR CIRCUIT JUDGE
P.O. BOX 1226
DANVILLE, KENTUCKY 40423-1226

(606) 236-4489
FAX (606) 236-8441

September 13, 1993

The Honorable Kenneth F. Ripple
United States Circuit Judge
208 United States Courthouse
South Bend, Indiana 46601

Dear Ken:

I have examined the proposed changes in FRAP 25 and 26, together with the proposed committee notes. There is no doubt in my mind that these changes would improve the Rules and reduce the number of times that courts of appeals feel bound to dismiss untimely appeals by institutionalized persons in spite of their strenuous representations that they were never served.

Judge Engel raises a valid question in his letter of September 1, but I wonder if this could not be dealt with by requiring an inmate sign a receipt at the time of personal delivery. There certainly should be some mechanism to keep inmates from playing games with the system.

I know that you will get a lot of suggestions and will refine the Rules as you go along. My purpose in writing, however, is to indicate that I agree there is a problem and that your general approach appears to be a good one.

I hope that you, Mary and the boys are well and that we will have an opportunity to see one another before too long.

With best regards, as always, I am

Sincerely yours,

Pierce Lively

cc: Chief Judge Merritt
Judge Engel

28

United States Court of Appeals
for the Seventh Circuit
219 South Dearborn Street
Chicago, Illinois 60604

Chambers of
Judge Ilana Diamond Rovner

(312) 435-5608 Telephone
(312) 408-5011 Facsimile

August 25, 1993

Hon. Kenneth F. Ripple
Chairman of the Advisory Committee
on Appellate Rules
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
United States Court of Appeals
for the Seventh Circuit
208 United States Courthouse
South Bend, IN 46601

Dear Ken:

Thank you for your letter soliciting the reactions of the judges of our court to the draft amendments to the appellate rules governing service which are now under consideration by your committee. The amendments constitute a very thoughtful proposal with which I am happy to concur.

With best regards,

Ilana D. Rovner

cc: Hon. William J. Bauer
Chief Judge

86 23

UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT

CHAMBERS OF
WALTER J. CUMMINGS
CIRCUIT JUDGE
19 SOUTH DEARBORN STREET
CHICAGO, ILLINOIS 60604

August 20, 1993

Honorable Kenneth F. Ripple

Dear Ken:

In response to your August 13th letter to our Chief Judge about some changes in the Appellate Rules, I think both proposals are an improvement and the Committee Notes sufficiently explain the need therefor.

Sincerely,

W. Cummings

Walter J. Cummings

CC: Chief Judge William J. Bauer

86-23

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
219 SOUTH DEARBORN STREET
CHICAGO, ILLINOIS 60604
(312) 435-5806

CHAMBERS OF
JUDGE RICHARD A. POSNER

August 25, 1993

Hon. Kenneth F. Ripple

Dear Ken:

I have your letter of August 13 to Bill Bauer inquiring about your committee's proposed rule regarding service on inmates. I am a bit leery. Inmates are of course frequent litigants in our court, meaning that a vast number of documents are served upon them; I fear that proof of delivery will be difficult and engender collateral litigation. The present practice I believe is that inmate cases are not dismissed unless the inmates miss deadlines by far more time than is plausibly attributed to delays in the delivery to them of the documents to which they are required to respond. Perhaps this informal practice is best. But I cannot claim to have given much thought to the matter.

Sincerely,

Richard A. Posner

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

94-23

Daniel A. Manion
United States Circuit Judge

8/20, 19 93

Ken -

the letter fine to [illegible]
as long as prison officials
cannot and later by either
the inmate or [illegible]

United States Court of Appeals
For the Ninth Circuit
United States Courthouse
San Diego, California 92101-8918

Chambers of
Clifford Wallace
Chief Judge

JAN 1994

December 30, 1993

Honorable James K. Logan
United States Circuit Judge
Chair, FRAP Advisory Committee
P.O. Box 790
Olathe, Kansas 66061-0790

RE: Proposed Amendments to Fed. R. App. P. 25(c) and 26(c) and (d)

Dear Jim:

This letter responds to Judge Ripple's August 13, 1993, correspondence on behalf of the Advisory Committee on Appellate Rules. I trust this response is still timely.

While I appreciate the committee's sensitivity to the problems of incarcerated litigants, I fear that the proposed amendments fail to alleviate this court's concerns regarding whether inmates are actually receiving mail and instead would result in delay. In the last year or so, this court has undertaken various efforts designed to enforce deadlines strictly in an effort to ensure prompt disposition of our still increasing caseload. The proposed amendments' simple reliance on prisoner declarations to trigger response times fails to provide this court with a date certain we can monitor routinely, and thus frustrates our case management efforts. Moreover, adoption of the changes could interfere with the court's orderly operation. For example, because the time to respond to a motion would be triggered by an unknown delivery date, the court would not know how long to defer action on a motion awaiting the prisoner's response. Continual promulgation of different rules for various categories of litigants complicates the deputy clerks' assessment of timeliness and proper disposition.

We are also concerned that no similar changes are planned to address instances where the prisoner must respond within a given time from entry of an order, in contrast to service by a party. Such inconsistency would surely create confusion. Finally, the proposed changes could conceivably result in diminished motivation on the part of prison officials to ensure prompt delivery of legal mail because the proposed accommodation would dissipate any consequences of their delay.

This court already employs various procedural safeguards, including flexible deadlines and reinstatements, in order to protect the interests of incarcerated litigants. Moreover, the case law itself mandates flexibility in dealing with pro se prisoners. Thus, it appears that authority and procedures already in place provide sufficient safeguards with regard to the noted problems.

I appreciate the opportunity to convey my thoughts to the Committee.

Yours truly,

J. Clifford Wallace
Chief Judge

JCW:mkc

86 23

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT
BOX 790
OLATHE, KANSAS 66051-0790

JAMES K. LOGAN
JUDGE

913-782-9293

August 30, 1993

The Honorable Kenneth F. Ripple
United States Circuit Judge
208 Federal Building
204 South Main Street
South Bend, Indiana 46601

Re: Federal Rules of Appellate Procedure 25 and 26

Dear Judge:

I am responding on behalf of the Tenth Circuit to your request for comments concerning the proposed changes in Rules 25 and 26 currently before the Advisory Committee on Federal Rules of Appellate Procedures, dealing with the general problem of service on institutionalized persons.

I have polled all of the judges of our court and as might be expected got a range of views, the majority approving but with some raising questions about the changes.

A couple of our judges want to be sure that we have the input of the prisons themselves as to alternatives or problems they see in the application of the rule. I believe the committee has sought input from the prisons, but if it has not I am sure most, if not all, of our judges think that definitely should be done.

One judge has raised the question whether we can ever close out an appeal if we cannot at least presume service has been made on the inmate. Is this going to string out the filing of briefs in prisoner cases so that we do not have really effective deadlines? Does this rule apply to the timeliness of appeals under Fed. R. App. P. 4(a)(6), or is the timeliness there governed by the civil rules rather than the appellate rules?

Two judges recommended that our rule be drafted to create a presumption that service has been made on the prisoner within three days of mailing, with the burden on the prisoner to rebut the presumption--with the showing of nonreceipt applied only in the event an inmate's response brief or other filing is untimely and the opposing party objects, or when the inmate seeks to reopen and set aside some action on the basis of lack of notice.

One judge suggested that the problem of when the inmate receives the service can be avoided by service by certified mail, return receipt requested, and that we should point that out in the commentary.

One judge pointed out that because these proposed changes are only to the appellate (not the civil) rules they primarily affect the time for responding to briefs of opposing parties, governed by Fed. R. App. P. 31. Seldom is the party opposing a prisoner in a hurry to get the matter decided and so the proposed changes probably are not terribly important. Presumably if the prisoner is late filing his or her brief the clerk's office will monitor the time for response and start sending messages when a response is overdue. One factor in whether the committee should adopt the rules as proposed would seem to be whether the changes really make any difference, and the committee should review the rules very carefully and point out in the comment at least when, if ever, the new rule would likely make a significant difference.

Respectfully submitted,

James K. Logan

JKL:mbb

cc: Professor Carol Mooney

United States Court of Appeals
Eleventh Judicial Circuit

Gerald Bard Tjoflat
Chief Judge
Jacksonville, Florida 32201

August 19, 1993

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 Ken:

I have your letter of August 13, enclosing the proposed amendments to FRAP 25 and 26. I have sent these proposals to the members of our court for comment and will be back in touch early next month.

Sincerely,

GBT/db

United States Court of Appeals
for the Federal Circuit
Washington, D.C. 20439

Chambers of
Helen Wilson Nies
Chief Judge

September 15, 1993

Kenneth F. Ripple, Esq.
Committee on Rules of Practice
& Procedure
Judicial Conference of the
United States
Washington, D.C. 20544

Dear Ken:

I have looked over the proposed rule of service on inmates and find it quite satisfactory. I received one comment from another judge who also approved the rule.

Best regards.

Sincerely,

Helen W. Nies

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
219 SOUTH DEARBORN
CHICAGO, ILLINOIS 60604

DONALD J. WALL
SENIOR STAFF ATTORNEY

(312) 435-5805
FAX (312) 408-5095

September 13, 1993

The Honorable Kenneth F. Ripple
Chairman, Appellate Rules Advisory Committee on
Rules of Practice and Procedure of the Judicial
Conference of the United States
Washington, D.C. 20544

RE: Comments of Senior Staff Attorneys to
Proposed Changes to Fed. R. App. P. 25 and 26

Dear Judge Ripple:

Karen Wilbanks asked that I coordinate the comments of my colleagues to the proposed rule changes. This transmittal includes responses from the D.C., First, Third, Seventh, Eighth, Tenth and Eleventh Circuits. I pass these comments on to you and hope that they are of assistance to you and your committee.

Very truly yours,

Donald J. Wall

cc: All Senior Staff Attorneys
Professor Mooney
Peter McCabe

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT
WASHINGTON, DC 20001

MARK J. LANGER
CHIEF STAFF COUNSEL

September 1, 1993

M E M O R A N D U M

TO: Chief Judge Mikva

cc: Bob Bonner

FROM: Mark J. Langer
Chief Staff Counsel

RE: Proposed New Appellate Rule Governing Service Upon an Inmate

The Clerk's Office deals most directly with the problems that arise in attempting to serve matters on inmates. Attached are Bob Bonner's comments with which Linda Jones concurs.

As Mr. Bonner points out, the D.C. Circuit's practice of requiring the Bureau of Prisons to obtain the inmate's signature on an acknowledgement of receipt has worked well. In the rare case when there is some doubt as to the inmate's receipt of an order or pleading, the benefit of the doubt is always given to the inmate. In those cases, the order is resent or if the case has been terminated, it is reopened to allow the inmate to present his or her arguments.

In short, as far as this circuit is concerned, there does not appear to be any problem that needs to be addressed by a rule change.

United States Court of Appeals

District of Columbia Circuit
Washington, D.C. 20001-2866

Ron Garvin
Clerk

General Information
(202) 273-03

August 23, 1993

M-E-M-O-R-A-N-D-U-M

TO: Mark Langer

FROM: Robert A. Bonner RAB

SUBJECT: Proposed Revisions to Fed. R. App. Pro. 25

Thanks for your memorandum of August 19, 1993 and the opportunity for comment.

I have no quarrel with the intent of the proposed revisions. A very real problem will arise, however, in those not infrequent instances when an inmate chooses not to respond to whatever is served upon him. A court will not receive a "notarized statement or declaration" and will have no way of knowing the item was received. An order to show cause why a case should not be dismissed (for whatever reason) would sit on the docket forever if the inmate choose not to respond to it, at least under our practice of not dismissing unless an inmate has received notice.

I see two alternatives to the proposal. The first would be for the rule to set forth a standard form of acknowledgment of receipt that the inmate would sign and which would be returned to the court. This is our present practice and it works very well. Whether BOP would be willing to perform this service for all of the circuits is a separate question.

The second alternative, which I favor, is to make the response time for an inmate 30 days (or 40 or 45) and simply assume receipt.

Linda Jones advises she agrees with the contents of this memorandum and has nothing to add to it.

UNITED STATES GOVERNMENT

memorandum

DATE: August 27, 1993

REPLY TO ATTN OF: Kathy Lanza

SUBJECT: Letter from Kenneth Ripple

TO: Don Wall

Judge Breyer previously asked for my comments on the proposed rule amendment. Attached is a copy of the memo I sent him.

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OPTIONAL FORM NO. 10
(REV. 1-80)
GSA FPMR (41 CFR) 101-11.6
5010-114

UNITED STATES GOVERNMENT

memorandum

DATE: August 19, 1993

REPLY TO ATTN OF: Kathy Lanza

SUBJECT: Letter from Kenneth Ripple
Proposed Amendments to FRAP 25 and 26

TO: Judge Breyer

Mr. Scigliano and Dan oppose the proposed amendments to FRAP 25 and 26. Vinnie and I agree with their view, which is set forth below.

Presently, service on litigants, including inmates, is complete on mailing, FRAP 25(c), and when a party is required or permitted to act within a specified period after service and service has been by mail, three days are added to the specified period to allow for the delay in mailing, FRAP 26(c). The potential problem, however, is that mail delivery to inmates may take much longer than delivery to non-incarcerated persons, with the result that the period for response may run before the inmate receives the motion or brief. The proposed amendment addresses this problem by providing that "[s]ervice on an inmate confined in an institution is not complete . . . until the copy is delivered to the inmate." In other words, the time for an inmate to respond to a § 1292(b) petition (FRAP 5(b)), a petition for leave to appeal under 28 U.S.C. § 636(c)(5) (FRAP 5.1(b)), a statement of issues, designation of the record, or designation of contents of appendix (FRAP 6(b), 10(b)(3)), motion (FRAP 27), or brief (FRAP 31) would run not from the date of mailing, but from the date the inmate actually receives the filing.

There are at least two problems with this amendment. First,

litigants and the court will not know when the inmate receives something. No longer is there a set time frame for response. How long, for example, should a court wait for a response from an inmate before ruling on a motion filed by a non-inmate? Because we will not know when an inmate received a motion, we will not know when the response time commenced or expired. See Fed. R. App. P. 27(a) ("[a]ny party may file a response in opposition to a motion . . . within 7 days after service of the motion").

Second, will the amendment indirectly impose additional duties on the clerk? Various of the FRAP rules direct the clerk of the district court or court of appeals to serve items. For example, FRAP 3(d) directs the district court clerk to "serve notice of the filing of a notice of appeal by mailing a copy thereof to counsel of record of each party . . . or, if a party is not represented by counsel, to the last known address of that party . . .. When an appeal is taken by a defendant in a criminal case, the clerk shall also serve a copy of the notice of appeal upon the defendant, either by personal service or by mail addressed to the defendant." If, under the proposed amendment to FRAP 25(c) service on an inmate is not complete until the item is delivered to the inmate, a litigious inmate might argue that the clerk has a duty to ascertain whether service was actually completed through delivery. See also FRAP 15(c) ("A copy of a petition for review or of an application or cross-application for enforcement of an order shall be served by the clerk of the court of appeals on each respondent in the manner prescribed by Rule 3(d)); FRAP 21(b) (order directing an answer to

a mandamus petition "shall be served by the clerk . . . on all . . . parties to the action in the trial court"); FRAP 45(c) ("Immediately upon the entry of an order of judgment the clerk shall serve a notice of entry by mail upon each party to the proceeding together with a copy of any opinion respecting the order or judgment . . . ."). If service is not complete until delivery, must the clerk ascertain whether an inmate has actually received a court order in order for the clerk to fulfill his duty under FRAP 45(c) to "serve" the inmate?

In the past, we have dealt with delay in prison mail by liberally granting extensions of time, entertaining motions for reconsideration, or recalling mandate, if necessary. These devices are adequate to deal with the problem of delay in prison mail. The amendments are not needed.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
OFFICE OF STAFF ATTORNEYS

TO: Don Wall
Senior Staff Attorney
Seventh Circuit

FROM: Marcy Waldron
Senior Staff Attorney
Third Circuit

RE: Proposed Change in Federal Rules of Appellate Procedure (Service on Institutionalized Persons)

DATE: September 13, 1993

The proposed change in the appellate rules regarding service on institutionalized persons has been reviewed by our supervisory staff and by the staff attorney who serves as Legal Coordinator in the Clerk's Office. The proposed language in Rule 25 is: "Service on an inmate confined in an institution is not complete, however, until the copy is delivered to the inmate."

We appreciate the attempt to solve the problem created by the delays inherent in the prison mail delivery system, but believe that the language as currently worded is not practicable for the courts. Service under the proposed rule is open ended; there is no way to estimate when service will occur, and there is no practical mechanism for determining when service has occurred.[1] This will cause problems for the courts in setting schedules and deadlines. [An example: We currently send pro se merits cases to panels upon the filing of the appellee's brief, and set a disposition date of fourteen days after the date of transmittal to the panel. If the rule changes, we will have difficulty setting a disposition date when the appellant is a pro se inmate, because we will have no way to anticipate when the reply brief, if any, will be filed.] Efficient processing of cases is a real concern for any court.

In addition, we believe the proposed rule will present problems for the prison system as well as the courts because of the need to determine the date of delivery to the inmate. Our court currently has procedures for cases in which it appears that an inmate's notice of appeal was untimely filed, consistent with Houston v. Lack, 487 U.S. 266 (1988)(notice of appeal is timely upon delivery to prison officials), and United States v. Grana, 864 F.2d 312, 316 (3d Cir. 1989)(any prison delay in transmitting

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[1] We believe that the proposed change in Rule 26 does not solve this problem.

to the inmate the notice of the district court's final order or judgment shall be excluded from the computation of a pro se inmate's time for taking an appeal). The burden is placed on the appellee to refute an inmate's assertion of delay (Grana) or delivery (Houston). The correspondence required to determine the filing date (notification of inmate; request for information from appellee upon inmate's response) takes up staff time; more staff time will be required if the new rule is adopted because more appeals are implicated. This is a real concern given the staffing problems currently experienced by the federal courts. Proving the service date will be difficult for opposing counsel. Certified mail receipts are usually signed by the prison mail room upon delivery, and not by the inmate upon his actual receipt of the document. There will be pressure placed on the prison system to change mail procedures in order to provide more specific information regarding mail delivery. When the federal courts in effect require state institutions to accommodate federal rules, the issue of comity arises.

We would suggest that the rule contain a presumed date of delivery, with language such as the following:

> Service on an inmate confined in an institution will be presumed to occur ten [or fourteen] days after the date of service by mail, unless the inmate shall show that service occurred upon a later date.

The inmate could show that delivery occurred on a date later than that presumed in the rule through a notarized or certified statement; that statement could be subject to refutation by the opposing party, upon submission of documentation showing that the document at issue was delivered on an earlier date.

Thank you for coordinating the submission of our responses.

cc: All Senior Staff Attorneys

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
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DONALD J. WALL
SENIOR STAFF ATTORNEY

(312) 435-5805
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September 13, 1993

The Honorable Kenneth F. Ripple
Chairman, Appellate Rules Advisory Committee on
Rules of Practice and Procedure of the Judicial
Conference of the United States
Washington, D.C. 20544

RE: Comments on Proposed Revisions to Rules 25 and 26 of the Federal Rules of Appellate Procedure

Dear Judge Ripple:

Much of the work of the staff attorneys in this circuit, as in other circuits, involves prisoner appeals. Accordingly, we are greatly interested in the proposed rule changes governing service on institutionalized persons as it affects the work of the court and offer the following comments.

Our primary concern relates to the necessity for the proposed changes. The court is sensitive to the problems and delays caused by a prison's internal mail distribution system. Our court historically has been flexible with prisoners meeting deadlines imposed by the Federal Rules of Appellate Procedure. Invariably the court will extend the time to respond to a motion or to file a brief, or otherwise reopen the time to respond so as to review inmate papers that are received late due to the delay in mail delivery.

It is important, of course, that a prisoner litigant receive all papers that relate to his appeal. But, as the Committee Note to the proposed change in FRAP 25(c) points out, the impetus for the change centers only on those instances when a prisoner litigant (proceeding pro se) "is required or permitted to respond within a prescribed period after service." Those instances which require or permit action within a certain amount of time after being served are actually few in number:

Rule 5 (Appeals by Permission under 28 U.S.C. § 1292(b)); Rule 5.1 (Appeals by Permission Under 28 U.S.C. § 636 (c)(5)); Rule 6 (b)(2)(ii) and Rule 10(b)(3) (Designation of Record on Appeal); Rule 24(a) (Proceedings in Forma Pauperis); Rule 27(a) (Motions); Rule 30(b) (Determination of Contents of Appendix); Rule 31 (Briefs); and Rule 39(d) (Objections to Bill of Costs).

The rule change is not triggered if the court issues an order requiring a response by a date certain. So, all a court needs to do to obviate the problem is to establish (issue an order) a date certain for the act to be done. Service then plays no part in the matter (Rule 26 does not apply) and the purpose for the rule change is gone.

Those instances where a delay may cause a failure to respond in a timely fashion can, in our view, best be handled by the court's relaxation of the time constraints via an extension of time or the reopening of the period to respond and reconsideration of the matter at hand.

Of equal concern is the need for the courts to efficiently and fairly manage its workload. The adoption of the proposed changes may cause an indefinite delay of many appeals. Courts should be able to consider service by mail enough in order to act on matters before it.

As it stands, the rules currently establish specific due dates for litigant action, counted from the date of mailing of particular papers (e.g. a motion or a brief). Under the proposed rule changes, the court must instead, for prisoner cases, use the date of actual receipt to compute the time limits for responses (e.g. a response to a motion or a reply brief). Simply put, the court will not be able to determine when a motion is ready to be ruled on or when a case is fully briefed and ready for submission because the court will not know when a prisoner receives the papers to start the time period for action.

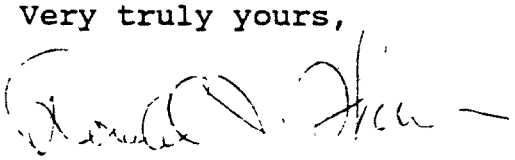
Many times the court gets nothing from prisoners in response to motions or briefs filed with the court. How are we to know when the prisoner received the papers? The proposed changes hand prisoners an undesirable amount of control over the management of their appeals in our courts.

A prisoner may not respond (or delay his response for an indefinite period) and thereby play havoc with the court's management of its workload. The prisoner could well say: "I'm not served unless I say I'm served." At bottom, the concern is

that the proposed changes do not set out when the court can take action in the absence of any response from a prisoner. Unless the prisoner tells us when he or she is served (or the prisoner actually files a response), it appears that the court cannot act because it would not know when the time to respond begins.

I hope that these comments are of help to the Committee in its consideration of the proposed rule changes.

Very truly yours,



Donald J. Wall

United States Court of Appeals
Eighth Circuit
Office of Staff Attorneys

Memorandum

To: Don Wall
Senior Staff Attorney
Seventh Circuit

From: Sheila Greenbaum
Senior Staff Attorney
Eighth Circuit

Re: Service on Institutionalized Persons: Possible Change in Appellate Rules

Date: September 10, 1993

Staff attorney Tad Bohannon has had more than his share of service issues, and jurisdictional problems caused thereby, in his cases. Consequently, I asked him to review proposed Rules 25 and 26. The following are his comments.

While the proposed amendment to Rule 25(c) recognizes that delivery of mail to an inmate confined in a institution may take longer than the normal time, I suggest that the amendment fails to recognize that documents mailed by an inmate confined in an institution may take longer to leave the institution than the three days provided by Rule 26(c). If the new rules are going to protect inmates from delays that result from the institution's internal mail system, I suggest the rules should also protect the non-institutional party from delays in the institution's internal mail system for outgoing mail. For instance, if an inmate filed a Rule 5 petition, and it is deemed served when the inmate places it in the institution's internal mail system (see Houston v. Lack, 487 U.S. 266 (1988)), the seven-day answer period may expire before the petition is even placed in the U.S. mail by prison officials.

I also believe the proposed rules create an ambiguity regarding service on inmates. For example, under Rule 30(b) the appellant is required to serve the appellee with a designated record "not later than ten days after the date on which the record is filed." If the appellant is not in an institution, and the appellee is an inmate, it will be easy for the appellant to violate Rule 30(b) under the proposed amendment to Rule 25. As proposed Rule 25 currently reads, if the appellant deposited the designated record in the mail on the tenth day, it is untimely. The proposed changes need to make it clear that for purposes of timely service by the non-institutionalized party on an inmate, service is deemed to be made upon mailing.

Thank you for coordinating our responses.

cc: All Senior Staff Attorneys

UNITED STATES COURT OF APPEALS
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September 10, 1993

Donald J. Wall
Senior Staff Attorney
United States Court of Appeals for
the Seventh Circuit
U.S. Courthouse
219 South Dearborn Street
Chicago, Illinois 60604

Re: Proposed Amendments to FRAP 25(c) and 26(c) and (d)

Dear Don:

In response to Judge Ripple's letter of August 13, we offer the following observations.

At the outset, the idea of requiring service on a confined inmate by actual delivery is sound. This should solve problems encountered when appellate courts take action (such as dismissal of an appeal) based on the assumption that an inmate has been afforded appropriate notice of procedural requirements or filings by adverse parties, but has not responded.

Here, as we see it, lies the real problem. Under current Fed. R. App. P. 25, service is complete upon mailing. The certificate of service serves as the measuring point and is a concrete reference by which to gauge compliance with the filing and service requirements of all other rules. In other words, everyone knows exactly when service has occurred, and all responsive actions can be accurately anticipated from that date.

The proposed amendment provides no such bright line measuring point. Although delivery is defined by what must happen, there is no provision for determining when it has happened, i.e., there is no "certificate of delivery" to trigger the running of other time periods. This could result in substantial chaos, leaving adverse parties and courts to proceed at their peril in acting on presumed delivery (or nondelivery).

In its notes, the committee has touched on several other problems in effecting this rule change, in particular the increased burden on institution officials, who will be required to sort, screen, and personally deliver inmate mail. These problems are further compounded by the frequency with which prisoners can

be transferred, either temporarily or permanently, among state, federal, and sometimes local institutions. There are other potential difficulties as well, especially in the area of who is to be responsible for ensuring compliance and at what cost. Opposing parties, counsel, and the courts are completely dependent on institution administrators to devise and enforce a system providing for prompt personal delivery to an inmate. Moreover, there are no provisions for the situation in which an inmate has been transferred or released and mail is returned to the sender, with no indication of the addressee's whereabouts.

A court could easily be indefinitely hamstrung with pending cases unless specific notification is provided that a document was delivered to the inmate. Under current rules, certain presumptions are made and a court (or opposing parties) can then act accordingly. Under the proposed changes, absent some formal mechanism evidencing receipt by the inmate, the court always acts at its peril if proceeding on the assumption that the inmate has been provided with a copy.

The following is an example of the mischief potential. Fed. R. App. P. 24(a) provides that if the district court has denied leave to proceed on appeal in forma pauperis, "the clerk shall forthwith serve notice of such action." The litigant then has thirty days in which to pay the fee or to move for IFP status to proceed with the appeal. How is the clerk to know if the inmate has received this notice? Will all communications with institutionalized litigants need to be sent by certified mail? What will the cost and delay factors be?

If a simple, low-cost method of determining delivery dates can be devised, the proposed amendment makes sense. We suggest, however, that the committee needs to address the issues of determining compliance with the delivery requirements as an integral part of the ultimate proposal.

Please convey to Judge Ripple my appreciation for the opportunity to comment.

Very truly yours,

JOHN K. KLEINHEKSEL

JKK:dlg

cc: Karen C. Wilbanks, Esq.
Chairperson, Staff Attorney Advisory Committee

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United States Court of Appeals

ELEVENTH CIRCUIT

KAREN C. WILBANKS
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September 9, 1993

The Honorable Kenneth F. Ripple
Chairman of Advisory Committees, Appellate Rules
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Washington, D.C. 20544

SUBJECT: Comments on Proposed Revisions to Rules 25 & 26, Fed.R.App.P.

Dear Judge Ripple:

Thank you for the opportunity to respond to the proposed revisions to Rules 25 and 26, Fed.R.App.P. Although we believe the concept is appropriate and the problem needs to be addressed, probably by rule, my staff and I have two major concerns about the draft:

(1) Rule 25(c) - The proposed revision does not protect a party who must serve an inmate within a prescribed time period. As the rule is drafted, there would be no way of assuring delivery to the inmate by the required deadline.

It appears the Committee should consider how service could be completed on an inmate for deadline purposes short of actual delivery to the inmate. For example, service could be completed upon delivery to the prison for purposes of the party meeting a service deadline but would not be complete until time of delivery to the inmate for the inmate's purposes in responding to the notice. In other words, the time between delivery to prison officials and delivery to the inmate would not be counted against either party. This way, a person serving an inmate could reasonably determine a date certain for delivery to the prison. Since they have no control over prison procedures or delays, they should not be required to assure delivery within the prison system.

(2) Rule 26(d) - This paragraph as drafted does not make it clear who must provide the notarized statement or declaration. Since the committee note to this subdivision clearly states that it intends this provision to apply to "an inmate's" notarized statement or declaration, we suggest this should be inserted into the rule itself in subsection (d).

I appreciate the Committee's consideration of this complex notice situation. Please let me know if I can provide any additional assistance or information.

Sincerely yours,

Karen C. Wilbanks Hm

Karen C. Wilbanks
Director

c: Donald Wall, Staff Attorney Rules Subcommittee Chair

TO: Honorable James K. Logan, Chair, and Members of the Advisory Committee on Appellate Rules, and Liaison Members

FROM: Carol Ann Mooney

DATE: March 25, 1994

SUBJECT: Item 93-7, the Houston v. Lack problem in the context of review of a decision of an administrative agency.

Mr. Munford has brought the case attached to this memorandum, Guirguis v. INS, 993 F.2d 508 (5th Cir. 1993), to my attention. Guirguis holds that Houston v. Lack is not applicable to a petition for review of an administrative agency decision.

Houston v. Lack, 487 U.S. 266 (1988) held that a *pro se* prisoner files a notice of appeal when the prisoner gives the notice, with postage prepaid, to prison officials for mailing to the federal district court. The Court reasoned that "a *pro se* prisoner has no choice but to hand his notice over to prison authorities for forwarding to the court clerk" and, therefore, has no control over whether the notice is mailed promptly.

In Guirguis an alien detained by the INS attempted to appeal from a deportation order and before the filing date gave the petition for review to an immigration officer for mailing, but the petition was not received by the court of appeals until after the time for filing had passed. The Fifth Circuit held that it did not have jurisdiction to hear the cases because the petition was not timely filed.

Guirguis held that Houston v. Lack was inapplicable to the filing of a petition for review of an INS decision because such a petition is filed with a court of appeals whereas Lack involved a notice of appeal which is filed with a district court. The Fifth Circuit observed that the Supreme Court's holding in Lack, that a prisoner's notice of appeal is timely filed if it is delivered to the prison officials for mailing to a district court within the time fixed for filing, was based upon the fact that nothing in the rules compels the conclusion that receipt by the clerk is the moment of filing. The Guirguis court noted that the district court rule on filing, Fed. R. Civ. P. 5(e), does not state that a filing is timely only is if it is received by the clerk within the time fixed for filing. In contrast, a petition for review must be filed with a court of appeals and Fed. R. App. P. 25(a) states that in order for a filing to be timely, it must be "received by the clerk within the time fixed for filing."

The Guirguis court held, therefore, that even if a detained alien is similar in circumstance to a prisoner and is unable to place a document directly into the mail and must entrust it to INS officials, Rule 25(a) precludes the court from reviewing the case unless the petition for review is received by the court of appeals within the time fixed for filing.

In response to the Houston v. Lack case the Committee recommended two rule changes both of which became effective on December 1, 1993.

The first change was to add subdivision (c) to Rule 4 dealing with a notice of appeal. The key provision of subdivision (c) states:

> 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.

Because this provision applies only to a notice of appeal, it would not appear to address the Guirguis problem.

The second amendment was to Rule 25(a), the general filing rule. The language in Rule 25(a) stating that filing is not timely unless the clerk receives the papers within the time fixed for filing remains unchanged. Two new sentences, however, were added to subdivision (a). They provide:

> Papers filed by an inmate confined in an institution are timely filed if deposited in the institution's internal mail system on or before the last day for filing. Timely filing of papers by an inmate confined in an institution may be shown by a notarized statement or eclaration (in compliance with 28 U.S.C. § 1746) setting forth the date of deposit and stating that first-class postage has been prepaid.

I believe that this new provision, if it had been in effect at the time of the Guirguis decision, would have altered the result in that case.

Am I correct that this general provision would apply so that a petition for review would be timely if delivered within the time fixed for filing to INS officials for mailing to the court of appeals? Rule 15 governing review of agency orders says only that the petition to review filed with the clerk of the court of appeals "within the time prescribed by law."

Mouawad S.B. GUIRGUIS, Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE, Respondent.

No. 93-4345.

United States Court of Appeals, Fifth Circuit.

June 21, 1993.

Alien who was adjudged to be aggravated felon sought review of Board of Immigration Appeals' (BIA) deportation order. The Court of Appeals, Jerry E. Smith, Circuit Judge, held that it did not have jurisdiction over petition since it was filed on 31st day following entry of BIA's order.

Petition dismissed.

1. Aliens ⇐54.3(1)

Petition for review in case of alien convicted of aggravated felony must be filed within statutory time limit if Court of Appeals is to have power to review Board of Immigration Appeals' order. Immigration and Nationality Act, § 106(a)(1), as amended, 8 U.S.C.A. § 1105a(a)(1).

2. Aliens ⇐54.3(1)

Time limit for filing petition for review of final order of deportation is mandatory and jurisdictional.

3. Administrative Law and Procedure ⇐723

Aliens ⇐54.3(1)

Narrow exception, that pro se prisoner is deemed to have filed notice of appeal timely where, on or before date notice was due to be filed, prisoner gave notice of appeal to prison official for mailing to federal district court, but notice was received by clerk of district court after time for filing notice had expired, is not available to petitioners aggrieved by orders of Board of Immigration Appeals who wish to petition for review by Court of Appeals; rule of appellate procedure stating that filings may be accomplished by mail addressed to clerk, but filing shall not be timely unless papers are received by clerk within time fixed for filing renders rationale of pro se prisoner exception inapposite to petition for review from administrative agency or board such as BIA. F.R.A.P.Rule 25(a), 28 U.S.C.A.

4. Administrative Law and Procedure ⇐723

Aliens ⇐54.3(1)

Court of Appeals did not have jurisdiction over petition for review in case of alien convicted of aggravated felony, where petition was filed on 31st day following entry of deportation order by Board of Immigration Appeals (BIA). Immigration and Nationality Act, § 106(a)(1), as amended, 8 U.S.C.A. § 1105a(a)(1).

Petition for Review of an Order of the Immigration and Naturalization Service.

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

Respondent, the Immigration and Naturalization Service ("INS"), moves the court to dismiss this petition for review brought by Mouawad Guirguis. Concluding that the pe-

tition was untimely filed and that, accordingly, we are without jurisdiction, we dismiss the petition.

I.

An immigration judge ("IJ) ordered that Guirguis be deported under section 241(a)(2)(A)(iii) of the Immigration and Nationality Act, as amended (the "Act"), 8 U.S.C. § 1251(a)(2)(A)(iii), as an aggravated felon; the IJ also ordered that Guirguis be deported under section 241(a)(2)(B)(i) of the Act, 8 U.S.C. § 1251(a)–(2)(B)(i), on account of his conviction stemming from a controlled substance violation. The IJ denied Guirguis's applications for asylum and withholding of deportation under sections 208 and 243(h) of the Act, as amended, 8 U.S.C. §§ 1158(a) and 1253(h), and for waiver of inadmissibility under section 212(c) of the Act, 8 U.S.C. § 1182(c).

The order of deportation became a "final order" of deportation when, on March 2, 1993, the Board of Immigration Appeals ("BIA") dismissed Guirguis's appeal from the IJ's decision. *See* 8 C.F.R. § 243.1. Guirguis filed the instant petition for review on April 2, 1993, which, importantly, is thirty-one days after the BIA entered its order of dismissal.

II.

[1, 2] The INS argues that the petition was untimely filed and that the defect is jurisdictional. Under section 106(a)(1) of the Act, as amended, 8 U.S.C. § 1105a(a)(1), a petition for review in the case of an alien convicted of an aggravated felony must be filed "not later than 30 days after issuance" of the final deportation order. *Pimental-Romero v. INS*, 952 F.2d 564, 564 (1st Cir. 1991) (per curiam). A petition "must be filed" within the limit of section 106(a)(1) if we are to have the power to review the BIA's order. *Te Kuei Liu v. INS*, 645 F.2d 279, 282–83 (5th Cir. Unit A May 1981); *Aguilar v. INS*, 638 F.2d 717, 718 n. 1 (5th Cir. Unit B Jan. 1981) (per curiam). The time limit for filing a petition for review of a final order of deportation is "mandatory and jurisdictional." *Lee v. INS*, 685 F.2d 343, 343 (9th Cir.1982) (per curiam). *Accord Pimental-Romero*, 952 F.2d at 564.[1]

Guirguis contends, however, that he is in the custody of the INS and gave the petition to an immigration detention officer for mailing on March 27, 1993, with first class postage paid, certified mail, return receipt requested. He correctly points out that in *Houston v. Lack*, 487 U.S. 266, 276, 108 S.Ct. 2379, 2385, 101 L.Ed.2d 245 (1988), the Court held that a *pro se* prisoner who, on or before the date his notice of appeal was due to be filed, gave that notice of appeal to a prison official for mailing to the federal district court, but the notice was received by the clerk of the district court after the time for filing the notice had expired, is deemed to have filed the notice timely.

In *Houston v. Lack*, the Court based its holding upon two grounds, one of which was what it called the "policy ground[ ]," *id.* at 275, 108 S.Ct. at 2384, which is that "a *pro se*

1. The Act originally permitted six months in which a petitioner could file a petition for review. The provision was amended, effective January 1, 1991, to allow 90 days in most cases but only 30 days in the case, as here, of an alien convicted of an aggravated felony. *See* § 106(a)(1). "Although most cases deciding the jurisdictional issue involved the earlier statute, the reduced time period does not change the jurisdictional nature of the statutory requirement." *Stajic v. INS*, 961 F.2d 403, 404 (2d Cir.1992) (per curiam) (citing *Pimental-Romero*, 952 F.2d at 564).

prisoner has no choice but to hand his notice [of appeal] over to prison authorities for forwarding to the court clerk" and thus has no control over whether the notice in fact is mailed promptly. *Id.* The circumstance of a detained alien appears to be similar, at least in some respects, to that of a prisoner, although there is no record here from which we can glean specific facts regarding the handling of mail in INS detention facilities or the ability, if any, of detainees to place matters directly into the mail rather than having to entrust them to INS officials.

Even assuming, however, that Guirguis's situation is similar, in that regard, to that of a prisoner, the similarity ends with the other ground relied upon (and the first one mentioned) by the Court in *Houston v. Lack*—which is a careful reading of the rules of appellate procedure applicable to appeals from district courts, FED.R.APP.P. 3(a) and 4(a). *See* 487 U.S. at 272–75, 108 S.Ct. at 2383–84. Rule 3(a) states that "[a]n 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." Rule 4(a) provides that "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...."

The Court observed that "nothing in Rules 3 and 4 compels the conclusion that, in all cases, receipt by the clerk of the district court is the moment of filing." 487 U.S. at 274, 108 S.Ct. at 2384. Thus, the Court reasoned, there was jurisdiction if the notice of appeal was deemed "filed" at the time the prisoner delivered it to prison officials for mailing. *Id.* at 272, 108 S.Ct. at 2383.

Houston v. Lack is of no avail to Guirguis on this ground, for that case is governed by the rules applicable to filing notices of appeal with the clerk of a *district court*, while Guirguis, seeking review not from a district court but from an administrative agency, was required to file his petition for review with the clerk of a *court of appeals*. Consequently, the timeliness of his petition for review is determined not by rules 3(a) and 4(a) but by FED.R.APP.P. 15(a) and 25(a).

Rule 15(a) reads as follows: "Review of an order of an administrative agency, board, commission or officer ... shall be obtained by filing with the clerk of a court of appeals ..., within the time prescribed by law, a petition ... to review...." Rule 25(a) states, "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." The corresponding rule for filings in district courts, FED.R.CIV.P. 5(e), contains no similar wording but states only that "[t]he filing of papers with the court ... shall be made by filing them with the clerk of the court...."

[3] The phrase "received by the clerk within the time fixed for filing" in rule 25(a) renders the rationale of *Houston v. Lack* inapposite to a petition for review from an administrative agency or board such as the BIA. Thus, the narrow exception carved out for *pro se* prisoners, based substantially upon the language of rules 3(a) and 4(a), is unavailable to petitioners aggrieved by orders of the BIA who wish to petition for review by a court of appeals.

[4] Guirguis's petition for review was not received by the clerk of this court until the

thirty-first day following entry of the order by the BIA. The petition, accordingly, is untimely, and we are without jurisdiction. The motion to dismiss the appeal is GRANTED, and the petition for review is DISMISSED.

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.

AGENDA ITEM - IV. B
Denver, Colorado
April 25-26, 1994

TO: Honorable James K. Logan, Chair, and Members of the Advisory Committee on Appellate Rules

FROM: Carol Ann Mooney, Reporter

DATE: March 11, 1994

SUBJECT: Item 91-24, Amendment of Fed. R. App. P. 29 re: amicus briefs

The proposal to amend Rule 29 grew out of the Local Rules Project. In its response to the Local Rules Project, the Fifth Circuit suggested that the Advisory Committee consider amendment of Rule 29. The Fifth Circuit suggested that:

1) the rule should specify which of the items required by Rule 28 to be included in a party's brief should be included in an amicus brief;
2) Rule 29 should establish a page limit for amicus briefs; and
3) Rule 29 should permit an amicus brief to be filed later than the brief of the party supported by the amicus which would eliminate, the Fifth Circuit believes, needless repetition of the party's arguments.

At the Advisory Committee's September 1993 meeting, the Committee considered two draft rules prepared by the Reporter. In the course of discussing those drafts the Committee made the following decisions:

1) that language similar to that in Sup. Ct. R. 37.1, indicating that an amicus brief will be permitted only when the amicus will bring information to the court that has not already been presented by the parties, should be included as prefatory to Rule 29 (minutes p. 19);
2) that language similar to that in Sup. Ct. R. 37.4 should be inserted in Rule 29 to provide the court with some standards for granting leave to file an amicus brief and to guide the party in framing the motion for leave to file (minutes p. 23);
3) that an amicus brief must be filed within the time allowed the party supported or, if an amicus does not support either party, within the time allowed the appellant or petitioner (minutes p. 23 and 26);
4) that an amicus brief be limited to 20 pages (minutes p. 24); and
5) that the Rule should affirmatively list the items that must be included in an amicus brief (minutes p. 25).

In light of those decisions, I have prepared a new draft for your consideration.

During the discussion of the items that must be included in an amicus brief, some members of the Committee questioned the need for an amicus to include the corporate disclosure statement generally required by Rule 26.1. Judge Sloviter stated that the Committee on Codes of Conduct had issued an advisory opinion regarding recusal based upon an interest in an amicus. Mr. Rabiej located the advisory opinion, and a copy of it is attached to this memorandum. I believe the opinion confirms the need for an amicus to prepare a disclosure statement.

Rule 29. Brief of An Amicus Curiae

(a) *In general.*-- An amicus curiae brief should bring relevant matter to the attention of the court which has not already been brought to its attention by the parties.

(b) *When permitted.*-- The United States or an officer or agency thereof, or a State, Territory or Commonwealth may file an amicus brief without consent of the other parties or leave of the court. In all other instances, an amicus curiae brief may be filed only:

(1) if accompanied by written consent of all parties;

(2) by leave of court granted on motion; or

(3) when requested by the court.

(c) *Motion for leave to file.* -- The motion must be accompanied by the proposed brief; the motion must state

(1) the movant's interest, and

(2) the facts or arguments that have not been, or reasons for believing that they will not

be, adequately presented by the parties, and the relevancy of those facts or arguments to the disposition of the case.

(d) *Contents and Form.*-- An amicus brief must comply with Rules 26.1 and 32. In addition to the requirements of Rule 32(a), the cover must identify the party or parties supported or indicate whether the brief supports affirmance or reversal. With respect to Rule 28, an amicus brief must include only the following:

(1) a table of contents, with page references, and a table of cases (alphabetically arranged), statutes and other authorities cited, with references to the pages of the brief where they are cited;

(2) an argument, which may be preceded by a summary; the argument need not include a statement of the applicable standard of review; and

(3) if determination of the issues presented requires the study of statutes, rules, regulations, etc. or relevant parts thereof, they

must be reproduced in the brief or in an addendum at the end.

(e) *Length.* -- An amicus brief may not exceed 20 pages unless the court provides otherwise by local rule or by order in a particular case.

(f) *Time for Filing.* -- An amicus brief, accompanied by a motion for filing when necessary, must be filed within the time allowed the party supported. If the amicus does not support either party, the brief must be filed within the time allowed the appellant or petitioner. A court may permit later filing, in which event it must specify the period within which an opposing party may answer.

(g) *Reply Brief.* -- An amicus curiae may not file a reply brief.

(h) *Oral Argument.* -- A motion of an amicus curiae to participate in the oral argument will be granted only for extraordinary reasons.

Committee Note

Rule 29 is entirely rewritten.

Subdivision (a). The role of an *amicus* is to bring relevant matter to the attention of the court which has not already been brought to its attention by the parties. The

subdivision, modeled upon Sup. Ct. R. 37.1, makes that role clear.

Subdivision (b). The only changes in this material are stylistic.

Subdivision (c). The provision in the former rule, granting permission to conditionally file the brief with the motion, is changed to one requiring that the brief accompany the motion. Sup. Ct. R. 37.4 requires that the proposed brief be presented with the motion.

The former rule only required the motion to identify the applicant's interest and to generally state the reasons why an amicus brief is desirable. The new rule requires a more specific statement of the facts or arguments that have not been, or will not be, adequately presented by the parties and the relevancy of those issues to the case. The new provisions are modeled upon Sup. Ct. R. 37.4.

Subdivision (d). The provisions in this subdivision are entirely new. Previously there was confusion as to whether an *amicus* brief must include all of the items listed in Rule 28. Out of caution practitioners in some circuits included all those items. Ordinarily that is unnecessary.

The requirement that the cover identify the party supported or indicate whether the *amicus* supports affirmance or reversal is an administrative aid.

Subdivision (e). This new provision imposes a shorter page limit for an *amicus* brief than for a party's brief. This is appropriate for two reasons. First, an *amicus* may omit certain items that must be included in a party's brief. Second, an *amicus* brief is supplemental. It need not address all issues or all facets of a case. It should treat only matter not adequately addressed by a party.

Subdivision (f). The time limit for filing is unchanged; an *amicus* brief must be filed within the time allowed the party the *amicus* supports. Ordinarily this means that the *amicus* brief must be filed within the time allowed for filing the party's principal brief. That, however, is not always the case. For example, if an *amicus* is filing a brief in support of

a party's petition for rehearing, the *amicus* brief is due within the time for filing that petition. Occasionally, an *amicus* supports neither party; in such instances, the amendment provides that the *amicus* brief must be filed within the time allowed the appellant or petitioner.

The former rule's statement that a court may, for cause shown, grant leave for later filing is unnecessary. Rule 26(b) grants general authority to enlarge the time prescribed in these rules for good cause shown. This new rule, however, states that when a court grants permission for later filing, the court must specify the period within which an opposing party may answer the arguments of the *amicus*.

Subdivision (g). This subdivision prohibits the filing of a reply brief by an *amicus curiae*. Sup. Ct. R. 37 and local rules of the D.C., Ninth, and Federal Circuits state that an *amicus* may not file a reply brief. The role of an amicus, as described in subdivision (a), should not require the use of a reply brief.

Subdivision (h). This provision is taken unchanged from the existing rule.

Attachment A
Current Rule 29

CURRENT FED. R. APP. P. 29

Rule 29. Brief of an amicus curiae

A brief of an amicus curiae may be filed only if accompanied by written consent of all parties, or by leave of court granted on motion or at the request of the court, except that consent or leave shall not be required when the brief is presented by the United States or an officer or agency thereof, or by a State, Territory, or Commonwealth. The brief may be conditionally filed with the motion for leave. A motion for leave shall identify the interest of the applicant and shall state the reasons why a brief of an amicus curiae is desirable. Save as all parties otherwise consent, any amicus curiae shall file its brief within the time allowed the party whose position as to affirmance or reversal the amicus brief will support unless the court for cause shown shall grant leave for later filing, in which event it shall specify within what period an opposing party may answer. A motion of an amicus curiae to participate in the oral argument will be granted only for extraordinary reasons.

Draft One - September 1993

Rule 29. Brief of An Amicus Curiae

(a) *When permitted.*-- An amicus curiae brief may be filed only:

(1) if accompanied by written consent of all parties;

(2) by leave of court granted on motion; or

(3) when requested by the court;

except that the United States or an officer or agency thereof, or a State, Territory or Commonwealth may file an amicus brief without consent of the other parties or leave of court. An amicus curiae may not file a reply brief.

(b) *Motion for leave to file.* -- A motion for leave to file an amicus brief must be filed no later than 15 days after the party supported by the amicus files its principal brief. If the movant does not support either party, the motion must be filed no later than 15 days after the appellant's brief is filed. The proposed brief must accompany the motion. The motion must

state

(1) the movant's interest, and

(2) the reasons why an amicus brief is desirable.

(c) *Contents and Form.*-- An amicus brief must comply with Rules 26.1, 28, and 32 except that it may omit the statements of:

(1) jurisdiction,

(2) the issues,

(3) the case, and

(4) the standard of review.

The cover must identify the party or parties supported or indicate whether the brief supports affirmance or reversal.

(d) *Length.* -- An amicus brief may not exceed 20 pages unless the court provides otherwise by local rule or by order in a particular case.

(e) *Time for Filing.* -- An amicus brief must be filed no later than 15 days after the party supported by the amicus files its principal brief. If the brief does

not support either party, it must be filed no later than 15 days after the appellant's brief is filed. For purposes of Rule 31(a), the time for filing the next brief runs from the date the amicus brief is filed.

Committee Note

Rule 29 is entirely rewritten.

Subdivision (a). The only change, other than stylistic, intended in this subdivision is to prohibit the filing of a reply brief by an *amicus curiae*. Sup. Ct. R. 37 and local rules of the D.C., Ninth, and Federal Circuits state that an *amicus* may not file a reply brief. The role of an *amicus* is to bring relevant matter to the attention of the court which has not already been brought to its attention by the parties. That role should not require the use of a reply brief.

Subdivision (b). In addition to stylistic changes, the amendment provides that a motion for leave to file an *amicus* brief must be filed no later than 15 days after the filing of the principal brief of the party the *amicus* intends to support. The proposed brief must accompany the motion. The time between the filing of the party's brief and the due date for the motion will allow an *amicus* to determine the need for its participation.

Subdivision (c). The provisions in this subdivision are entirely new. Previously there was confusion as to whether an *amicus* brief must include all of the items listed in Rule 28. Out of caution practitioners in some circuits included all those items. Ordinarily that is unnecessary.

The requirement that the cover identify the party supported or indicate whether the *amicus* supports affirmance or reversal is an administrative aid.

Subdivision (d). This new provision imposes a shorter page limit for an *amicus* brief than for a party's brief. This is appropriate for two reasons. First, an *amicus* may omit certain items that must be included in a party's brief. Second, an *amicus* brief is supplemental. It need not address all issues or all facets of a case. It should treat only matter not adequately addressed by a party.

Subdivision (e). This subdivision is a companion to subdivision (b). It provides that an *amicus* brief must be filed no later than 15 days after the filing of the principal brief of the party the *amicus* supports. If the *amicus* brief does not support either party, it must be filed no later than 15 days after the filing of the appellant's brief. The delay between the filing of the party's brief and the due date for the *amicus* brief will enable the *amicus* to focus only upon those issues not raised or adequately presented by the party. Repetition of the party's arguments should be eliminated.

Because the party not supported by the *amicus* will want to be able to respond to the arguments made by the *amicus*, this subdivision adds 15 days to the time allowed for filing the next brief. This should be sufficient additional time even though the party next to file may not be aware that an *amicus* supports the other side until the *amicus* brief is filed. A party's basic argument is usually not altered by the filing of an *amicus* brief. The party only needs to add material responsive to the argument made by the *amicus*.

Draft Two - September 1993

Rule 29. Brief of An Amicus Curiae

(a) *When permitted.*-- An amicus curiae brief may be filed only:

(1) if accompanied by written consent of all parties;

(2) by leave of court granted on motion; or

(3) when requested by the court;

except that the United States or an officer or agency thereof, or a State, Territory or Commonwealth may file an amicus brief without consent of the other parties or leave of court. An amicus curiae may not file a reply brief.

(b) *Motion for leave to file.* -- The motion must state

(1) the movant's interest, and

(2) the reasons why an amicus brief is desirable.

Conditional filing of the brief with the motion is encouraged but not required.

(c) *Contents and Form.*-- An amicus brief must comply with Rules 26.1, 28, and 32 except that it may omit the statements of:

(1) jurisdiction,

(2) the issues,

(3) the case, and

(4) the standard of review.

The cover must identify the party or parties supported or indicate whether the brief supports affirmance or reversal.

(d) *Length.* -- An amicus brief may not exceed 20 pages unless the court provides otherwise by local rule or by order in a particular case.

(e) *Time for Filing.* -- An amicus brief must be filed within the time allowed for filing the principal brief of the party supported. If the amicus does not support either party, the brief must be filed within the time allowed for filing the appellant's brief.

Committee Note

Rule 29 is entirely rewritten.

Subdivision (a). The only change, other than stylistic, intended in this subdivision is to prohibit the filing of a reply brief by an *amicus curiae*. Sup. Ct. R. 37 and local rules of the D.C., Ninth, and Federal Circuits state that an *amicus* may not file a reply brief. The role of an *amicus* is to bring relevant matter to the attention of the court which has not already been brought to its attention by the parties. That role should not require the use of a reply brief.

Subdivision (b). The only change intended, other than stylistic, is to change the provision granting permission to conditionally file the brief with the motion, to one encouraging the filing of the brief with the motion. Sup. Ct. R. 37.4 requires that the proposed brief be presented with the motion.

Subdivision (c). The provisions in this subdivision are entirely new. Previously there was confusion as to whether an *amicus* brief must include all of the items listed in Rule 28. Out of caution practitioners in some circuits included all those items. Ordinarily that is unnecessary.

The requirement that the cover identify the party supported or indicate whether the *amicus* supports affirmance or reversal is an administrative aid.

Subdivision (d). This new provision imposes a shorter page limit for an *amicus* brief than for a party's brief. This is appropriate for two reasons. First, an *amicus* may omit certain items that must be included in a party's brief. Second, an *amicus* brief is supplemental. It need not address all issues or all facets of a case. It should treat only matter not adequately addressed by a party.

Subdivision (e). The time limit for filing is unchanged; an *amicus* brief must be filed within the time

allowed for filing the principal brief of the party the *amicus* supports. Occasionally, an *amicus* supports neither party; in such instances, the amendment provides that the *amicus* brief must be filed within the time allowed for filing the appellant's principal brief. The statement that a court may for cause shown grant leave for later filing has been omitted as unnecessary. Rule 26(b) grants general authority to enlarge the time prescribed in these rules for good cause shown.

Attachment C
Local Rules and I.O.P's

CIRCUIT RULES AND I.O.P.'s

D.C. CIRCUIT RULE 29. Briefs for an Amicus Curiae

The rules stated below shall apply with respect to the brief for *amicus curiae* not appointed by the court. A brief for an *amicus curiae* shall be governed by the provisions of Circuit Rule 28, as appropriate.

(a) Contents of Brief. The brief shall avoid repetition of facts or legal arguments made in the principal (appellant/petitioner or appellee/respondent) brief, and shall focus on points not made or adequately elaborated upon in the principal brief, although relevant to the issues before this Court.

(b) Leave to File. Any individual or non-governmental entity seeking leave to participate as *amicus curiae* shall, within 30 days of the docketing of the case in this court, file either a written representation that all parties consent to such participation, or, in the absence of such consent, a motion for leave to participate as *amicus curiae*. (For this purpose, the term "governmental entity" includes the United States or an officer or agency thereof, the District of Columbia, or a State, Territory, or Commonwealth of the United States.) The court may extend this time on a showing of good cause. A governmental entity planning to participate as *amicus curiae* shall, within the same 30 days, or as promptly thereafter as possible, submit a notice of intent to file an *amicus* brief.

(c) Timely Filing. Generally, a brief for *amicus curiae* will be due as set by the briefing order in each case. In the absence of provision for such a brief in the order, the brief shall be filed in accordance with the time limitations described in FRAP 29.

(d) Single Brief. *Amici curiae* on the same side shall join in a single brief to the extent practicable. This requirement shall not apply to a governmental entity. Any separate brief for an *amicus curiae* shall contain a certificate of counsel plainly stating why the separate brief is necessary. Generally unacceptable grounds for the filing of separate briefs include representations that the issues presented require greater length than these Rules allow (appropriately addressed by a motion to exceed length limits), that counsel cannot coordinate their efforts due to geographical dispersion, or that separate presentations were allowed in earlier proceedings.

(e) No Reply Brief. Unless otherwise directed by the court, no reply brief

of an *amicus curiae* will be received.

See Circuit Rules 28(f) (Briefs for Intervenors), and 34(e) (Participation in Oral Argument by *Amici Curiae*).

D.C. Cir. I.O.P. IX. Briefs

* * * * *

3. *Amici curiae and Intervenors.* (See Fed. R. App. P. 29; D.C. Cir. Rules 28(e), 29.)

A brief of an *amicus curiae* may be filed only by written consent of all the parties or by leave of the Court, unless the *amicus* is the United States or an officer or agency thereof, a state, a territory, the District of Columbia, a Commonwealth of the United States, or has been appointed by the Court. Governmental entities, however, must submit a notice of an intent to file an *amicus* brief. *See* D.C. Cir. Rule 29(b). A motion for leave to file an *amicus* brief should set forth the interest of the *amicus* and the reasons why briefing is desirable. Motions for leave to participate *amicus curiae*, or written representations of the consent of all parties to such participation, are due within 30 days of docketing, unless the Court grants an extension for good cause. Parties seeking leave to participate as *amicus curiae* after the merits panel has been assigned or at the rehearing stage, should be aware that the Court will not accept an *amicus* brief where it would result in the recusal of a member of the panel or recusal of a member of the *in banc* Court.

The rules define an "intervenor" as an interested person who has sought and obtained this Court's leave to participate in an already instituted proceeding. *See* D.C. Cir. Rule 28(c). Briefs of *amici* and intervenors are limited to 8,750 words if prepared by word processing systems or using standards typographical printing in any typeface at least 11 points in height, or 35 pages if prepared by a typewriter. Typewritten briefs must be typed in a non-proportional type face with no more than ten characters per inch. *See* D.C. Cir. Rule 28(d). The briefs are due approximately 15 days after the brief of the party the intervenor or *amicus* supports, and the briefs may not repeat facts or legal arguments made and adequately elaborated upon in the parties' brief. Circuit Rule 28(e)(4) requires consolidated briefing by intervenors on the same side, to the extent practicable. Similarly, Circuit Rule 29(d) requires *amici curiae* on the same side to join in a single brief, to the extent practicable. Where an intervenor or *amicus* files a separate brief, counsel must certify in the brief why a separate brief is necessary. Grounds that are *not* acceptable as reasons for filing a separate brief include

representations that the issues presented require more pages than allowed under the Court's rules; that the counsel cannot coordinate filing a single brief because of geographical dispersion; or that separate presentations were permitted in the proceedings below. When a governmental entity is an *amicus curiae* or an intervenor, it is not required to file a joint brief with other *amici* or intervenors. For this purpose, a governmental entity includes the United States or an officer of agency thereof, a state, a territory, the District of Columbia, or a Commonwealth of the United States. An intervenor supporting an appellant or petitioner may file a reply brief when the appellant's or petitioner's reply brief is due, but an *amicus* may not file a reply brief unless otherwise directed by the Court. Reply briefs for intervenors are limited to 4,400 words if printed or prepared by word processing systems, or 17 pages if prepared by a typewriter. Typewritten briefs must be typed in a non-proportional typeface with no more than ten characters per inch.

4th Cir. I.O.P. 29.1

The Court prefers but does not require that a motion for leave to file a brief as amicus curiae be accompanied by the proposed brief. Any such motion, however, must be filed under separate cover from the proposed brief and contain a statement concerning the consent of the parties as required by Local Rule 27(b).[1]

5th Cir. R. 29. Brief of an Amicus Curiae

29.1. *Time for Filing Motion.* One wishing to file an amicus curiae brief should move to do so within 15 days after the filing of the principal brief of the party whose position as to affirmance or reversal the amicus brief will support. The proposed brief should accompany the motion. This time was established by the Court to provide for maximum utilization of the provision of the Fed. R. App. P. 28(i).

29.2. *Contents and Form.* Briefs filed under this rule shall comply with the applicable FRAP provisions and with Local Rules 28, 31 and 32, except that with respect to Fed. R. App. P. 28(a) and Local Rule 28.2, the amicus brief should, in

[1] 4th Cir. R. 27(b) requires a motion to "contain a statement by counsel that counsel for the other parties to the appeal have been informed of the intended filing of the motion. The statement shall indicate whether the other parties consent to the granting of the motion, or intend to file responses in opposition."

complying with Local Rule 28.2.1,[2] state only the interest of the amicus curiae, and the amicus brief need not contain a statement of the issues, statement of the case, request for oral argument or statement of jurisdiction. The brief should avoid the repetition of facts or legal arguments contained in the principal brief and should focus on points either not made or not adequately discussed therein. Any brief not in conformity herewith may be stricken, on motion or sua sponte.

29.3. *Length of Briefs.* Unless otherwise permitted by the Court, the amicus brief shall be in the form prescribed by Local Rule 32 and shall not exceed 20 pages, exclusive of pages containing the certificate of interested persons, table of contents, table of citations and any addendum containing statutes, rules, regulations, etc.

5th Cir. R. 31. Filing and Service of Briefs.

* * * * *

31.2. *Briefs -- Time for Filing Briefs of Intervenors or Amicus Curiae.* In order to provide for maximum utilization of the options permitted by FRAP 28(i), the time for filing the brief of the intervenor or amicus is extended until 15 days after the filing of the principal brief of the party supported by the intervenor or amicus. For purposes of FRAP 31(a), the time for filing the next brief shall run from that date.

7th Cir. R. 29. Brief of an Amicus Curiae

(a) *Avoiding Unnecessary Repetition.* Before completing the preparation of an amicus brief, counsel for an amicus curiae shall attempt to ascertain the arguments that will be made in the brief of any party whose position the amicus is supporting, with a view to avoiding any unnecessary repetition or restatement of those arguments in the amicus brief.

(b) *Page Limitation.* Except by permission of the court, an amicus brief shall not exceed 20 pages.

8th Cir. R. 29A. Amicus Curiae Brief - Length

All amicus curiae briefs shall be limited to 20 pages.

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[2] 5th Cir. R. 28.2.1 is entitled "Certificate of Interested Persons."

9th Cir. R. 29-1. Reply Brief of an Amicus Curiae

No reply brief of an amicus curiae will be received.

Advisory Committee Note to Rule 29-1

The filing of multiple amici curiae briefs raising the same points in support of one party is disfavored. Prospective amici are encouraged to file a joint brief. Movants are reminded that the court will review the amicus curiae brief in conjunction with the briefs submitted by the parties, so that amici briefs should not repeat arguments or factual statements made by the parties.

Amici who wish to join in the arguments or factual statements of a party or other amici are encouraged to file and serve on all parties a short letter so stating in lieu of a brief. The letter shall be provided in an original and three copies.

10th Cir. R. 29. Brief of an Amicus Curiae.

29.1. *Length of Amicus Brief.* Except by permission of the court, amicus briefs shall be limited to 20 pages.

10th Cir. I.O.P. V. Writing a Brief.

A. *Formal Requirements as to Contents.*

* * * * *

6. *Amicus Briefs.* Amicus briefs may be filed only with the written consent of all parties (such consent must be filed with the brief), or by leave of court granted on motion, or at the request of the court. Consent or leave is not required for amicus briefs by the United States, an agency or office of the United States, or by a State or Territory. Fed. R. App. P. 29.

11th Cir. R. 29-1. Motions for Leave.

Motions for leave to file a brief of amicus curiae must comply with FRAP 27 and 11th Cir. R. 27-1, including the requirement of a Certificate of Interested Persons and Corporate Disclosure Statement as described in FRAP 26.1 and the accompanying circuit rules.

11th Cir. R. 28-2. Briefs - Contents.

Each principal and amicus brief shall consist, in the order listed, of the following:

(a) *Cover Page.* Elements to be shown on the cover page include . . .

(b) *Certificate of Interested Persons and Corporate Disclosure Statement.* A Certificate . . .

(c) *Statement Regarding Oral Argument.* Appellant's brief shall include . . .

(d) *Table of Contents and Citations.* The table of contents and citations shall include . . .

(e) *Statement Regarding Adoption of Briefs of Other Parties.* A party who . . .

(f) *Statement of Jurisdiction.* Each brief shall include a concise statement of the statutory or other basis of the jurisdiction of this court, containing citations of authority when necessary.

(g) *Statement of the Issues.*

(h) *Statement of the Case. . . .*

(i) *Summary of the Argument.* The opening brief of the parties shall . . .

(j) *Argument and Citations of Authority. . . .*

(k) *Conclusion.*

(l) *Certificate of Service.*

11th Cir. I.O.P. 29 Amicus Brief.

The clerk has authority to refuse the submission of any amicus brief which does not comply with FRAP 32 and 11th Cir. R. 28-1, 28-2, 31-1, 32-3.

Fed. Cir. R. 29. Brief of an amicus curiae.

(a) *Content; form.* The brief of an amicus curiae shall comply with Rules 28 and 32 of the Federal Circuit Rules except as provided in this rule. The statements of related cases, of jurisdiction, of the issues, and of the case, and the addendum, may be omitted. The brief shall not exceed 20 pages exclusive of the items listed in (1) through (6), (12), and (13) of Rule 28(A) of these Federal Circuit Rules. The cover of such a brief shall indicate whether it urges affirmance or reversal of the judgment or order under review. An amicus may not file a reply brief except by leave of the court granted only in extraordinary circumstances.

(b) *List of Amicus Curiae.* The clerk shall maintain a list of bar associations and other organizations to be invited to file amicus curiae brief when directed by the court. Bar associations and other organizations will be placed on the list upon request. The request shall be reviewed annually not later than October 1st.

Attachment D
Supreme Court Rules

SUPREME COURT RULE 37. BRIEF OF AN AMICUS CURIAE

.1. An *amicus curiae* brief which brings relevant matter to the attention of the Court that has not already been brought to its attention by the parties is of considerable help to the Court. An *amicus* brief which does not serve this purpose simply burdens the staff and facilities of the Court and its filing is not favored.

* * * * *

.3. A brief of an *amicus curiae* in a case before the Court for oral argument may be filed when accompanied by the written consent of all parties and presented within the time allowed for the filing of the brief of the party supported, or, if in support of neither party, within the time allowed for filing the petitioner's or appellant's brief. A brief *amicus curiae* must identify the party supported or indicate whether it suggests affirmance or reversal, and must be as concise as possible. No reply brief of an *amicus curiae* and no brief of an *amicus curiae* in support of a petition for rehearing will be received.

.4 When consent to the filing of a brief of an *amicus curiae* in a case before the Court for oral argument is refused by a party to the case, a motion for leave to file indicating the party or parties who have refused consent accompanied by the proposed brief and printed with it, may be presented to the Court. A motion will not be received unless submitted within the time allowed for the filing of an *amicus* brief on written consent. The motion shall concisely state the nature of the applicant's interest and set forth facts or questions of law that have not been, or reasons for believing that they will not be, presented by the parties and their relevancy to the disposition of the case. The motion may in no event exceed five pages. A party served with the motion may file an objection thereto concisely stating the reasons for withholding consent which must be printed in accordance with Rule 33. The cover of an *amicus* brief must identify the party supported or indicate whether it supports affirmance or reversal.

.5 Consent to the filing of a brief of an *amicus curiae* is not necessary when the brief is presented on behalf of the United States by the Solicitor General; on behalf of any agency of the United States authorized by law to appear on its own behalf when submitted by the agency's authorized legal representative; on behalf of a State, Territory, or Commonwealth when submitted by its Attorney General; or on behalf of a political subdivision of a State, Territory, or Commonwealth when submitted by its authorized law officer.

.6 Every brief or motion filed under this Rule must comply with the applicable provision of Rules 21, 24, and 33 (except that it shall be sufficient to set forth in the brief the interest of the *amicus curiae*, the argument, the summary of the argument, and the conclusion); and shall be accompanied by proof of service as required by Rule 29.

91-24

L. RALPH MECHAM
DIRECTOR

JAMES E. MACKLIN, JR.
DEPUTY DIRECTOR

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
CHIEF RULES COMMITTEE
SUPPORT OFFICE

September 24, 1993

Honorable Dolores K. Sloviter
Chief Judge, United States Court of Appeals
18614 United States Courthouse
Independence Mall West
601 Market Street
Philadelphia, Pennsylvania 19106

Dear Judge Sloviter:

You were certainly correct that the Committee on the Codes of Conduct had issued an advisory opinion regarding *amicus curiae* briefs. I am enclosing a copy of Advisory Opinion Number 63, which responds to an inquiry on this issue.

I am looking forward to the next meeting of the Standing Committee.

Sincerely,

John K. Rabiej

John K. Rabiej

Enclosure

cc: Honorable Robert E. Keeton
Honorable Alicemarie H. Stotler
Honorable Kenneth F. Ripple
Honorable James K. Logan
Professor Carol Ann Mooney

ADVISORY COMMITTEE ON CODES OF CONDUCT
ADVISORY OPINION NO. 63

Disqualification in Relation to Amici.

An opinion of the Advisory Committee has been requested on the applicability of Canon 3C(1)(c) to an amicus curiae. The inquiry is whether this provision of the Canon requires disqualification (1) generally whenever the judge has an interest in a corporation filing an amicus brief and (2) when, after a panel decision has been rendered by a court of appeals, such a corporation for the first time files a motion for leave to submit an amicus brief in support of the petition for rehearing and the suggestion for rehearing en banc.

Canon 3C(1)(c) provides that the judge shall disqualify himself when

> (c) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding; . . .

In the situations described in the inquiry, the judge does not have a financial interest in the subject matter in controversy. See E. Thode, Reporter's Notes to A.B.A. Code of Judicial Conduct 66 (1973). Nor does he have such an interest in a party bound by its outcome. See 1B J. Moore, Federal Practice 0.411(6), at 1551 (2d ed. 1974). There remains the question of whether the judge's interest in the amicus constitutes "any other interest that could be substantially affected by the outcome of the proceeding".

Any financial interest that could be substantially affected by the outcome of a proceeding is a disqualifying interest, and this aspect of the Canon applies to an ownership interest in any corporation, whether or not the corporation appears as an amicus. Even in those situations where an ownership interest could be substantially affected by the outcome of a proceeding, one might well doubt that a judge's impartiality might reasonably be questioned if the extent of his interest is minimal. However, the Reporter's Notes to the Code of Judicial Conduct indicate that if the interest could be substantially affected by the outcome, the extent of the interest is irrelevant. The Reporter states that ownership of stock in a nonparty should result in disqualification when the nonparty is in the same industry as the party and the value of industry stock generally could be substantially affected

by the decision in the pending case. E. Thode, supra, at 66;[1] see C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure §3547, at 365 (1975). But see, In re Virginia Electric & Power Co., 539 F.2d 357, 367-368 (4th Cir. 1976) (suggesting that a de minimis interest in a nonparty does not require disqualification). Since a rule of at least equal stringency would seem appropriate where a nonparty is an amicus, a small stock interest in an amicus requires disqualification when the per-unit value of stock could be substantially affected by the decision of the court.

Given the mandatory nature of Canon 3C(1)(c), the result is the same even when the amicus does not surface until the rehearing stage.

In the event that a decision in a pending case will not substantially affect a judge's interest in an amicus, another standard would become relevant, viz., the prohibition against a judge's participation when "his impartiality might reasonably be questioned." Canon 3C(1).[2]

Finally, it should be emphasized that if an interest in an amicus would not be substantially affected by the outcome and if the judge's impartiality might not otherwise reasonably be questioned, stock ownership in an amicus is not per se a disqualification.

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[1] Professor Thode explains that the test is "not whether a judge has a 'substantial interest' but whether the interest that he has could be substantially affected by a decision in the proceeding before him."

[2] Section 455(e) of Title 28 provides that disqualification for the existence of the reasonable appearance of partiality may be waived by the parties. The Code of Judicial Conduct has a similar provision. See State of California v. Kleppe, 431 F.Supp. 1344, 1350-1351 (C.D. Cal. 1977).

The appearance of impropriety standard was the one relied on by the trial judge to disqualify himself in State of California v. Kleppe, 431 F.Supp. 1344, 1349-1350 (C.D. Cal. 1977), which concerned Exxon's offshore oil leasing. The judge not only owned stock in nonparty Union Oil, whose own operations nearby would be affected by the case's outcome and who had royalty override and partnership arrangements with Exxon in the area, but had also served as Union's litigation counsel for twelve years and reviewed oil and gas leases for it, possibly including some in the area under the judge's consideration.

AGENDA ITEM - IV. C
Denver, Colorado
April 25-26, 1994

TO: Honorable James K. Logan, Chair, and Members of the Advisory Committee on Appellate Rules

FROM: Carol Ann Mooney, Reporter

DATE: March 11, 1994

RE: Items 89-5, 90-1, 91-25 and 92-4, amendment of Rule 35 re: in banc proceedings

There are four items on the Committee's docket dealing with Rule 35; they are items 89-5, 90-1, 91-25 and 92-4.

Items 89-5 and 90-1 involve proposed amendments that would treat a request for a rehearing in banc like a petition for a panel rehearing so that a request for a rehearing in banc also will suspend the finality of a court of appeals' judgment and extend the period for filing a petition for writ of certiorari. The proposed amendments also would change the term "suggestion" for rehearing in banc to "petition." Both changes have been approved by the Advisory Committee (April 1993) and by the Standing Committee (July 1993) for publication. Publication of these proposed changes has been delayed, however, pending resolution of items 91-25 and 92-4. The drafts in this memorandum reflect the changes approved under items 89-5 and 90-1.

Item 91-25 grew out of the Local Rules Project. The Project suggested that the Advisory Committee consider adopting some or all of the provisions in the various circuit rules dealing with suggestions for in banc determination. In its response to the Local Rules Project Report, the Fifth Circuit recommended adoption of its rule which specifies the contents of a suggestion for in banc consideration.

At the September 1993 meeting, the Advisory Committee considered two drafts prepared pursuant to those suggestions. The Committee consensus was that it was unnecessary to specify the contents of a petition for rehearing in banc in detail, thus eliminating one draft from consideration. The other draft made only one significant change in the rule. The draft required a petition for in banc consideration to include a statement demonstrating that in banc consideration is appropriate. Ten circuits currently have a similar requirement. The Committee approved that draft along with some additional changes:

1. the rule should include a length limitation;
2. the caption of subdivision (a) should be changed from "When Hearing or Rehearing In Bank Will Be Ordered" to "When Hearing or Rehearing In Bank May Be Ordered;" and
3. subdivision (f) should be amended to make it clear that a senior judge or a judge sitting by designation may not call for a vote on a request for rehearing in banc unless such a judge was member of the panel whose decision is sought to be reviewed.

Item 92-4 involves a suggestion from the Solicitor General that intercircuit conflict should be made an explicit ground for granting an in banc hearing. The Committee agreed that the Rule should include some reference to intercircuit conflict as grounds for granting rehearing in banc.

The Solicitor General's suggestion had been to amend subdivision (a) so that intercircuit conflict would be treated as a separate category of cases as to which in banc review would be appropriate. The Committee did not decide, however, whether to adopt that approach or to treat intercircuit conflict as grounds for determining that a proceeding involves a question of "exceptional importance."

I was asked to prepare a new draft integrating all of the decisions made to date. Because the Committee did not decide exactly how to treat a case involving an intercircuit conflict, there are two drafts. Draft one treats intercircuit conflict as grounds for finding that a proceeding involves a question of "exceptional importance;" that approach requires amendment only of subdivision (b). Draft two treats intercircuit conflict as a separate category of cases as to which in banc review may be appropriate; this approach requires amendment of both subdivisions (a) and (b).

Rule 35. ~~Determination of Causes by the Court~~ In Banc Proceedings

(a) *When Hearing or Rehearing in Banc ~~Will~~ May 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~~ An in banc hearing or rehearing is not favored and ordinarily will not be ordered ~~except when~~ unless:

(1) consideration by the full court is necessary to secure or maintain uniformity of its decisions, ~~or~~

(2) the proceeding involves a question of exceptional importance.

(b) *~~Suggestion~~ Petition of a Party for Hearing or Rehearing in Banc.* - A party may ~~suggest the appropriateness of~~ petition for a hearing or rehearing in banc.

(1) The petition must begin with a statement either that:

(A) the panel decision conflicts with a decision of the United States

Supreme Court or of the court to which the petition is addressed (citations to the conflicting case or cases is required) and that consideration by the full court is necessary to secure and maintain uniformity of the court's decisions;

(B) the proceeding involves one or more questions of exceptional importance; each such question must be concisely stated, preferably in a single sentence. A proceeding may present a question of exceptional importance when it involves an issue as to which the panel decision in that case, or another decision of the court to which the petition is addressed, conflicts with a decision of another federal court of appeals (citation to the conflicting case or cases is required).

(2) A petition for hearing or rehearing in banc may not exceed 15 pages unless the court provides otherwise by local rule or by

order in a particular case. When both a petition for panel rehearing and a petition for rehearing in banc are filed, whether or not they are combined in a single document, the combined documents may not exceed 15 pages.* Pages excluded by Rule 28(g) do not count.

~~No response shall be filed unless the court shall so order. The clerk shall transmit any such suggestion to the members of the panel and the judges of the court who are in regular active service but a vote need not be taken to determine whether the cause shall be heard or reheard in banc unless a judge in regular active service or a judge who was a member of the panel that rendered a decision sought to be reheard requests a vote on such a suggestion made by a party.~~

(c) *Time for ~~Suggestion~~ Petition of a Party for Hearing or Rehearing in Banc. ~~; Suggestion Does Not~~*

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* **Reporter's Comment:** The Committee did not address the problem of the length limit when both a petition for panel rehearing and a petition for rehearing in banc are filed. Three circuit rules, D.C. Cir. R. 35 (b), 10th Cir. R. 35.5, and 11th Cir. R. 35-8, use the approach taken in the draft. The other circuits do not address the issue.

~~Stay Mandate. If a party desires to suggest that~~ A petition that an appeal be heard initially in banc~~, the suggestion~~ must be ~~made~~ filed by the date on which the appellee's brief is filed.** A ~~suggestion~~ petition for a rehearing in banc must be ~~made~~ filed 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 or stay the issuance of the mandate.~~

** **Reporter's Comment:** The requirement that a petition to hear "an appeal" initially in banc must be filed by the "date on which the appellee's brief is filed," is unchanged from the current rule.

Would it be better to require filing by the date on which the appellee's brief is due? An appellant who wishes to request in banc consideration must anticipate the filing date of the appellee's brief. If there are multiple appellees who are separately represented, is the petition due when the first appellee's brief is filed?

Should the word "appeal" be changed to "proceeding" because requests for in banc consideration are not limited to appeals? I think not; that change would complicate the due date for the petition and requests for in banc consideration of motions, etc. are sufficiently rare that it is probably not worth the complication.

(d) *Number of Copies.* -- The number of copies that must be filed may be prescribed by local rule and may be altered by order in a particular case.

(e) *Response.*-- No response may be filed to a petition for in banc consideration unless the court orders a response.

(f) *Voting on a Petition.* -- The clerk must transmit any such petition to the judges of the court who are in regular active service and, with respect to a petition for rehearing, to any other members of the panel that rendered the decision sought to be reheard, but a vote need not be taken to determine whether the cause will be heard or reheard in banc unless one of those judges requests a vote.

Committee Note

One of the purposes of the amendments is to treat a request for a rehearing in banc like a petition for panel rehearing so that a request for a rehearing in banc will suspend the finality of the court of appeals' judgment and extend the period for filing a petition for writ of certiorari. Companion amendments are made to Rule 41.

Subdivision (a). The title of this subdivision is changed from "When a Hearing or Rehearing In Banc Will Be Ordered" to "When a Hearing or Rehearing In Banc May Be Ordered." The change emphasizes the discretion a court has with regard to granting in banc review.

Subdivision (b). The term "petition for rehearing in banc" is substituted for the term "suggestion for rehearing in banc." The terminology change is not a necessary part of the changes that extend the time for filing a petition for a writ of certiorari when a party requests a rehearing in banc. The terminology change reflects, however, the Committee's intent to treat similarly a petition for panel rehearing and a request for a rehearing in banc.

The amendments also require each petition for in banc consideration to begin with a statement concisely demonstrating that the case meets the criteria for in banc consideration. It is the Committee's hope that requiring such a statement will cause the drafter of a petition to focus on the narrow grounds that support in banc consideration and to realize that a petition should not be filed unless the case meets those rigid standards.

Intercircuit conflict is cited as a reason for determining that a proceeding involves a question of "exceptional importance." Intercircuit conflicts create problems. When the circuits construe the same federal law differently, parties' rights and duties depend upon where a case is litigated. Given the increase in the number of cases decided by the federal courts and the Supreme Court's inability to increase the number of cases it considers on the merits, conflicts between the circuits may remain unresolved by the Supreme Court for an extended period of time. The existence of an intercircuit conflict often generates additional litigation in the other circuits as well as in the circuits that are already in conflict. Although an in banc proceeding will not necessarily prevent intercircuit conflicts, an in banc proceeding provides a safeguard against unnecessary intercircuit conflicts.

Four circuits have rules or internal operating procedures that recognize a conflict with another circuit as a legitimate basis for granting a rehearing in banc. D.C. Cir. R. 35(c); 7th Cir. R. 40(c); 9th Cir. R. 35-1; and 4th Cir. I.O.P. 40.5. An intercircuit conflict may present a question of "exceptional importance" because of the costs that intercircuit conflicts impose on the system as a whole, in addition to the significance of the issues involved. It is not, however, the Committee's intent to make the granting of a hearing or

rehearing in banc mandatory whenever there is an intercircuit conflict.

When a panel decision conflicts with a decision of another circuit, a petition to rehear the case in banc may be appropriate. Subpart (b)(1)(B) also provides that a petition may state that the proceeding involves an issue as to which "another decision of the court" conflicts with a decision of another circuit. That language is included because a request for an initial hearing in banc may be appropriate when a proceeding involves an issue as to which a decision in an earlier case from the circuit conflicts with a decision from another circuit.

Counsel are reminded that their duty is fully discharged without filing a petition for rehearing in banc unless the case meets the rigid standards of subdivision (a) of this Rule.

Paragraph (2) of this subdivision establishes a maximum length for a petition. Fifteen pages is the length currently used in five circuits; D.C. Cir. R. 35(b), 5th Cir. R. 35.5, 10th Cir. R. 35.5, 11th Cir. R. 35-8, and Fed. Cir. R. 35(d). Each request for in banc consideration must be studied by every active judge of the court and is a serious call on limited judicial resources. The extraordinary nature of the issue or the threat to uniformity of the court's decision can be established in most cases in less than fifteen pages.

To improve the clarity of the Rule, the material dealing with filing a response to a petition and with voting on a petition have been moved to new subdivisions (e) and (f).

Subdivision (c). Two changes are made in this subdivision. First, the sentence stating that a request for a rehearing in banc does not affect the finality of the judgment or stay the issuance of the mandate is deleted. The deletion of that sentence does not affirmatively accomplish the goal of extending the period for filing a petition for writ of certiorari; it simply sets the stage for such an amendment. In order to affirmatively accomplish that objective, Sup. Ct. R. 13.4 must be amended.

Second, the language permitting a party to include a

request for rehearing in banc in a petition for panel rehearing is deleted. The Committee believes that those circuits that want to require two separate documents should have the option to do so.

Subdivision (e). This is a new subdivision. The substance of the subdivision, however, was drawn from former subdivision (b). The only changes are stylistic; no substantive changes are intended.

Subdivision (f). This is a new subdivision. The substance of the subdivision, however, was drawn from former subdivision (b).

Because of the discretionary nature of the in banc procedure, the filing of a suggestion for rehearing in banc has not required a vote; a vote is taken only when requested by a judge of the court in regular active service or by a judge who was a member of the panel that rendered the decision sought to be reheard. It is not the Committee's intent to change the discretionary nature of the procedure or to require a vote on a petition for rehearing in banc. The rule continues, therefore, to provide that a court is not obligated to vote on such petitions. It is necessary, however, that each court develop a procedure for disposing of such petitions because they will suspend the finality of the court's judgment and toll the time for filing a petition for certiorari.

Rule 35. ~~Determination of Causes by the Court~~ In Banc Proceedings

(a) *When Hearing or Rehearing in Banc ~~Will~~ May 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~~ An in banc hearing or rehearing is not favored and ordinarily will not be ordered ~~except when~~ unless:

(1) consideration by the full court is necessary to secure or maintain uniformity of its decisions, ~~or~~

(2) a decision of the court is in conflict with a decision of another federal court of appeals, or

(3) the proceeding involves a question of exceptional importance.

(b) ~~*Suggestion*~~ *Petition of a Party for Hearing or Rehearing in Banc.* - A party may ~~suggest the appropriateness of~~ petition for a hearing or rehearing in banc.

(1) The petition must begin with a statement that:

(A) the panel decision conflicts with a decision of the United States Supreme Court or of the court to which the petition is addressed (citations to the conflicting case or cases is required) and that consideration by the full court is necessary to secure and maintain uniformity of the court's decisions;

(B) the proceeding involves an issue as to which the panel decision in that case, or another decision of the court to which the petition is addressed, conflicts with a decision of another federal court of appeals (citation to the conflicting case or cases is required); or

(C) the proceeding involves one or more questions of exceptional importance; each such question must be concisely stated, preferably in a single sentence.

(2) A petition for hearing or rehearing in banc may not exceed 15 pages unless the court provides otherwise by local rule or by order in a particular case. When both a petition for panel rehearing and a petition for rehearing in banc are filed, whether or not they are combined in a single document, the combined documents may not exceed 15 pages.*** Pages excluded by Rule 28(g) do not count.

~~No response shall be filed unless the court shall so order. The clerk shall transmit any such suggestion to the members of the panel and the judges of the court who are in regular active service but a vote need not be taken to determine whether the cause shall be heard or reheard in banc unless a judge in regular active service or a judge who was a member of the panel that rendered a decision sought to be reheard~~

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~~requests a vote on such a suggestion made by a party.~~

(c) *Time for ~~Suggestion~~ Petition of a Party for Hearing or Rehearing in Banc.* ~~; Suggestion Does Not Stay Mandate.~~ ~~If a party desires to suggest that~~ A petition that an appeal be heard initially in banc~~, the suggestion~~ must be ~~made~~ filed by the date on which the appellee's brief is filed.**** A ~~suggestion~~ petition for a rehearing in banc must be ~~made~~ filed 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~~

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~~for rehearing shall not affect the finality of the judgment of the court of appeals or stay the issuance of the mandate.~~

(d) *Number of Copies.* -- The number of copies that must be filed may be prescribed by local rule and may be altered by order in a particular case.

(e) *Response.*-- No response may be filed to a petition for in banc consideration unless the court orders a response.

(f) *Voting on a Petition.* -- The clerk must transmit any such petition to the judges of the court who are in regular active service and, with respect to a petition for rehearing, to any other members of the panel that rendered the decision sought to be reheard, but a vote need not be taken to determine whether the cause will be heard or reheard in banc unless one of those judges requests a vote.

Committee Note

One of the purposes of the amendments is to treat a request for a rehearing in banc like a petition for panel rehearing so that a request for a rehearing in banc will suspend the finality of the court of appeals' judgment and extend the period for filing a petition for writ of certiorari. Companion amendments are made to Rule 41.

Subdivision (a). The title of this subdivision is changed from "When a Hearing or Rehearing In Banc Will Be Ordered" to "When a Hearing or Rehearing In Banc May Be Ordered." The change emphasizes the discretion a court has with regard to granting in banc review.

Intercircuit conflict is made an explicit ground for granting a hearing or rehearing in banc. Intercircuit conflicts create problems. When the circuits construe the same federal law differently, parties' rights and duties depend upon where a case is litigated. Given the increase in the number of cases decided by the federal courts and the Supreme Court's inability to increase the number of cases it considers on the merits, conflicts between the circuits may remain unresolved by the Supreme Court for an extended period of time. The existence of an intercircuit conflict often generates additional litigation in the other circuits as well as in the circuits that are already in conflict. Although an in banc proceeding will not necessarily prevent intercircuit conflicts, an in banc proceeding provides a safeguard against unnecessary intercircuit conflicts.

Four circuits have rules or internal operating procedures that recognize a conflict with another circuit as a legitimate basis for granting a rehearing in banc. D.C. Cir. R. 35(c); 7th Cir. R. 40(c); 9th Cir. R. 35-1; and 4th Cir. I.O.P. 40.5. Intercircuit conflict also has served as grounds for demonstrating that a case involves a question of "exceptional importance." An intercircuit conflict may present a question of "exceptional importance" because of the costs that intercircuit conflicts impose on the system as a whole, in addition to the significance of the issues involved. It is not, however, the Committee's intent to make the granting of a hearing or rehearing in banc mandatory whenever there is an intercircuit conflict.

Subdivision (b). The term "petition for rehearing in banc is substituted for the term "suggestion for rehearing in banc." The terminology change is not a necessary part of the changes that extend the time for filing a petition for a writ of certiorari when a party requests a rehearing in banc. The terminology change reflects, however, the Committee's intent to treat similarly a petition for panel rehearing and a request for a rehearing in banc.

The amendments also require each petition for in banc consideration to begin with a statement concisely demonstrating that the case meets the criteria for in banc consideration. It is the Committee's hope that requiring such a statement will cause the drafter of a petition to focus on the narrow grounds that support in banc consideration and to realize that a petition should not be filed unless the case meets those rigid standards.

Intercircuit conflict may provide the basis for such a statement. When a panel decision conflicts with a decision of another circuit, a petition to rehear the case in banc may be appropriate. Subpart (b)(1)(B) also provides that a petition may state that the appeal involves an issue as to which "another decision of the court" conflicts with a decision of another circuit. That language is included because a request for an initial hearing in banc may be appropriate when an appeal involves an issue as to which a decision in an earlier case from the circuit conflicts with a decision from another circuit.

Counsel are reminded that their duty is fully discharged without filing a petition for rehearing in banc unless the case meets the rigid standards of subdivision (a) of this Rule.

Paragraph (2) of this subdivision establishes a maximum length for a petition. Fifteen pages is the length currently used in five circuits; D.C. Cir. R. 35(b), 5th Cir. R. 35.5, 10th Cir. R. 35.5, 11th Cir. R. 35-8, and Fed. Cir. R. 35(d). Each request for in banc consideration must be studied by every active judge of the court and is a serious call on limited judicial resources. The extraordinary nature of the issue or the threat to uniformity of the court's decision can be established in most cases in less than fifteen pages.

To improve the clarity of the Rule, the material dealing with filing a response to a petition and with voting on a petition have been moved to new subdivisions (e) and (f).

Subdivision (c). Two changes are made in this subdivision. First, the sentence stating that a request for a rehearing in banc does not affect the finality of the judgment or stay the issuance of the mandate is deleted. The deletion

of that sentence does not affirmatively accomplish the goal of extending the period for filing a petition for writ of certiorari; it simply sets the stage for such an amendment. In order to affirmatively accomplish that objective, Sup. Ct. R. 13.4 must be amended.

Second, the language permitting a party to include a request for rehearing in banc in a petition for panel rehearing is deleted. The Committee believes that those circuits that want to require two separate documents should have the option to do so.

Subdivision (e). This is a new subdivision. The substance of the subdivision, however, was drawn from former subdivision (b). The only changes are stylistic; no substantive changes are intended.

Subdivision (f). This is a new subdivision. The substance of the subdivision, however, was drawn from former subdivision (b).

Because of the discretionary nature of the in banc procedure, the filing of a suggestion for rehearing in banc has not required a vote; a vote is taken only when requested by a judge of the court in regular active service or by a judge who was a member of the panel that rendered the decision sought to be reheard. It is not the Committee's intent to change the discretionary nature of the procedure or to require a vote on a petition for rehearing in banc. The rule continues, therefore, to provide that a court is not obligated to vote on such petitions. It is necessary, however, that each court develop a procedure for disposing of such petitions because they will suspend the finality of the court's judgment and toll the time for filing a petition for certiorari.

Draft One - September 1993

Rule 35. Determination of a 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~~ An in banc hearing or rehearing is not favored and ordinarily will not be ordered ~~except when~~ unless:

(1) consideration by the full court is necessary to secure or maintain uniformity of its decisions, or

(2) the proceeding involves a question of exceptional importance.

(b) ~~*Suggestion*~~ *Petition of a Party for Hearing or Rehearing in Banc.* - A party may ~~suggest the appropriateness of~~ petition for a hearing or rehearing in banc. The petition must begin with a statement that either

(1) the panel decision conflicts with a decision of the United States Supreme Court or of the court to which the petition is addressed (citations to the conflicting case or cases is required) and that consideration by the full court is necessary to secure and maintain uniformity of the court's decisions; or

(2) the appeal involves one or more questions of exceptional importance; each such question must be concisely stated, preferably in a single sentence.

~~No response shall be filed unless the court shall so order. The clerk shall transmit any~~

~~such suggestion to the members of the panel and the judges of the court who are in regular active service but a vote need not be taken to determine whether the cause shall be heard or reheard in banc unless a judge in regular active service or a judge who was a member of the panel that rendered a decision sought to be reheard requests a vote on such a suggestion made by a party.~~

(c) *Time for ~~Suggestion~~ Petition of a Party for Hearing or Rehearing in Banc ;~~ ~~Suggestion Does Not Stay Mandate~~.* - If a party desires to ~~suggest that~~ petition for an appeal to be heard initially in banc, the ~~suggestion~~ petition must be ~~made~~ filed by the date on which the appellee's brief is filed. A ~~suggestion~~ petition for a rehearing in banc must be ~~made~~ filed 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 or stay the issuance of the mandate.~~

(d) *Number of Copies.* -- The number of copies that must be filed may be prescribed by local rule and may be altered by order in a particular case.

(e) *Response.*-- No response may be filed to a petition for in banc consideration unless the court orders a response.

(f) *Voting on a Petition.* -- The clerk must transmit any such petition to the judges of the court who are in regular active service and, with respect to a petition for rehearing, to any other members of the panel that rendered the decision sought to be

reheard but a vote need not be taken to determine whether the cause will be heard or reheard in banc unless a judge requests a vote.

Committee Note

Subdivision (a). The only changes are stylistic; no substantive changes are intended.

Subdivision (b). The amendment requires that each petition for in banc consideration begin with a statement that concisely demonstrates that the case meets the criteria for in banc consideration. It is the Committee's hope that requiring such a statement will cause the drafter of a petition to focus on the narrow grounds that support granting in banc consideration and to realize that a petition should not be filed unless the case meets those rigid standards. Counsel are reminded that their duty is fully discharged without filing a petition for rehearing in banc unless the case meets the rigid standards of subdivision (a) of this Rule.

To improve the clarity of the Rule, the material dealing with filing a response to a petition and with voting on a petition have been moved to new subdivisions (e) and (f).

Subdivision (e). This is a new subdivision. The substance of the subdivision, however, was drawn from former subdivision (b). The only changes are stylistic; no substantive changes are intended.

Subdivision (f). This is a new subdivision. The substance of the subdivision, however, was drawn from former subdivision (b). The only changes are stylistic; no substantive changes are intended.

Draft Two - September 1993

Rule 35. Determination of a 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~~ An in banc hearing or rehearing is not favored and ordinarily will not be ordered ~~except when~~ unless:

(1) consideration by the full court is necessary to secure or maintain uniformity of its decisions, or

(2) the proceeding involves a question of exceptional importance.

(b) ~~*Suggestion*~~ *Petition of a Party for Hearing or Rehearing in Banc.* - A party may ~~suggest the appropriateness of~~ petition for a hearing or rehearing in banc.

(1) Contents. --The petition must include in the following order:

(A) a cover as required by Rule 32(b)(1);[1]

(B) a statement that either

(i) the panel decision conflicts with a decision of the United States Supreme Court or of the court to which the

---

[1] Rule 32(b)(1), as approved for publication in December, states:
(1) A petition for rehearing, a petition for rehearing in banc, and any response to such petition must ~~shall~~ be produced in a manner prescribed by subdivision (a) with a cover the same color as the party's principal brief.
It does not apply to a petition for an initial hearing in banc. Should it?

petition is addressed (citations to the conflicting case or cases is required) and that consideration by the full court is necessary to secure and maintain uniformity of the court's decisions; or

(ii) the appeal involves one or more questions of exceptional importance; each such question must be concisely stated, preferably in a single sentence;

(C) the corporate disclosure statement required by Rule 26.1;

(D) a table of contents and a table of authorities cited, both with page references;

(E) a statement of the issue or issues meriting in banc consideration;

(F) a statement of the case including the nature of the case, the course of the proceedings, and the disposition of the case;

(G) a statement of any facts necessary to argument of the issues;

(H) an argument that must address specifically not only the merits of the issue but why it is worthy of in banc consideration; and

(I) a conclusion.

(2) Length. -- Except by permission of the court, or as specified by local rule, a petition for in banc consideration must not exceed 15 pages, exclusive of

pages containing the corporate disclosure statement, table of contents, table of authorities, proof of service, and any addendum containing statutes, rules, regulations, etc.

(3) Number of Copies. -- The number of copies that must be filed may be prescribed by local rule and may be altered by order in a particular case.

~~No response shall be filed unless the court shall so order. The clerk shall transmit any such suggestion to the members of the panel and the judges of the court who are in regular active service but a vote need not be taken to determine whether the cause shall be heard or reheard in bane unless a judge in regular active service or a judge who was a member of the panel that rendered a decision sought to be reheard requests a vote on such a suggestion made by a party.~~

(c) *Time for ~~Suggestion~~ Petition of a Party for Hearing or Rehearing in Banc ~~; Suggestion Does Not Stay Mandate~~.* - If a party desires to ~~suggest that~~ petition for an appeal to be heard initially in banc, the ~~suggestion~~ petition must be ~~made~~ filed by the date on which the appellee's brief is filed. A ~~suggestion~~ petition for a rehearing in banc must be ~~made~~ filed 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 or stay the issuance of the mandate.~~

~~(d) *Number of Copies.* -- The number of copies that must be filed may be~~

~~prescribed by local rule and may be altered by order in a particular case.~~

(d) *Response.*-- No response may be filed to a petition for in banc consideration unless the court orders a response.

(e) *Voting on a Petition.* -- The clerk must transmit any such petition to the judges of the court who are in regular active service and, with respect to a petition for rehearing, to any other members of the panel that rendered the decision sought to be reheard but a vote need not be taken to determine whether the cause will be heard or reheard in banc unless a judge requests a vote.

Committee Note

Subdivision (a). The only changes are stylistic; no substantive changes are intended.

Subdivision (b) paragraph (1). The amendment creates a separate paragraph that specifies the items that must be included in a petition for in banc consideration. In general the items are the same as those that must be included in a party's principal brief. The amendment, however, also requires each petition for in banc consideration to begin with a concise statement demonstrating that the case meets the criteria for in banc consideration. It is the Committee's hope that requiring such a statement will cause the drafter of a petition to focus on the narrow grounds that support granting in banc consideration and to realize that a petition should not be filed unless the case meets those rigid standards. Counsel are reminded that their duty is fully discharged without filing a petition for rehearing in banc unless the case meets the rigid standards of subdivision (a) of this Rule.

To improve the clarity of the Rule, the material dealing with filing a response to a petition and with voting on a petition have been moved to new subdivisions (d) and (e).

Subdivision (b) paragraph (2). This new provision establishes a maximum length for a petition. Fifteen pages is the length currently used in the D.C., Fifth, Tenth, Eleventh, and Federal Circuits. Each request for in banc consideration must be studied

by every active judge of the court and is a serious call on limited judicial resources. The extraordinary nature of the issue or the threat to uniformity of the court's decision can be established in most cases in less than fifteen pages.

Subdivision (b) paragraph (3). The provision governing the number of copies has simply been moved from subdivision (d) to this new paragraph. The change is stylistic; no substantive changes are intended.

Subdivision (d). This is a new subdivision. The substance of the subdivision, however, was drawn from former subdivision (b). The only changes are stylistic; no substantive changes are intended.

Subdivision (e). This is a new subdivision. The substance of the subdivision, however, was drawn from former subdivision (b). The only changes are stylistic; no substantive changes are intended.

Solicitor General's Draft

Rule 35. Determination of Causes by the Court In Banc

(a) **When Hearing or Rehearing in Banc Will Be Ordered.** A majority of the circuits 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 issue, or ~~(2)~~ (3) when the proceeding involves a question of exceptional importance.

Attachment C
Local Rules

D.C. Cir. R. 35. Petition for Rehearing and Suggestion for Hearing or Rehearing *In Banc*

* * * * *

(b) Number of Copies and Length. An original and 4 copies of petitions for rehearing, and an original and 19 copies of suggestions for hearing or rehearing *in banc* shall be filed. Such petitions and suggestions may be combined in one pleading or filed as separate documents. Whether filed as one pleading or as separate documents, a petition and/or suggestion shall not exceed a cumulative length of 15 pages, and shall otherwise conform to the requirements for a motion specified in Circuit Rule 27. This court disfavors motions to exceed page limits and such motions will be granted only for extraordinarily compelling reasons.

(c) Contents of Suggestion for In Banc Consideration. A suggestion for hearing or rehearing *in banc* shall contain a separate introductory section, captioned "Concise Statement of Issue and Its Importance," that shall set forth the reasons why the case is of exceptional importance or, where applicable, with what decision or decisions of the Supreme Court of the United States, of this court, or of any other federal appellate court, the panel decision is claimed to be in conflict. Without such a statement, the suggestion will not be accepted for filing.

D.C. Cir. I.O.P. XIII.B. Reconsideration.

2. *Rehearing En Banc.*

. . . The suggestion cannot be more than 11 printed pages in length, or 15 typewritten pages; motions to exceed this limitation are rarely granted. . . .

1st Cir. R. 35.1. Petitions for In Banc Consideration.

Supplementing FRAP Rule 35, the following requirement shall apply:

Each application shall be submitted with ten copies.

Where the party suggesting in banc consideration is represented by counsel, the petition shall include one or both of the following statements as applicable:

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decision(s) of the Supreme Court of the United States or the precedents of this circuit and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this court: [cite specifically the case or cases];

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance: [set forth each question in one sentence].

3rd Cir. R. 35. Required Statement of Rehearing In Banc.

Where the party suggesting rehearing in banc is represented by counsel, the suggestion shall contain, so far as is pertinent, the following statement of counsel:

"I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to decisions of the United States Court of Appeals for the Third Circuit or the Supreme Court of the United States, and that consideration by the full court is necessary to secure and maintain uniformity of decision in this Court, i.e., the panel's decision is contrary to the decisions of this court or the Supreme Court in [citing specifically the case or cases],

Or, that this appeal involves a question of exceptional importance, i.e. [set forth in one sentence]."

3rd Cir. R. 32.3 Form of Motions and Other Papers Only

* * * * *

(b) Suggestions for rehearing in banc in which the petitioner is represented by counsel shall contain the "Statement of Counsel" required by 3rd Cir. LAR 35.1. All petitions or suggestions seeking either panel rehearing or rehearing in banc shall include as an exhibit a copy of the panel's judgment, order, and opinion, if any, as to which rehearing is sought.

5th Cir. R. 35. Determination of Causes by the Court En Banc.

35.1. Caution. As is noted in FRAP 35, en banc hearing or rehearing of appeals is not favored. Among the reasons for this is that each request for en banc consideration must be studied by every active judge of the Court and hence is a serious call on limited judicial resources. Counsel have a duty to the Court commensurate with that owed their clients to read with attention and observe with restraint the certificates required of them in 35.2.2 below. The Court takes the view that, given the extraordinary nature of suggestions for en banc consideration, it is fully justified in imposing sanctions of its own initiative under, *inter alia*, Fed. R. App. P. 38 and 28 U.S.C. § 1927, upon the person who signed the suggestions, the represented party, or both, for manifest abuse of the procedure.

35.2. Form of Suggestion. Twenty copies of every suggestion of en banc consideration, whether upon initial hearing or rehearing, shall be filed. The suggestion shall not be incorporated in the petition for rehearing before the panel, if one is filed, but shall be complete in itself. In no case shall a suggestion of en banc consideration adopt by reference any matter from the petitions for panel rehearing or from any other brief or motions in the case. A suggestion of en banc consideration shall contain the following items, in order:

35.2.1. Certificate of interested persons required for briefs by 28.2.1.

35.2.2. If the party suggesting en banc consideration is represented by counsel, one or both of the following statements of counsel, as applicable:

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decision(s) of the United States Court of Appeals for the Fifth Circuit [or the Supreme Court of the United States], and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this Court: [citing specifically the case or cases].

I express a belief based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance: [set forth each question in one sentence].

_____

Attorney of record for _____

Counsel are reminded that in every case the duty of counsel is fully discharged without filing a suggestion for rehearing en banc unless the case meets the rigid standards of FRAP 35(a).

35.2.3. Table of contents and citations;

35.2.4. Statement of the issue or issues asserted to merit en banc consideration. It will rarely occur that these will be the same as those appropriate for panel rehearing. A suggestion of en banc consideration must be limited to the circumstances enumerated in FRAP 35(a).

35.2.5. Statement of the course of proceedings and disposition of this case;

35.2.6. Statement of any facts necessary to the argument of the issues;

35.2.7. Argument and authorities. These shall concern only the issues required by paragraph (.2.4) hereof and shall address specifically, not only their merit, but why they are contended to be worthy of en banc consideration.

35.2.8. Conclusion; and

35.2.9. Certificate of service.

* * * * *

35.5. Length. A suggestion for en banc consideration shall not exceed 15 pages in length, without permission of the Court.

6th Cir. R. 14. *En Banc* - Required Statement for Rehearing *En Banc*

* * * * *

(b) Required statement for rehearing *en banc.* Where the petitioner is represented by counsel the petition shall contain, on the first page of the petition, one or both of the following statements of counsel as applicable:

REQUIRED STATEMENTS FOR REHEARING *EN BANC*
(Designate one or both relied on)

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decision(s) of the United States Court of Appeals for the Sixth Circuit [or the Supreme Court of the United States] and that consideration by the full Court is necessary to secure and maintain uniformity of decisions: [citing specifically the case or cases].

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance: [set forth each question in one sentence].

_____

(Signature)

Attorney of record for:

_____

(c) **Counsel not obligated to file.** *En banc* consideration of a case is an extraordinary measure, and in every case the duty of counsel is fully discharged without filing a suggestion for rehearing *en banc* unless the case meets the rigid standards of Rule 35(a) of the Federal Rules of Appellate Procedure. The filing of a petition for rehearing or suggestion for rehearing *en banc* are not prerequisites to the filing of a petition for writ of certiorari.

7th Cir. R. 40. Petitions for Rehearing

(a) *Table of Contents.* The petition for rehearing shall include a table of contents with page references and a table of cases (alphabetically arranged), statutes and other authorities cited, with reference to the pages of the brief where they are cited.

(b) *Number of Copies.* Fifteen copies of a petition for rehearing shall be filed, except that 25 shall be filed if the petitioner suggests rehearing in banc.

(c) *Required Statement for Suggestion of Rehearing In Banc.* Suggestions that an appeal be reheard in banc shall state in a concise sentence at the beginning of the petition why the appeal is of exceptional importance or with what decision of the United States Supreme Court, this court, or another court of appeals the panel decision is claimed to be in conflict.

* * * * *

8th Cir. R. 35A. Hearing and Rehearing En Banc.

* * * * *

(c) *Suggestion for En Banc Disposition.* A suggestion shall not refer to or adopt by reference any matter from other briefs or motions in the case.

(1) *Number.* A party seeking an en banc proceeding shall file 18 copies of a suggestion for hearing or rehearing en banc.

(2) *Required Statement.* The suggestion of any party represented by counsel and seeking hearing or rehearing en banc shall include one or both of the following statements signed by counsel:

(i) I express a belief, based on a reasoned and studied professional judgment, that the decision is contrary to the following decisions of the United States Court of Appeals for the Eighth Circuit [or the

Supreme Court of the United States], and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this court: [cite specifically the case or cases].

Attorney of Record
for [Name of Party]

(ii) I express a belief, based on a reasoned and studied professional judgment, that this appeal raises the following questions of exceptional importance: [set forth each question in one sentence].

Attorney of Record
for [Name of Party]

* * * * *

9th Cir. R. 35-1 Suggestion of the Appropriateness of Rehearing En Banc

Where a suggestion of the appropriateness of a rehearing en banc is made pursuant to FRAP 35(b) as part of a petition for rehearing, a reference to such suggestion, as well as to the petition for rehearing, shall appear on the cover of the combined petition and suggestion.

When the opinion of a panel directly conflicts with an existing opinion by another court of appeals and substantially affects a rule of national application in which there is an overriding need for national uniformity, the existence of such conflict is an appropriate ground for suggesting a rehearing en banc.

10th Cir. R. 35. Determination of Causes by the Court En Banc.

* * * * *

35.2. Form and Content of Suggestion for Hearing or Rehearing En Banc.

35.2.1 Suggestion in Petition for Rehearing. When a suggestion for rehearing en banc is made in a petition for rehearing, a reference to the suggestion, as well as to the petition for rehearing, shall appear on the cover page and in the title of the document.

35.2.2. Essential Allegations. When a party seeking en banc consideration is represented by counsel, the petition must contain one or both of the following statements of counsel, as applicable.

(a) I express a belief based on a reasoned and studied professional judgment that the panel decision is contrary to the following decision(s) of the United States Supreme Court or of the United States Court of Appeals for the Tenth Circuit, and consideration by the full court is necessary to secure and maintain uniformity of decisions in this court [citing specifically the case or cases].

(b) I express a belief based on a reasoned and studied professional judgment that this appeal involves one or more questions of exceptional importance: [set forth each question in one sentence].

/s/_____
Attorney of Record for _____

* * * * *

35.5. Form of Request. Suggestions for en banc consideration shall not exceed 15 pages in length. If made jointly with a petition for rehearing, the combined documents shall not exceed 15 pages and shall be complete within themselves without reference to prior motions or briefs. . . .

11th Cir. R. 35-6. Form of Suggestion.

A suggestion of en banc consideration shall be bound in a white cover which is clearly labeled with the title "Suggestion of Rehearing (or Hearing) En Banc". A suggestion of rehearing en banc will also be treated as a petition for rehearing before the original panel. A petition for rehearing will not be treated as a suggestion for rehearing en banc. A suggestion of en banc consideration shall contain the following items in this sequence:

(a) a cover page as required by 11th Cir. R. 29-2(a);

(b) A Certificate of Interested Persons and Corporate Disclosure Statement as described in FRAP 26.1 and the accompanying circuit rules.

(c) where the party suggestion en banc consideration is represented by counsel, one or both of the following statements of counsel as applicable:

I express a belief, based on a reasoned and studied professional

judgment, that the panel decision is contrary to the following decision(s) of the Supreme Court of the United States or the precedents of this circuit and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this court: [cite specifically the case or cases]

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance: [set forth each question in one sentence]

/s/_____
Attorney of Record for

_____

(d) table of contents and citations;

(e) statement of the issue(s) asserted to merit en banc consideration;

(f) statement of the course of proceedings and disposition of the case;

(g) statement of any facts necessary to argument of the issues;

(h) argument and authorities. These shall concern only the issues and shall address specifically not only their merit but why they are contended to be worthy of en banc consideration;

(i) conclusion;

(j) certificate of service.

11th Cir. R. 35-8. Length.

A suggestion of en banc consideration shall not exceed 15 pages, and if made with a petition for rehearing (whether or not they are combined in a single document) the combined documents shall not exceed 15 pages.

Fed. Cir. R. 35. Determination of causes by the court in banc.

* * * * *

(b) Content of suggestion for hearing or rehearing in banc. A suggestion that an appeal be initially heard in banc shall contain the following statement of

counsel at the beginning of the suggestion:

> Based on my reasoned and studied professional judgment, I believe this appeal requires answer to one or more precedent-setting questions of exceptional importance: (set forth each question in a separate sentence).
>
> /s/ _____
> Attorney of Record for _____

A suggestion that an appeal be reheard in banc shall contain one or both of the following statements of counsel, as applicable, at the beginning of the suggestion:

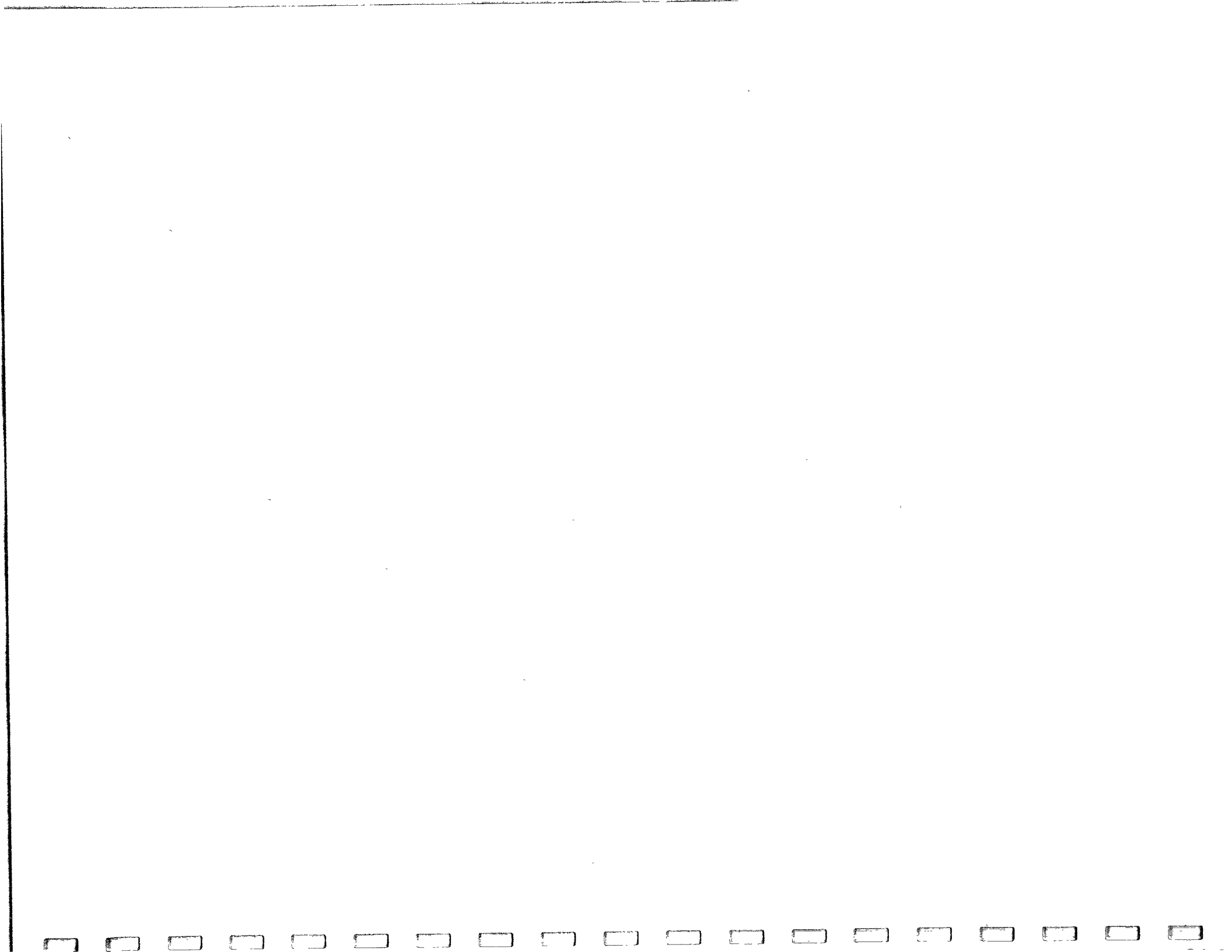
> Based on my reasoned and studied professional judgment, I believe the panel decision is contrary to the following decision(s) of the Supreme Court of the United States or the precedent(a) of this court: (cite specifically the decision(s) or precedent(s)).
>
> Based on my reasoned and studied professional judgment, I believe this appeal requires answer to one or more precedent-setting questions of exceptional importance: (set forth each question in a separate sentence).
>
> /s/ _____
> Attorney of Record for _____

(c) Suggestion for hearing in banc; response; format; service; length; cover; certificate of interest; number of copies. A suggestion for hearing in banc or response if requested by the court shall be in the form prescribed by Rule 32(a) of the Federal Rules of Appellate Procedure. A suggestion for hearing in banc shall not exceed five pages, excluding pages containing the certificate of interest, table of contents, table of citations, and any addendum containing statutes, rules, regulations, etc. The cover shall contain the information required of brief (see Fed. Cir. R. 32(e)). The cover of the suggestion shall be yellow and the cover of the answer, if one is required by the court, shall be brown. A certificate of interest (see Fed. Cir. R. 47.4) shall immediately follow the cover. Fifteen copies of the suggestion for hearing in banc shall be filed with the court, and two copies shall be served on each party separately represented.

(d) Suggestions for rehearing in banc; response; format; service; length; cover; certificate of interest; appendix; number of copies. A suggestion for rehearing in banc or response if requested by the court shall be in the form prescribed by Rule 32(a) of the Federal Rules of Appellate Procedure. A suggestion for rehearing in banc or response may not exceed 15 pages, excluding pages containing the certificate of interest, table of contents, table of citations, and any addendum

containing statutes, rules, regulations, etc. The cover shall contain the information required of briefs (see Fed. Cir. R. 32(e)). The cover of the suggestion shall be yellow and the cover of the answer, if one is required by the court, shall be brown. A certificate of interest (see Fed. Cir. R. 47.4) shall immediately follow the cover. A copy of the opinion in the appeal sought to be reheard shall be bound with the suggestion as an appendix. Fifteen copies of the suggestion for rehearing in banc shall be filed with the court, and two copies shall be served on each party separately represented.

Item IV. D
Will Be Circulated
At A Later Time.



AGENDA ITEM - V. A
Denver, Colorado
April 25-26, 1994

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

FROM: Carol Ann Mooney, Reporter

DATE: September 4, 1993

SUBJECT: Item 93-1, conflict between Fed. R. Civ. P. 9(h) and 28 U.S.C. § 1292(a)(3) re: interlocutory appeal of admiralty cases with non-admiralty claims.

Judge Edward Becker of the Third Circuit wrote to Judge Ripple last winter about an apparent conflict between Fed. R. Civ. P. 9(h) and 28 U.S.C. § 1292(a)(3) with respect to interlocutory appeal of admiralty cases that include non-admiralty claims. A copy of Judge Becker's letter is attached.

Section 1292 is, of course, the section governing interlocutory appeals. It provides in pertinent part:

> (a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:
>
> * * * * *
>
> (3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed.

Because section 1292(a)(3) allows interlocutory appeal from a decree in an admiralty case, as distinguished from an admiralty claim, Judge Becker believes that a litigant can bring an interlocutory appeal of a non-admiralty claim that is part of a larger admiralty case. A copy of the opinion in Roco Carriers, Ltd. v. M/V Nurnberg Express, which supports that reading is attached to this memorandum.

However, Judge Becker believes that the last sentence of Fed. R. Civ. P. 9(h) may preclude such a reading of § 1292(a)(3) or at least conflict with it. The last sentence of Fed. R. Civ. P. 9(h) states:

> The reference in Title 28, U.S.C. § 1292(a)(3), to admiralty cases shall be construed to mean admiralty and maritime claims within the meaning of this subdivisions (h).

Judge Becker has read the last sentence of Rule 9(h) as an attempt to limit the broad grant in § 1292(a)(3) of interlocutory appeal in admiralty cases (presumably

allowing interlocutory appeal of a non-admiralty claim in an admiralty case) to one that allows only interlocutory appeal of admiralty claims.

One of the cases Judge Becker cites as supporting that reading is Alleman v. Bunge, 756 F.2d 344 (5th Cir. 1984). Alleman may say something much narrower. Alleman can be read as saying that the last sentence of Rule 9(h) means only that a case is not an admiralty case (for purposes of § 1292(a)(3)) unless it involves at least one admiralty claim as defined by 9(h).[1] In other words, unless a case involves an admiralty claim (as defined in Rule 9(h)), there cannot be interlocutory appeal under 28 U.S.C. § 1292(a)(3). A copy of the Alleman opinion is attached to this memorandum.

In Alleman, plaintiffs brought suit in state court for injuries to a longshoreman on a grain barge. The suit was brought under the Longshoremen's and Harbor Workers' Compensation Act, general maritime law, and state law. A defendant removed the case to federal court on the basis of diversity jurisdiction.

The federal district court granted summary judgment to eight of the defendants. Another defendant attempted to bring an interlocutory appeal of the grant of summary judgment under § 1292(a)(3). The court of appeals dismissed the appeal. The court of appeals' position was that it had jurisdiction only on the basis of diversity and that § 1292(a)(3) applies only if the court has admiralty jurisdiction, which the court did not have.

Although the plaintiffs in Alleman could have brought their suit in federal court and they could have invoked admiralty jurisdiction by including a statement identifying their claim as a maritime claim, they did not do so. The result of those decisions was that under Fed. R. Civ. P. 9(h), their claim was not an admiralty claim. The case was before the district court, as the result of the removal, solely on the basis of diversity jurisdiction.

Alleman is not a case in which a federal court had before it a case involving an admiralty claim and interlocutory appeal of a separate non-admiralty claim was prohibited. The case involved essentially only one claim and it was not an admiralty claim, as defined by 9(h), even though it could have been had the plaintiffs chosen to sue

---

[1] The main purpose of Fed. R. Civ. P. 9(h) is to define an admiralty and maritime claim. The rule establishes two governing principles:

1. if a claim is cognizable only in admiralty, then it is automatically an admiralty or maritime claim; and
2. if a claim for relief is within a district court's jurisdiction on the basis of admiralty law and it is also within the court's jurisdiction on some other ground, is an admiralty claim only if the party's pleading contains a statement identifying the claim as an admiralty claim.

in federal court and to claim admiralty jurisdiction. The case and the last sentence of Rule 9(h) simply may mean that unless a case involves an admiralty claim determined according to Rule 9(h), there cannot be interlocutory appeal under 28 U.S.C. § 1292(a)(3).

As Judge Becker's letter notes there is virtually no case law on this issue. Most of the litigation about § 1292(a)(3) jurisdiction deals with whether the decision sought to be reviewed determined the "rights and liabilities" of the parties. My research discloses no cases on point other than those cited by Judge Becker. All of which leaves us approximately where we began, with a sentence in Civil Rule 9(h) that is, as Judge Becker describes it, "opaque." There may or may not be a conflict between it and section 1292(a)(3).

The questions for the Committee appear to be:

1. Should steps be taken to clear up the ambiguity? If so, is it really a matter for the Advisory Committee on Civil Rules?
2. Because this involves a question of interlocutory appeal and the Rules Enabling Act has been amended to allow expansion, by rule, of the types of interlocutory appeals permitted, should the whole issue be put on hold until such time as the Committee is ready to look at the question of interlocutory appeals generally?

United States Court Of Appeals
For The Third Circuit

Chambers of
Edward R. Becker
United States Circuit Judge

19613 United States Courthouse
Independence Mall West
Philadelphia, Pa. 19106-1782

February 23, 1993

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

Dear Ken:

As you may recall from our telephone conversation last fall, in the course of working up a case for argument I recently discovered what appears to be a conflict between Fed. R. Civ. P. 9(h) and 28 U.S.C. § 1292(a)(3) with respect to the interlocutory appeal of admiralty cases that include non-admiralty claims. I never did get to write an opinion on this issue, and so am writing this letter to inform you of this apparent glitch.

The language of § 1292(a)(3) suggests that it is a case-specific provision. Although it is not entirely clear, the wording of § 1292(a)(3) suggests that litigants can take advantage of the statute's liberal policy governing appellate admiralty jurisdiction as long as they seek to appeal a claim that is within an admiralty case. The statute provides that appeals may be taken from "[i]nterlocutory decrees . . . determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed." 28 U.S.C. § 1292(a)(3) (emphasis added). In my view, and I have found one court that agrees, see Roco Carriers, Ltd. v. M/V Nurnberg Express, 899 F.2d 1292, 1297 (2d Cir. 1990), the case-specific orientation of § 1292(a)(3) implies that a litigant can appeal a non-admiralty claim that is part of a larger admiralty case.

However, Fed. R. Civ. P. 9(h), which purports to construe the scope of § 1292(a)(3), suggests otherwise due to its claim-specific approach. Rule 9(h) provides that "[t]he reference in Title 28, U.S.C., § 1292(a)(3), to admiralty cases shall be construed to mean admiralty and maritime claims within the meaning of this subdivision (h)." Fed. R. Civ. P. 9(h) (emphasis added). As I read this statement -- though it is somewhat opaque -- it construes § 1292(a)(3) only to cover admiralty claims, which would exclude non-maritime claims contained within admiralty cases (i.e., a non-admiralty counter-

claim). In addition, some courts have followed this interpretation of Rule 9(h) in the course of construing § 1292(a)(3). See Alleman v. Bunge, 756 F.2d 344 (5th Cir. 1984); Focht v. United States Army Corps. of Eng'rs, 714 F.2d 139 (6th Cir. 1983) (unpublished); accord 9 James W. Moore, Moore's Federal Practice, ¶ 110.19[3], at 209 (1992).

Perhaps your reading of § 1292(a)(3) and Rule 9(h) is such that no such contradiction arises. I, however, found the two provisions to conflict. I bring it to your attention, and through you to that of the Advisory Commmittee, in the hopes that something can be done to clarify matters and remove uncertainty.

Sincerely,

Edward R. Becker

ERB:pmk

cc: Prof. Carol Ann Mooney, Reporter

with much too broad a brush, as I see it, in its reference to "the dangers of asbestos."

The clear implication is that once a product is shown to be dangerous to some persons under some circumstances, punitive damages can be awarded against a manufacturer who fails to anticipate its subsequently discovered propensity to endanger other persons in markedly different circumstances. This is hardly the "recklessness" ... close to criminality", which we described in *Roginsky* as the standard for awarding punitive damages under New York law. As Judge Friendly there said, "error in failing to make what hindsight demonstrates to have been the proper response—even 'gross' error—is not enough to warrant submission of punitive damages to the jury." 378 F.2d at 843.

I therefore respectfully dissent from the majority's affirmance of the jury's awards of punitive damages.

ROCO CARRIERS, LTD.,
Plaintiff-Appellee,

v.

M/V NURNBERG EXPRESS, her engines, boilers, etc., Hapag-Lloyd Aktiengesellschaft, and Aid Export Trucking Corp., Defendants,

Aid Export Trucking Corp.,
Defendant-Appellant.

Docket Nos. 528, 529, 89-7768, 89-7770.

United States Court of Appeals,
Second Circuit.

Argued Jan. 8, 1990.

Decided March 22, 1990.

Nonvessel operating common carrier brought separate actions against employer of terminal operator, and against warehouseman, alleging admiralty jurisdiction in both actions. The United States District Court for the Southern District of New York, John F. Keenan, J., consolidated the two actions and dismissed the complaint as to the operator, and granted carrier's cross motion for summary judgment against warehouseman. Warehouseman appealed. The Court of Appeals, Meskill, Circuit Judge, held that: (1) pendent party jurisdiction was available; (2) warehouseman could avail itself of provisions of statute permitting interlocutory appeals in admiralty actions; and (3) summary judgment in favor of carrier was proper due to warehouseman's failure to meet its burden following carrier's presentation of evidence of delivery of goods to the warehouseman and subsequent loss of the goods.

Affirmed.

1. Admiralty ⇐1.20(2), 12

Nonvessel operating common carrier's claim against warehouseman was grounded on state law and not within federal admiralty jurisdiction, where the claim arose from the warehouseman's handling of cargo which was on land.

2. Admiralty ⇐1(3)

Pendent party jurisdiction is available in admiralty cases in those instances in which the state law claim against the additional party arises out of a common nucleus of operative facts with the admiralty claim and the resolution of the factually connected claims in a single proceeding would further the interests of conserving judicial resources and fairness to the parties.

3. United States ⇐125(6)

Jurisdictional grants waiving sovereign immunity are ordinarily interpreted narrowly.

4. Admiralty ⇐1(3)

Admiralty jurisdiction extends to an entire case, including nonadmiralty claims against a second defendant. 28 U.S.C.A. § 1333(1).

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5. Admiralty ⇐103

Warehouseman, against whom nonvessel operating common carrier brought pendent party claim grounded in state law, in action in which carrier brought admiralty claim against employer of terminal operator, could avail itself of provisions of statute which permit interlocutory appeals in admiralty actions, following district court's determination of liability against warehouseman, and nonliability of carrier, but before determination of damages. 28 U.S.C.A. § 1292(a)(3).

6. Warehousemen ⇐24(1)

Warehouseman failed to explain loss of goods delivered to the warehouseman by common carrier, and thus common carrier was entitled to summary judgment, under New York law, on its pendent state law claim against warehouseman, in action in which carrier brought admiralty claim against employer of terminal operator; affidavit of warehouseman's president in which president asserted that he personally counted goods as they were being loaded did not raise a factual issue, and warehouseman failed to provide a specific factual basis, as opposed to an inexact guess, about what could have happened to the goods.

7. Warehousemen ⇐34(5)

Under New York law, once a plaintiff has presented uncontroverted evidence of delivery of goods to a warehouseman and of the warehouseman's failure to honor the demand for the release of the stored goods, the warehouseman bears the burden of providing an explanation for loss of the goods supported by evidence sufficient to create a question of fact.

8. Warehousemen ⇐34(5)

Under New York law, the mere allegation that a loss occurred elsewhere does not excuse a warehouseman from meeting its burden of offering a sufficiently supported explanation for the loss of goods which have been delivered to the warehouseman, any more than would an allegation that the goods were stolen by some third party despite the warehouseman's exercise of due care.

9. Federal Civil Procedure ⇐2544

A party opposing a motion for summary judgment must set forth specific facts demonstrating the existence of a genuine issue of fact.

Norman Ingber, Salzman, Ingber & Winer, New York City, for defendant-appellant.

Stephen A. Agus, New York City (Agus & Hatem, New York City, of counsel), for plaintiff-appellee.

Before MESKILL and NEWMAN, Circuit Judges, and WEINSTEIN,* District Judge.

MESKILL, Circuit Judge:

Defendant-appellant Aid Export Trucking Corporation (Aid Export) appeals from judgments entered in the United States District Court for the Southern District of New York, Keenan, *J.*, in two cases consolidated by the district court involving the loss of cargo. We are presented with the questions whether pendent party jurisdiction is available in admiralty cases, whether a pendent party may take advantage of the provisions of 28 U.S.C. § 1292(a)(3), which permit interlocutory appeals in admiralty cases, and whether the district court properly granted summary judgment in favor of plaintiff-appellee Roco Carriers, Ltd. (Roco) and against Aid Export.

BACKGROUND

Most of the facts are undisputed. Roco, a New York corporation, is a non-vessel operating common carrier. In September 1982, it engaged Aid Export, also a New York corporation and a warehouseman and trucking company, to prepare for shipment 100 cartons of "Zippo" lighters. The cartons were allegedly loaded into a container, and the container was sealed at Aid Ex-

* Hon. Jack B. Weinstein, United States District Judge for the Eastern District of New York, sitting by designation.

port's warehouse. Aid Export transported the container by truck to a stevedoring company and terminal operator hired by Hapag-Lloyd Aktiengesellschaft (Hapag-Lloyd) so that the container could be loaded on Hapag-Lloyd's vessel, the NURNBERG EXPRESS.

Before the truck entered the terminal, the container was opened and the Aid Export seal broken in the presence of Aid Export's driver so that a Hapag-Lloyd representative could inspect how certain hazardous cargo also in the container was secured. After the container was inspected, it was resealed with a Hapag-Lloyd seal. The truck and the container were then weighed, and the cargo weight was calculated to be 19,765 pounds. The bill of lading prepared by Roco, however, listed the cargo weight at 20,608 pounds.

The container was loaded onto the NURNBERG EXPRESS. It was then transported to Hamburg, West Germany, where it was unloaded from the ship and a West German customs seal was placed on it. The container was then delivered by truck to a warehouse, where it was stripped. At the warehouse, thirty-one of the one hundred cartons were missing, even though the Hapag-Lloyd and West German seals appeared intact.

In February 1983, Roco again used Aid Export to prepare a shipment of 100 cartons of lighters. Aid Export loaded the cartons into a container, sealed the container with one of its seals and delivered it by truck to a terminal for loading on Hapag-Lloyd's ship, the DUSSELDORF EXPRESS. At the terminal, the truck and cargo were weighed, and the cargo weight was calculated at 29,230 pounds. Once again, this was inconsistent with the bill of lading, which listed the cargo weight to be 30,313 pounds.

Upon arrival in West Germany, a West German customs seal was placed on the container, and it was delivered to a warehouse in Hamburg. After the container was stripped at the warehouse, thirty-four cartons were missing. The Aid Export and West German seals appeared intact when the container was stripped.

Roco brought separate actions regarding the two shipments against Hapag-Lloyd and Aid Export, alleging admiralty jurisdiction in both. The district court consolidated the two actions for all purposes. Hapag-Lloyd moved for summary judgment, and Roco made a cross-motion for summary judgment against Hapag-Lloyd or, in the alternative, against Aid Export. The court granted Hapag-Lloyd's motion and dismissed the complaint as to Hapag-Lloyd. It also granted Roco's cross-motion against Aid Export, concluding that Aid Export had failed to raise a genuine issue of material fact in the face of Roco's *prima facie* showing of conversion.

DISCUSSION

Aid Export argues on appeal that the district court improperly granted summary judgment when genuine issues of material fact remained about who had possession of the cargo when the loss occurred. Roco questions whether Aid Export, as a pendent party against whom only a state law claim is asserted, can avail itself of the provisions of 28 U.S.C. § 1292(a)(3), which, in admiralty cases, permit interlocutory appeals from determinations of liability prior to an award of damages. However, neither party, before us or below, has raised the more fundamental question whether pendent party jurisdiction is available at all in admiralty cases. In light of the Supreme Court's decision in *Finley v. United States*, — U.S. —, 109 S.Ct. 2003, 104 L.Ed.2d 593 (1989), we must first address the question of subject matter jurisdiction over the claim against Aid Export. *See Republic of Philippines v. Marcos*, 806 F.2d 344, 352 (2d Cir.1986) ("[A] federal court has a duty on its own motion to consider whether there is properly federal jurisdiction in the case before it."), *cert. dismissed sub nom. Ancor Holdings, N.V. v. Republic of Philippines*, 480 U.S. 942, 107 S.Ct. 1597, 94 L.Ed.2d 784 *cert. denied sub nom. New York Land Co. v. Republic of Philippines*, 481 U.S. 1048, 107 S.Ct. 2178, 95 L.Ed.2d 835 (1987).

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A. *Pendent Party Jurisdiction After* Finley

[1] Roco's claim against Hapag-Lloyd falls within the scope of the district court's admiralty jurisdiction. *See* 28 U.S.C. § 1333(1). However, inasmuch as any claim against Aid Export arose while the cargo was on land, Roco's claim against Aid Export is grounded on state law and not within federal admiralty jurisdiction. *See Colgate Palmolive Co. v. S/S DART CANADA*, 724 F.2d 313, 315 (2d Cir.1983), *cert. denied*, 466 U.S. 963, 104 S.Ct. 2181, 80 L.Ed.2d 562 (1984); *Leather's Best, Inc. v. S.S. MORMACLYNX*, 451 F.2d 800, 808 (2d Cir.1971). Moreover, because Roco and Aid Export are citizens of the same state, there is no diversity of citizenship to serve as an independent ground for asserting subject matter jurisdiction. The only other basis for jurisdiction over the claim against Aid Export might be pendent party jurisdiction.

[2] The established rule of this Circuit has been that pendent party jurisdiction is available in admiralty cases in those instances in which the state law claim against the additional party arises out of a common nucleus of operative facts with the admiralty claim and the resolution of the factually connected claims in a single proceeding would further the interests of conserving judicial resources and fairness to the parties. *E.g., National Resources Trading, Inc. v. Trans Freight Lines*, 766 F.2d 65, 68 (2d Cir.1985); *Leather's Best*, 451 F.2d at 809–11. *See generally United Mine Workers v. Gibbs*, 383 U.S. 715, 725–27, 86 S.Ct. 1130, 1138–39, 16 L.Ed.2d 218 (1966). This is also the rule in other circuits. *E.g., Feigler v. Tidex, Inc.*, 826 F.2d 1435, 1439 (5th Cir.1987); *In re Oil Spill by Amoco Cadiz Off Coast of France*, 699 F.2d 909, 913–14 (7th Cir.), *cert. denied sub nom. Astilleros Espanoles, S.A. v. Standard Oil Co. (Indiana)*, 464 U.S. 864, 104 S.Ct. 196, 78 L.Ed.2d 172 (1983). However, after the Supreme Court's decision in *Finley*, the continued viability of the doctrine of pendent party jurisdiction in any context is seriously in question. *See Staffer v. Bouchard Transp. Co.*, 878 F.2d 638, 643 n. 5 (2d Cir.1989) (suggesting in dicta that "pendent-party jurisdiction apparently is no longer a viable concept").

In *Finley*, the Supreme Court held that pendent party jurisdiction is not available when the primary claim is brought under the Federal Tort Claims Act (FTCA), 28 U.S.C. § 1346(b). 109 S.Ct. at 2010. Employing a restrictive reading of pendent party jurisdiction, the Court determined that factual similarity and judicial economy alone are insufficient to exert jurisdiction over state law claims involving additional parties without an independent basis for jurisdiction. *Id.* at 2008. Relying on the general proposition that a federal court's subject matter jurisdiction is limited to the bounds set forth by the Constitution *and* to the extent that, within those limits, jurisdiction is authorized by Congress, *id.* at 2005–06; *see The Mayor v. Cooper*, 73 U.S. (6 Wall.) 247, 252, 18 L.Ed. 851 (1868); *Ex Parte Bollman*, 8 U.S. (4 Cranch) 75, 93, 2 L.Ed. 554 (1807), the Court concluded that pendent party jurisdiction is available only if the statute providing federal jurisdiction over the primary claim can also be interpreted as specifically conferring jurisdiction over other claims against additional parties. 109 S.Ct. at 2008–09; *see also Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 98 S.Ct. 2396, 57 L.Ed.2d 274 (1978); *Aldinger v. Howard*, 427 U.S. 1, 96 S.Ct. 2413, 49 L.Ed.2d 276 (1976); *Zahn v. International Paper Co.*, 414 U.S. 291, 94 S.Ct. 505, 38 L.Ed.2d 511 (1973).

[3] An action brought into federal court by way of the FTCA, such as that in *Finley*, and an action brought pursuant to the court's admiralty jurisdiction, such as that in the instant case, are by no means identical in terms of the nature of the relevant statutory grants of jurisdiction. First, a federal court's jurisdiction under the FTCA is predicated on a waiver of sovereign immunity permitting individuals to bring tort claims against the United States. Jurisdictional grants waiving sovereign immunity are ordinarily interpreted narrowly. *See United States v. Sherwood*, 312 U.S. 584, 590, 61 S.Ct. 767, 771, 85 L.Ed. 1058 (1941).

This factor is entirely absent in the context of the instant case.

Second, underlying admiralty jurisdiction is the sound policy of permitting claims arising in the admiralty or maritime context to be resolved in a single setting. *See British Transp. Comm'n v. United States*, 354 U.S. 129, 137–38, 77 S.Ct. 1103, 1107, 1 L.Ed.2d 1234 (1957). This is not merely a matter of convenience for the parties. Rather, it stems from the historical recognition of the importance that maritime claims in particular be subjected to efficient and uniform procedures and treatment. *See In Re Oil Spill*, 699 F.2d at 913–14.

Third, and most important for the analysis under *Finley*, the language of the relevant statutory grants of jurisdiction in *Finley* and in our case are substantially different. The jurisdictional statute for FTCA claims provides, in pertinent part, that the federal courts "shall have exclusive jurisdiction of civil actions on claims against the United States." 28 U.S.C. § 1346(b). The Supreme Court placed great significance on the fact that this jurisdictional grant was limited to claims against a specific party—the United States. It therefore concluded that section 1346(b) "defines jurisdiction in a manner that does not reach defendants other than the United States." 109 S.Ct. at 2009. By contrast, the statute providing admiralty jurisdiction is strikingly broad: It confers exclusive jurisdiction over "[a]ny civil case of admiralty or maritime jurisdiction." 28 U.S.C. § 1333(1).

The importance of this last distinction is illustrated by a comparison of cases in other circuits decided in the wake of *Finley*. The Eighth Circuit, in *Lockard v. Missouri Pacific R.R. Co.*, 894 F.2d 299 (8th Cir. 1990), applied *Finley*'s strict rule of construction to the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51, 56, and held that the FELA's jurisdictional grant did not extend to pendent party claims. 894 F.2d at 302–03. The court's holding rested on the language of the FELA, which imposes liability on "[e]very common carrier by railroad" for injuries sustained by railroad employees. 45 U.S.C. § 51. Thus, the court concluded that the FELA, like the FTCA, created "a grant of jurisdiction over claims involving particular parties," and the statutory language simply could not be read to include claims against other parties. 894 F.2d at 302; *see also Stallworth v. City of Cleveland*, 893 F.2d 830, 838 (6th Cir.1990) (no pendent party jurisdiction under 42 U.S.C. § 1983 over state law claim of loss of consortium); *Iron Workers Mid-South Pension Fund v. Terotechnology Corp.*, 891 F.2d 548, 551 (5th Cir.1990) (no pendent party jurisdiction under Employee Retirement Income Security Act, 29 U.S.C. § 1132(e), over state law claim to enforce lien).

By contrast, in *Teledyne, Inc. v. Kone Corp.*, 892 F.2d 1404 (9th Cir.1989), the Ninth Circuit determined that the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1330, does provide for pendent party jurisdiction. *Id.* at 1409–10. The *Teledyne* Court found the language of the FSIA's jurisdictional grant unlike that of the FTCA in that the former provided jurisdiction over a "civil *action* against a foreign state," 28 U.S.C. § 1330(a) (emphasis added), while the latter provided jurisdiction only for "*claims* against the United States." 28 U.S.C. § 1346(b) (emphasis added). The Ninth Circuit concluded that the choice of the word "action," rather than "claim," in the FSIA indicated that the FSIA's jurisdictional grant included claims against parties other than foreign states that arise out of the same nucleus of operative facts and thus would ordinarily be part of the same action as the primary claim. 892 F.2d at 1409.

[4] The admiralty jurisdictional statute does not contain a limitation as to a certain category of parties, as does the FTCA and the FELA. Nor does it contain a limitation as to a certain category of claims. Rather, it creates jurisdiction over an admiralty "case." 28 U.S.C. § 1333(1). Therefore, while the FTCA confers jurisdiction over claims "against the United States and no one else," *Finley*, 109 S.Ct. at 2008, admiralty jurisdiction extends to an entire case, including non-admiralty claims against a second defendant. *See Teledyne*, 892 F.2d

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at 1409. *See generally Osborn v. United States Bank*, 22 U.S. (9 Wheat.) 737, 822–28, 6 L.Ed. 204 (1824).

In light of the broadly worded jurisdictional grant over admiralty cases and "the strong admiralty policy in favor of providing efficient procedures for resolving maritime disputes," *In Re Oil Spill*, 699 F.2d at 914, we see no reason at this juncture to depart from the established rule of this Circuit that pendent party jurisdiction is available in the unique area of admiralty. Accordingly, the district court had subject matter jurisdiction over the pendent party claim against Aid Export, and it did not abuse its discretion in exercising that jurisdiction. *See Leather's Best*, 451 F.2d at 811.

B. *Appellate Jurisdiction Under § 1292(a)(3)*

[5] Roco argues that, because Aid Export is a pendent party and the claim against it is grounded in state law rather than admiralty, Aid Export may not avail itself of the provisions of 28 U.S.C. § 1292(a)(3) permitting interlocutory appeals in admiralty actions. Neither party has provided us with case law specifically addressing that question, and the issue appears to be a novel one. Nevertheless, it need not detain us for long.

Section 1292(a)(3) provides, in pertinent part, that appeals may be taken from "[i]nterlocutory decrees ... determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed." This exception to the final judgment rule has its historical origins in the once common practice in admiralty cases of referring the determination of damages to a master or commissioner after resolving the question of liability. *See* Fed.R.Civ.P. 53(b). Section 1292(a)(3) permitted parties to appeal the finding of liability before facing a potentially costly damages proceeding. *See* 9 J. Moore, B. Ward & J. Lucas, *Moore's Federal Practice* ¶ 110.19[3], at 210 (2d ed. 1989).

We see no reason to deny a pendent party the right to appeal an interlocutory determination of liability when the same decision can be appealed by the other parties in the case. The determination of liability against Aid Export is integrally linked with the determination of non-liability on the part of Hapag-Lloyd. Moreover, the language of section 1292(a)(3) is not limited to admiralty *claims;* instead, it refers to admiralty *cases.* The state law claim against Aid Export is in federal court only because Roco is permitted to append it to the admiralty claim against Hapag-Lloyd. It is thus part of the admiralty case, and we therefore conclude that we have appellate jurisdiction.

C. *Summary Judgment*

[6] Finally we reach the merits of Aid Export's appeal. Aid Export argues first that the district court improperly saddled it with the burden of coming forward with an explanation of the loss of the cargo. Second, it contends that the district court erred in granting summary judgment when genuine issues of material fact exist about who had possession of the cargo when the loss occurred.

[7] Under New York law, which governs Roco's claim against Aid Export, once a plaintiff has presented uncontroverted evidence of delivery of goods to a warehouseman and of the warehouseman's failure to honor the demand for the release of stored goods, the warehouseman bears the burden of providing an explanation for the loss of the goods supported by evidence sufficient to create a question of fact. *Colgate Palmolive*, 724 F.2d at 317; *I.C.C. Metals, Inc. v. Municipal Warehouse Co.*, 50 N.Y.2d 657, 664, 409 N.E.2d 849, 853–54, 431 N.Y.S.2d 372, 378–79 (1980). The warehouseman's explanation "cannot be merely the product of speculation and conjecture" and must show not just "what might conceivably have happened to the goods, but rather what actually happened to the goods." *I.C.C. Metals*, 50 N.Y.2d at 664 n. 3, 409 N.E.2d at 853 n. 3, 431 N.Y.S.2d at 377 n. 3.

[8] Aid Export argues that this burden-shifting rule should not be applied to it because a factual dispute exists over

whether the loss occurred while the cargo of lighters was in its possession. Indeed, the rule is predicated on the "practical necessity" that results from the warehouseman's exclusive control over stored goods, placing it in the best position to explain any loss of the goods. *Id.* at 665, 409 N.E.2d at 854, 431 N.Y.S.2d at 377. Yet, the mere allegation that the loss occurred elsewhere does not excuse the warehouseman from meeting its burden of offering a sufficiently supported explanation any more than would an allegation that the goods were stolen by some third party despite the warehouseman's exercise of due care.

In an effort to create a factual dispute on the issue of who had possession of the cargo when the loss took place, Aid Export relies almost exclusively on the affidavit of Sabato F. Catucci, its president. In his affidavit, Catucci asserts that he personally counted the cartons as they were being loaded into the container. He does not and apparently cannot state, however, that he observed the container at all times prior to its being sealed. Catucci maintains in the affidavit that the plastic seals that were used on the container were capable of being bypassed, but provides no basis or support for this conclusory assertion. He also states that the discrepancy in the weight of the cargo discovered at the terminal "could be due to something as simple as the amount of gas in the trucks." Aid Export attempts to bolster this explanation for the weight discrepancy by pointing to the deposition testimony of a Hapag–Lloyd employee who commented that a discrepancy of two or three hundred pounds was not out of the ordinary. Yet, Aid Export fails to provide a specific factual basis, as opposed to an inexact guess about what "could" be, that would explain the weight discrepancies of 843 and 1,083 pounds in the two shipments.

[9] The conclusory statements and unsupported assertions presented by Aid Export are insufficient to meets its burden. A party opposing a motion for summary judgment must set forth specific facts demonstrating the existence of a genuine issue of fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The evidence on which Aid Export relies falls short of creating a genuine factual dispute about the reliability of the plastic seals, the weight discrepancies or the integrity of the cargo while the cargo was in its possession.

Roco made a *prima facie* showing of conversion under New York law. Aid Export, after several years of discovery, is unable to rebut that showing by coming forward with adequate support for its explanation for the loss of the cargo. In these circumstances, Roco is entitled to summary judgment in its favor.

CONCLUSION

The judgments of the district court are affirmed.

Marjorie DATSKOW, Executrix of the Estates of Robert C. Gross and Susan C. Gross, deceased, and Administratrix of the Estates of Michael and David Gross, deceased, and Grossair, Inc., Plaintiffs–Appellants,

v.

TELEDYNE, INC., CONTINENTAL PRODUCTS DIVISION, Defendant–Appellee.

No. 622, Docket 89–7916.

United States Court of Appeals, Second Circuit.

Argued Jan. 10, 1990.

Decided March 23, 1990.

Opinion on Denial of Rehearing May 2, 1990.

Plaintiffs in wrongful death and survival action appealed from order of the United States District Court for the Western District of New York, David G. Larimer, J., which dismissed for lack of jurisdiction and insufficiency of process. The

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If this is to continue to be the law governing such matters, then we have, in simple terms, given to the plaintiff in circumstances such as these a ticket to ride serenely past the bar of the domestic relations exception by the simple expedient of alleging "intentional infliction of emotional distress". There is no question that the proof of that tort does not require the proof of a domestic relations factor, but it is equally certain that in these cases the offense arises out of the domestic relations relationship and that the relationship is a salient factor—probably the most salient factor—in showing the degree of emotional distress suffered by the plaintiff. I simply cannot agree that the plaintiff, for future cases, under these circumstances should be permitted to avoid the exception.

As set out above, the law in this Circuit is so clearly stated that the writer is forced to concur in the result reached in the majority opinion.

I concur.

James J. ALLEMAN and Shirley Alleman, Plaintiffs,

v.

BUNGE CORPORATION, et al., Defendants-Appellants,

v.

REPUBLIC INSURANCE CO., et al., Defendants-Appellees.

No. 84-3209
Summary Calendar.

United States Court of Appeals, Fifth Circuit.

Dec. 19, 1984.

Longshoreman and his wife brought suit in Louisiana state court to recover for personal injuries that resulted from longshoreman's falling in open hole on grain barge while employed as longshoreman. Claims were brought under Longshoremen's and Harbor Workers' Compensation Act, general maritime law, and Louisiana state law against employer and several insurers. Employer removed action to federal court on basis of diversity jurisdiction. The United States District Court for the Eastern District of Louisiana, at New Orleans, Frederick J.R. Heebe, Chief Judge, granted eight insurance companies summary judgment on grounds that their policy with employer excluded coverage of claims by employees, and employer appealed. The Court of Appeals, Reavley, Circuit Judge, held that: (1) action was not in federal admiralty court's jurisdiction, and (2) appeal could not be based upon statute which permits appeal of interlocutory decrees in admiralty cases.

Appeal dismissed.

1. Removal of Cases ⇐95

Although longshoreman and his wife could have invoked admiralty jurisdiction of federal courts by filing statement with their complaint identifying it as maritime claim, where they exercised their historical option to bring action in state court under savings to suitors clause, by removing action to federal court, employer could not alter their substantive rights or destroy their right to prosecute their action in common-law tort, but could remove action only to federal diversity court; thus, action was not in federal admiralty court's jurisdiction. 28 U.S.C.A. §§ 1292(a)(3), 1332(a), 1333; Fed.Rules Civ.Proc.Rule 9(h), 28 U.S.C.A.

2. Federal Courts ⇐576

Where federal court's admiralty jurisdiction was not invoked, employer sued by longshoreman and his wife under Longshoremen's and Harbor Workers' Compensation Act, general maritime law, and Louisiana state law, could not base its appeal of dismissal of several insurers on statute which permits appeal of interlocutory decrees in admiralty cases. Longshoremen's

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and Harbor Workers' Compensation Act, §§ 1–51, 33 U.S.C.A. §§ 901–950; LSA-C.C. art. 2315; 28 U.S.C.A. §§ 1292(a)(3), 1332(a), 1333; Fed.Rules Civ.Proc.Rule 9(h), 28 U.S.C.A.

John E. Galloway, New Orleans, La., for Bunge Corp. & Ins. Co. of North America.

Robert S. Reich, Charles F. Lozes, New Orleans, La., for Republic Ins. Co., et al.

Norman C. Sullivan, Jr., New Orleans, La., for St. Louis Shipbuilding.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before REAVLEY, POLITZ and HIGGINBOTHAM, Circuit Judges.

REAVLEY, Circuit Judge:

Bunge Corp. and Insurance Co. of North America (hereinafter referred to collectively as Bunge) appeal a summary judgment in favor of eight insurance companies.[1] Bunge attempts to base this appeal on 28 U.S.C. § 1292(a)(3) (1982), which permits appeal of interlocutory decrees in admiralty cases. Because this appeal is not from a maritime action and no other jurisdiction exists, we dismiss the appeal.

James and Shirley Alleman brought suit in Louisiana state court to recover for personal injuries that resulted from James' falling in an open hole on a grain barge while employed by Bunge as a longshoreman. The Allemans brought claims under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901–950 (1982), general maritime law, and Louisiana state law, La.Civ.Code Ann. art. 2315 (West Supp.1984), against, among others, Bunge and eight other insurance companies with which Bunge had an insurance policy. Bunge removed the action to federal court on the basis of diversity jurisdiction, 28 U.S.C. § 1832(a) (1982). The federal district court then granted the eight insurance companies summary judgment on grounds that their policy with Bunge excluded coverage of claims by employees.

[1] The admiralty jurisdiction of the federal courts, 28 U.S.C. § 1333 (1982), could have been invoked in this case. The Allemans could have filed their complaint with a statement identifying it as a maritime claim, Fed.R.Civ.P. 9(h),[2] in admiralty court. *Bynum v. Patterson Truck Lines, Inc.*, 655 F.2d 643, 644 (5th Cir.1981) (Longshoremen's and Harbor Workers' Compensation Act is a maritime cause of action). Instead, the Allemans exercised their "historic option," *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 371, 79 S.Ct. 468, 480, 3 L.Ed.2d 368 (1959), to bring their action in state court under the savings to suitors clause of 28 U.S.C. § 1333(1) (1982). Numerous and important consequences flow from the Allemans' decision to bring their action in state court. *See T.N.T. Marine Service, Inc. v. Weaver Shipyards & Dry Docks, Inc.*, 702 F.2d 585, 586–87 (5th Cir.), *cert. denied*, — U.S. —, 104 S.Ct. 151, 78 L.Ed.2d 141 (1983) (jurisdiction invoked governs venue, interlocutory appeals, remedies available, right to jury trial, and law that applies). By removing this action, Bunge could not alter the Allemans' substantive rights or destroy their right to prosecute their action in a common law court. Bunge could have re-

1. The insurance companies are: Continental Insurance Co., Bellefonte Insurance Co., Midland Insurance Co., Northeastern Insurance Co., Penn Lumberman's Mutual Insurance Co., The Lumberman Insurance Co., Ranger Insurance Co., and Republic Insurance Co.

2. A pleading or count setting forth a claim for relief within the admiralty and maritime jurisdiction that is also within the jurisdiction of the district court on some other ground may contain a statement identifying the claim as an admiralty or maritime claim for the purposes of Rules 14(c), 38(e), 82, and the Supplemental Rules for Certain Admiralty and Maritime Claims. If the claim is cognizable only in admiralty, it is an admiralty or maritime claim for those purposes whether so identified or not. The amendment of a pleading to add or withdraw an identifying statement is governed by the principles of Rule 15. The reference in Title 28, U.S.C. § 1292(a)(3), to admiralty cases shall be construed to mean admiralty and maritime claims within the meaning of this subdivision (h).

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moved this action only to a federal diversity court. *Cf. Gaitor v. Peninsular & Occidental Steamship Co.*, 287 F.2d 252, 255 (5th Cir.1961) (maritime action brought in state court could be removed only if diversity jurisdiction existed). Therefore, the Allemans' action is not in the federal admiralty court's jurisdiction.

[2] Because 28 U.S.C. § 1292(a)(3) (1982), may be used only if the federal court's admiralty jurisdiction has been invoked, Fed.R.Civ.P. 9(h), Bunge cannot base jurisdiction for this appeal on that statute. Because no other basis for this appeal exists,[3] it is DISMISSED.

UNITED STATES of America,
Plaintiff-Appellee,

v.

James Glenn ADCOCK,
Defendant-Appellant.

No. 84-1215.

United States Court of Appeals,
Fifth Circuit.

Jan. 7, 1985.

Defendant was convicted in the United States District Court for the Western District of Texas, H.F. Garcia, J., of cocaine possession, and he appealed. The Court of Appeals held that search warrant by means of which two pounds of the drug were discovered in defendant's residence was supported by probable cause, established by facts alleged in supporting affidavit.

Affirmed.

3. The district court did not certify this summary judgment under Fed.R.Civ.P. 54(b). *See Boudeloche v. Tnemec Co.*, 693 F.2d 546, 547 (5th Cir.1982) (order adjudicating fewer than all claims as to fewer than all parties not appealable as final judgment unless certified pursuant to Rule 54(b)).

1. Searches and Seizures ⇐3.9

Court of Appeals reviews sufficiency of affidavit upon basis of which search warrant was issued by applying to it a commonsense consideration of totality of the circumstances presented thereby.

2. Searches and Seizures ⇐3.6(2)

"Probable cause" which will justify issuance of search warrant is that which warrants a man of reasonable caution in believing that there is a practical, nontechnical probability that contraband is present on the premises to be searched; it does not demand a showing that the belief is more likely true than false.

See publication Words and Phrases for other judicial constructions and definitions.

3. Drugs and Narcotics ⇐188

Facts stated in affidavit, to effect that cab driver, apprehended in possession of small amount of cocaine, had delivered defendant to address without charging a money fare, that cab driver's claim not to know defendant was false, that cab driver probably entered premises before he was apprehended with the drug, that the premises were frequented by persons having connections with drug smuggling, and that defendant himself had been arrested a few months earlier for possession of cocaine established probable cause for issuance of warrant to search the premises.

Kuhn, Mallios & Doyle, Robert J. Kuhn, James D. Doyle, III, Austin, Tex., for defendant-appellant.

Edward C. Prado, U.S. Atty., Carl Pierce, Sidney Powell, Asst. U.S. Attys., San Antonio, Tex., for plaintiff-appellee.

Appeal from the United States District Court for the Western District of Texas.

Before GEE, POLITZ and HIGGINBOTHAM, Circuit Judges.

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

FROM: Carol Ann Mooney, Reporter

DATE: September 6, 1993

SUBJECT: Item 93-3, Amendment of Rule 41 re: 7-day period for issuance of the mandate; and
Item 93-6, Amendment of Rule 41 to specify when the mandate becomes effective.

Item 93-3

At the Advisory Committee's April 1993 meeting, the Committee reviewed proposed amendments to Rules 40 and 41 following publication. The proposed amendments lengthen the time for filing a petition for rehearing in a civil case involving the United States. That change was requested by former Solicitor General Starr and is docketed as item 91-2. The amendments were ultimately approved by both the Advisory Committee and the Standing Committee. Copies of the proposed changes as submitted to the Judicial Conference are attachment A to this memorandum.

The proposed amendment to Rule 40 lengthens the time for filing a petition for rehearing in some, but not all, cases from 14 to 45 days after entry of judgment. As a consequence of that change, the provision in Rule 41(a) requiring a court of appeals to issue the mandate 21 days after entry of judgment also must be changed. The proposed amendment to Rule 41 requires a court of appeals to issue the mandate 7 days after expiration of the time for filing a petition for rehearing.

Judge Newman commented upon the proposed change to Rule 41(a). He stated that he sees no need to delay the issuance of the mandate until 7 days after the time for seeking rehearing has expired. He suggested that a court should be able to issue the mandate "within 7 days" after expiration of the time for filing a petition for rehearing.

Several members of the Committee expressed a preference for a day certain for issuance of the mandate. That is, they preferred a rule that requires the mandate to issue 7 days after expiration of the time for filing a petition for rehearing rather than one that would require the court to issue the mandate "within 7 days."

Ironically, the Advisory Committee's discussion of the comment actually focused upon whether 7 days is too short a time rather than too long a time. A 7-day period is

provided by the current rule;[1] therefore, the proposed amendment to Rule 41(a) does not change the time frame. Proposed amendments to Rule 41(b), however, establish standards for granting a stay of mandate and may make it more difficult for a party to obtain a stay of mandate within the 7-day period.[2] Proposed amendments to Rule 41(b) require a party seeking a stay of mandate to show that a petition for *certiorari* "would present a substantial question and that there is good cause for a stay."

The members of the Advisory Committee made two observations about the sufficiency of the 7-day period. First, although changes to Rule 41(b) require a party to establish grounds for a stay, a party has the time period for filing the petition for rehearing as well as the 7 days thereafter to formulate arguments for granting a stay. In fact, the arguments for granting a stay are often the same arguments presented in the petition for rehearing.

Second, the seven day time period does not currently cause any difficulties. As a pragmatic matter, if a mandate issues and a stay is subsequently granted, the court recalls the mandate. If that practice is problematic, an amendment stating that if an application for a stay is filed, the mandate cannot issue until the court acts on the application might be preferable to lengthening the 7-day period. D.C. Cir. R. 15(b) includes such a provision.[3] (The D.C. Cir. R. as well as the local rules and internal operating procedures from the other circuits are attachment B to this memorandum.)

The question before the Committee is whether the 7 day period is the right length of time.

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[1] Rule 41(a) currently requires the mandate to issue 21 days after entry of judgment. Because Rule 40 says that a petition for rehearing must be entered within 14 days after entry of judgment, the effect is that Rule 41(a) requires the mandate to issue 7 days after expiration of the time for filing a petition for rehearing.

[2] The local rules in six circuits, however, require a similar showing. D.C. Cir. R. 15 (b)(1); 4th Cir. I.O.P. 41.2; 5th Cir. R. 41.1; 7th Cir. R. 41(a); 8th Cir. R. 41A; and 11th Cir. 41-1(a). Four other circuits make it clear that a stay of mandate is not granted simply upon request. 1st Cir. R. 41; 6th Cir. R. 15(a); 9th Cir. R. 41-1; 10th Cir. R. 41.1. Therefore, the change in Fed. R. App. P. 41(b) may not significantly alter the type of information that must be presented to a court to obtain a stay or the ease with which stays are granted.

[3] On January 4, 1993, the D.C. Circuit announced its intention to revoke all existing circuit rules and issue new rules numbered to correspond to the Federal Rules of Appellate Procedure. Proposed D.C. Cir. R. 41 contains a provision identical to that in D.C. Cir. R. 15(b), providing that the mandate will not issue while an application for a stay is pending.

Item 93-6

This August, Solicitor General Days wrote to Judge Ripple proposing a different amendment to Fed. R. App. P. 41(a). He suggests that Rule 41 should specify that a mandate is effective upon issuance.[4] A copy of his letter, which includes a proposed draft, is attachment C to this memorandum.

In addition to the Fourth Circuit authority cited in the letter,[5] the Tenth Circuit also has an I.O.P. governing the effectiveness of a judgment. It provides that "judgments of the court take effect upon the issuance of the mandate."[6]

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[4] The Solicitor General's letter is not the first time that the uncertainty about the effective date of a court's judgment or order has been brought to the attention of the Advisory Committee.

In addition to Judge Newman's comment about the time for issuance of the mandate under Rule 41, the NLRB also submitted a comment concerning the proposed amendments to Rules 40 and 41 that would lengthen the time for filing a petition for rehearing in civil cases. The NLRB opposed the changes because they would delay the effectiveness of enforcement orders. The NLRB stated that although the law is unclear about the effective date of a judgment or order, it believes that an enforcement order becomes effective only upon issuance of the mandate and, as a consequence, the changes would delay the effectiveness of enforcement orders.

In response to the NLRB's comment, several members of the Advisory Committee noted that a court may direct that the mandate issued forthwith when its immediate issuance is warranted. The Committee approved the amendments as published, making only minor stylistic changes.

[5] Although the letter cites 4th Cir. R. 41.1, my 1992 version of the 4th Circuit rules includes no such rule. I believe the correct citation is to 4th Cir. I.O.P. 41.1.

[6] 10th Cir. I.O.P. VIII.B.1.

Rule 40. Petition for Rehearing

(a) *Time for Filing; Content; Answer; Action by Court if Granted.*-- A petition for rehearing may be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order or by local rule. However, in all civil cases in which the United States or an agency or officer thereof is a party, the time within which any party may seek rehearing shall be 45 days after entry of judgment unless the time is shortened or enlarged by order. The petition ~~shall~~ must state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended and ~~shall~~ must contain such argument in support of the petition as the petitioner desires to present. Oral argument in support of the petition will not be permitted. No answer to a petition for rehearing will be received unless requested by the court, but a petition for rehearing will ordinarily not be granted in the absence of such a request. If a petition for rehearing is

granted, the court may make a final disposition of the cause without reargument or may restore it to the calendar for reargument or resubmission or may make such other orders as are deemed appropriate under the circumstances of the particular case.

Committee Note

Subdivision (a). The amendment lengthens the time for filing a petition for rehearing from 14 to 45 days in civil cases involving the United States or its agencies or officers. It has no effect upon the time for filing in criminal cases. The amendment makes nation-wide the current practice in the District of Columbia and the Tenth Circuits, *see* D.C. Cir. R. 15(a), 10th Cir. R. 40.3. This amendment, analogous to the provision in Rule 4(a) extending the time for filing a notice of appeal in cases involving the United States, recognizes that the Solicitor General needs time to conduct a thorough review of the merits of a case before requesting a rehearing. In a case in which a court of appeals believes it necessary to restrict the time for filing a rehearing petition, the amendment provides that the court may do so by order. Although the first sentence of Rule 40 permits a court of appeals to shorten or lengthen the usual 14 day filing period by order or by local rule, the sentence governing appeals in civil cases involving the United States purposely limits a court's power to alter the 45 day period to orders in specific cases. If a court of appeals could adopt a local rule shortening the time for filing a petition for rehearing in all cases involving the United States, the purpose of the amendment would be defeated.

Rule 41. Issuance of Mandate; Stay of Mandate

(a) *Date of Issuance.* -- The mandate of the court ~~shall~~ must issue ~~21~~ 7 days after the ~~entry of judgment~~ expiration of the time for filing a petition for rehearing unless such a petition is filed or the time is shortened or enlarged by order. A certified copy of the judgment and a copy of the opinion of the court, if any, and any direction as to costs shall constitute the mandate, unless the court directs that a formal mandate issue. The timely filing of a petition for rehearing will stay the mandate until disposition of the petition unless otherwise ordered by the court. If the petition is denied, the mandate ~~shall~~ must issue 7 days after entry of the order denying the petition unless the time is shortened or enlarged by order.

(b) *Stay of Mandate Pending ~~Application~~ Petition for Certiorari.* ~~--A stay of the mandate pending application to the Supreme Court for a writ of certiorari may be granted upon motion, reasonable notice of which shall be given to all parties.~~ A party

who files a motion requesting a stay of mandate pending petition to the Supreme Court for a writ of certiorari must file, at the same time, proof of service on all other parties. The motion must show that a petition for certiorari would present a substantial question and that there is good cause for a stay. The stay ~~shall~~ cannot exceed 30 days unless the period is extended for cause shown ~~. If~~ or unless during the period of the stay, ~~there is filed with the clerk of the court of appeals~~, a notice from the clerk of the Supreme Court is filed showing that the party who has obtained the stay has filed a petition for the writ ~~in that court~~, in which case the stay ~~shall~~ will continue until final disposition by the Supreme Court. ~~Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari the mandate shall issue immediately.A~~ The court of appeals must issue the mandate immediately when a copy of a Supreme Court order denying the petition for writ of certiorari is filed. The court may require a bond or

other security ~~may be required~~ as a condition to the grant or continuance of a stay of the mandate.

Committee Note

Subdivision (a). The amendment conforms Rule 41(a) to the amendment made to Rule 40(a). The amendment keys the time for issuance of the mandate to the expiration of the time for filing a petition for rehearing, unless such a petition is filed in which case the mandate issues 7 days after the entry of the order denying the petition. Because the amendment to Rule 40(a) lengthens the time for filing a petition for rehearing in civil cases involving the United States from 14 to 45 days, the rule requiring the mandate to issue 21 days after the entry of judgment would cause the mandate to issue while the government is still considering requesting a rehearing. Therefore, the amendment generally requires the mandate to issue 7 days after the expiration of the time for filing a petition for rehearing.

Subdivision (b). The amendment requires a party who files a motion requesting a stay of mandate to file, at the same time, proof of service on all other parties. The old rule required the party to give notice to the other parties; the amendment merely requires the party to provide the court with evidence of having done so.

The amendment also states that the motion must show that a petition for certiorari would present a substantial question and that there is good cause for a stay. The amendment is intended to alert the parties to the fact that a stay of mandate is not granted automatically and to the type of showing that needs to be made. The Supreme Court has established conditions that must be met before it will stay a mandate. *See* Robert L. Stern et al., Supreme Court Practice § 17.19 (6th ed. 1986).

LOCAL RULES AND I.O.P.'s

D.C. Cir. R. 15. Petitions for Rehearing, Suggestions for Hearing or Rehearing En Banc, Mandates and Remands

* * * * *

(b) *Mandates.*

(1) Stay of Mandate. A motion for a stay of the issuance of mandate shall not be granted unless the motion sets forth facts showing good cause for the relief sought.

(2) Time for Issuance. While retaining discretion to direct immediate issuance of its mandate in an appropriate case, this Court ordinarily will include as part of its disposition an instruction that the clerk will withhold issuance of the mandate until the expiration of the time for filing a petition for rehearing or a suggestion for rehearing en banc and, if such petition or suggestion is timely filed, until seven days after disposition thereof. Such an instruction is without prejudice to the right of any party at any time to move for expedited issuance of the mandate for good cause shown. If a timely motion to stay issuance of the mandate has been filed, the mandate shall not issue while the motion is pending. If the motion is denied, the mandate ordinarily would be issued seven days thereafter. If the motion is granted, the stay would not ordinarily extend beyond 30 days from the date that the mandate would otherwise have been issued.

(3) Writs. No mandate shall issue in connection with an order granting or denying a writ of mandamus or other special writ but the order or judgment granting or denying the relief sought shall become effective automatically twenty-one days after issuance in the absence of an order or other special direction of this Court to the contrary.

(4) When rehearing en banc is granted, the court will recall the mandate if it has issued.

1st Cir. R. 41. Stay of Mandate.

Whereas an increasingly large percentage of unsuccessful petitions for certiorari have been filed in this circuit in criminal cases in recent years, in the interests of minimizing unnecessary delay in the administration of justice mandate will not be stayed hereafter in criminal cases following the affirmance of a conviction simply upon request. On the contrary, mandate will issue and bail will be revoked at such time as the court shall order except upon a showing, or an independent finding by the court, of probable cause to believe that a petition would not be frivolous, or filed merely for delay. See 18 U.S.C. § 3148. The

court will revoke bail even before mandate is due. A comparable principle will be applied in connection with affirmed orders of the NLRB, see *NLRB v. Athbro Precision Engineering*, 423 F.2d 573 (1st Cir. 1970), and in other cases where the court believes that the only effect of a petition for certiorari would be pointless delay.

2nd Cir. R. 41. Issuance of mandate.

Unless otherwise ordered by the court, the mandate shall issue forthwith in all cases in which (1) an appeal from an order or judgment of a district court or a petition to review or enforce an order of an agency is decided in open court, (2) a petition for a writ of mandamus or other extraordinary writ is adjudicated, or (3) the clerk enters an order dismissing an appeal or a petition to review or enforce an order of an agency for a default in filings, as directed by an order of the court or a judge.

4th Cir. I.O.P. 41. Issuance of Mandate; Stay of Mandate.

41.1 Mandate. On the date of issuance of mandate, the Clerk of the Court will issue written notice to the parties and the clerk of the lower court that the judgment of the Court of Appeals takes effect that day. The trial court record will be returned to the clerk of the court simultaneously with the issuance of the mandate.

41.2. Motion for stay of the mandate. A motion for stay of the issuance of the mandate shall not be granted simply upon request. Ordinarily the motion shall be denied unless there is a specific showing that it is not frivolous or filed merely for delay. The motion must present a substantial question or set forth good or probable cause for a stay. Only the original of the motion need be filed. Stay requests are normally acted upon without a request for a response.

* * * * *

5th Cir. R. 41. Issuance of Mandate; Stay of Mandate

41.1. Stay of Mandate -- Criminal Appeals. A motion for a stay of the issuance of a mandate in a direct criminal appeal filed under FRAP 41 shall not be granted simply upon request. Unless the petition sets forth good cause for stay or clearly demonstrates that a substantial question is to be presented to the Supreme Court, the motion shall be denied and the mandate thereafter issued forthwith.

41.2. Recall of Mandate. A mandate once issued shall not be recalled

except to prevent injustice.

41.3. Effect of Granting Rehearing En Banc. Unless otherwise expressly provided, the effect of granting a rehearing en banc is to vacate the panel opinion and judgment of the Court and to stay the mandate.

6th Cir. R. 15. Mandate

(a) **Stay of Mandate.** In the interest of minimizing unnecessary delay in the administration of justice, the issuance of the mandate will not be stayed simply upon request. The mandate ordinarily will issue pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure unless there is a showing, or an independent determination by the court that a petition for writ of certiorari would not be frivolous or filed merely for delay.

(b) **Time for Filing Motion to Stay.** A motion to stay the mandate must be received in the clerk's office within twenty-one (21) days after the entry of judgment or seven (7) days from entry of order on petition for rehearing.

(c) **Duration of Stay Pending Application for Certiorari.** A stay of the mandate pending application to the Supreme Court for a writ of certiorari shall not be effective later than the date on which the movant's application for a writ of certiorari must be filed pursuant to 28 U.S.C. § 2101 or Rule 20 of the Supreme Court Rules, as applicable. If during the period of the stay there is filed with the clerk a notice from the clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that court, the stay shall continue until final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari, the mandate shall issue immediately.

7th Cir R. 41. Stay of Mandate or Stay of Execution of Judgment Enforcing Administrative Order

(a) *Mandate Ordinarily Will Not Be Stayed.* In the absence of extraordinary need, the mandate will not be stayed at the request of a party, except upon a specific motion which includes:

(1) A certification of counsel that a petition for certiorari to the Supreme Court of the United States is being filed and is not merely for delay.

(2) A statement of the specific issues to be raised in the petition for certiorari.

(3) A substantial showing that the petition for certiorari which is being filed raises an important question meriting review by the Supreme Court.

(b) *Time for Filing Motion to Stay.* A motion to stay the mandate must be filed prior to the regularly scheduled date for issuance of the mandate.

(c) *Stay of Execution of Judgment Enforcing Administrative Order Subject to Same Requirement as Stay of Mandate.* Execution of a judgment enforcing an order of an administrative agency will be stayed only on the conditions provided in subparagraph (a) with respect to a mandate.

(d) *Notice to Clerk of Filing Petition for Certiorari.* An attorney filing a petition for certiorari or notice of appeal with the Supreme Court shall, on the date it is mailed or filed, notify the clerk of this court by telephone of the mailing or filing.

8th Cir. R. 41A. Stay or Recall of Mandate

In a direct criminal appeal, the court will grant a motion for stay of issuance of a mandate under FRAP 41 only if the motion sets forth good cause for a stay or clearly demonstrates a substantial question is to be presented to the Supreme Court.

In civil cases including agency proceedings, the court may deny a stay of mandate if the question would not likely be appropriate for determination by the Supreme Court.

Once issued, a mandate will be recalled only to prevent injustice.

9th Cir. R. 41-1 Stay of Mandate

In the interest of minimizing unnecessary delay in the administration of criminal justice, a motion for stay of mandate pursuant to FRAP 41(b), pending petition to the Supreme Court for certiorari, will not be granted as a matter of course, but will be denied if the Court determines that the petition for certiorari would be frivolous or filed merely for delay.

In other cases including National Labor Relations Board proceedings, the Court may likewise deny a motion for stay of mandate upon the basis of a similar determination.

Circuit Advisory Committee
Note to Rule 41-1

Only in exceptional circumstances will a panel order the mandate to issue immediately upon the filing of a disposition. Such circumstances include cases where a petition for rehearing, suggestion for rehearing en banc, or petition for writ of certiorari would be legally frivolous; or where an emergency situation requires that the action of the Court become final and mandate issue at once. The mandate will not be stayed automatically upon the filing of an application to the Supreme Court for writ of certiorari. However, a stay may be granted upon

motion.

When the Court receives a motion for stay or recall of mandate, the Clerk sends it to the author of the disposition or if the author is a visiting judge, to the presiding judge of the panel. The author or presiding judge rules on the motion. The motion will not be routinely granted; it will be denied if the Court determined that the application for certiorari would be frivolous or is made merely for delay.

10th Cir. R. 41 Issuance of Mandate; Stay of Mandate

41.1. Stay Not Routinely Granted

41.1.1. Criminal Cases. To minimize delay in the administration of justice, following the affirmance of a conviction in criminal cases the mandate will issue and bail will be revoked at such time as the court shall order except upon a showing that a petition to stay the mandate would not be frivolous or filed merely for delay, or an independent finding by the court to the same effect, or by a judge of the hearing panel to the same effect. The court, or a judge of the hearing panel, may revoke bail before the mandate is issued. See 18 U.S.C. § 3141(b).

41.1.2. Civil Cases. A principle comparable to 10th Cir. R. 41.1.1 will be applied in connection with affirmed orders of the National Labor Relations Board and in other cases, absent a finding by the court that a petition for certiorari would not result in pointless delay.

41.2. Effect of Petition for Rehearing. A timely filed petition for rehearing will stay the mandate until disposition of the petition, unless otherwise ordered by the court. If the court has ordered the mandate to issue forthwith to minimize delay in the resolution of the appeal, a timely petition for rehearing may be denied without recalling the mandate. If the petition is granted, the mandate will be recalled.

10th Cir. I.O.P. VIII. Decision--Mandate--Costs.

* * * * *

B. *Mandate.*

1. Issuance. Judgments of the court take effect upon the issuance of the mandate. The mandate of the court of appeals is issued 21 days after entry of judgment, unless either a timely petition for rehearing is pending or an explicit court order shortens or lengthens this period. . . .

* * * * *

11th Cir. R. 41-1. Stay or Recall of Mandate.

(a) A motion filed under FRAP 41 for a stay of the issuance of a mandate in a direct criminal appeal shall not be granted upon request. Ordinarily the motion will be denied unless it shows that it is not frivolous, not filed merely for delay, and shows that a substantial question is to be presented to the Supreme Court or otherwise sets forth good cause for a stay.

(b) A mandate once issued shall not be recalled except to prevent injustice.

(c) Unless otherwise expressly provided, granting a suggestion for rehearing en banc vacates the panel opinion and stays the mandate.

(d) Because the timely filing of a petition for rehearing will stay the mandate under FRAP 41, and because a suggestion for rehearing en banc is also treated as a petition for rehearing under 11th Cir. R. 35-6, upon timely filing of a petition for panel rehearing or suggestion of rehearing en banc, the mandate is stayed until disposition thereof unless otherwise ordered by the court.

Fed. Cir. R. 41. Issuance of mandate; stay of mandate.

An order dismissing a case on consent or for failure to prosecute, or dismissing, remanding, or transferring a case on motion, shall constitute the mandate. The date of the certified order shall be the date of the mandate. In appeals dismissed or transferred by the court sua sponte in an opinion, the mandate shall be issued in regular course.

Practice Note. *Suggestion for rehearing in banc does not stay mandate.* If a petition for rehearing is denied, the mandate will be issued 7 days thereafter even if a suggestion for rehearing in banc is pending.

Relation of mandate to application for certiorari; stay of mandate. That a mandate has issued does not affect the right to apply to the Supreme Court for writ of certiorari. Consequently, a motion to stay the mandate is expected to advance reasons for the stay other than merely the intention to apply for certiorari, e.g., to forestall action in the trial court or agency that would necessitate a remedial order of the Supreme Court if the writ of certiorari were to be granted.

U.S. Department of Justice

Office of the Solicitor General

Attachment C

The Solicitor General

Washington, DC 20530

AUG 12 1993

The Honorable Kenneth F. Ripple
Chairman, Advisory Committee on
Appellate Rules
208 U.S. Courthouse
204 Main Street
South Bend, Indiana 46601-2122

Re: Proposal For Amendment to FRAP 41 Concerning the Issuance of Mandates.

Dear Judge Ripple:

I would like to propose that the Committee consider amending FRAP 41 to clear up a matter of confusion concerning the issuance of mandates by the courts of appeals.

Rule 41(a) currently states that the mandate of the court shall issue 21 days after the entry of judgment, unless the time is shortened or enlarged by order. A timely-filed petition for rehearing will stay the mandate until disposition of the petition unless otherwise ordered by the court. If a petition is denied, the mandate will issue 7 days after entry of the order denying the petition, unless the time is enlarged or shortened by order. A certified copy of the judgment and a copy of the opinion of the court, if any, constitutes the mandate, unless the court directs that a formal mandate issue.

Although Rule 41(a) adequately explains when the mandate will issue, the Rule does not specify when the mandate becomes effective. This omission raises the question whether a mandate becomes effective when it is issued, when it is received by the district court or agency to which it is sent, or when the court or agency below acts upon it.

This problem is significant. For example, if a district court were to issue an injunction that is reversed on appeal, the prevailing party on appeal could not be certain under Rule 41(a) whether he must continue to comply with the injunction until the mandate physically arrives in the district court clerk's office and the district court issues an order vacating the injunction, consistent with the court of appeals mandate. We believe that the court of appeals mandate should govern as soon as it issues, even if the district court or agency below delays, or never does anything, in response to that mandate.

We not been able to find any case law that addresses this issue. The cases hold that district courts are without power to do anything contrary to a court of appeals' mandate, but they do not clarify when the mandate becomes effective. See Finberg v. Sullivan, 659 F.2d 93, 96 n.5 (3d Cir. 1981) (en banc); City of Cleveland v. FPC, 561 F.2d 344, 346 (D.C. Cir. 1977).

Furthermore, only one circuit has a local rule that addresses this problem. Fourth Circuit Rule 41.1 states that "[o]n the date of issuance of mandate, the Clerk of the Court will issue written notice to the parties and the clerk of the lower court that the judgment of the Court of Appeals takes effect that day." Thus, by local rule, a mandate of the Fourth Circuit takes effect on the day it is issued.

We recommend that the Committee adopt the Fourth Circuit's practice as a national rule. In particular, we suggest that the Committee add the following sentence to Rule 41(a):

> The mandate of the court is effective on the date it is issued, and shall be considered as having been entered on the docket of the court or agency below on the date of its issuance.

This language would make it clear that a mandate is effective immediately upon issuance, rather than when a copy of the mandate physically arrives at the district court clerk's office or at the agency, or when those bodies act upon it.

We also note that the same issue arises with respect to Supreme Court mandates, since there is no Supreme Court rule or FRAP rule that states when a Supreme Court mandate is effective. Thus, if the Committee agrees that FRAP 41(a) should be amended along the lines we have suggested above, it also should propose a new rule addressing the effective date of Supreme Court mandates. The new rule concerning Supreme Court mandates could be placed in rule 41 as a new subsection (c), providing as follows:

> **(c) Effective Date of Supreme Court Mandates.** The mandate of the Supreme Court in any case on review from a federal court of appeals shall be treated as effective on the date it is issued, and shall be considered as having been entered on the docket of the court of appeals on the date of its issuance.

Alternatively, the Committee may wish to suggest that the Supreme Court amend its rules to include such a provision.

Thank you for your assistance in this matter.

Sincerely,

Drew S. Days, III
Solicitor General

cc: Carol Ann Mooney
Reporter, Appellate Rules Committee

Robert E. Kopp
Director, Appellate Staff
Civil Division

AGENDA ITEM - V. C
Denver, Colorado
April 25-26, 1994

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

FROM: Carol Ann Mooney, Reporter

DATE: September 11, 1993

SUBJECT: Item 93-4, amendment of Rule 41 re: length of time for stay of mandate

A proposed amendment to Rule 41(b) provides that a motion for a stay of mandate must show that a petition for *certiorari* would present a substantial question and that there is good cause for a stay. (A copy of the proposed amendment as submitted to the Judicial Conference is attached to this memorandum.) The proposed amendment was published for comment in January 1993 and the comments were discussed by the Advisory Committee at its April 1993 meeting. In its comment the National Association of Criminal Defense lawyers suggested that the rule be amended further to expand the presumptive period for a stay from 30 days to 90 days. The Committee decided that such a change would need to be published for comment and, as a result, the discussion of the suggestion should be postponed until a later meeting. The suggestion is now before the Committee.

Unless stayed, the mandate of a court of appeals issues 21 days after judgment (except in cases involving the United States[1]). A motion for a stay of mandate must be filed during that time. Fed. R. App. P. 41(b) states that if a stay of mandate is granted, it may not "exceed 30 days unless the period is extended for cause shown." If, however, during the period of the stay, the court of appeals receives notice from the clerk of the Supreme Court that the party who obtained the stay has filed a petition for *certiorari*, the stay continues until final disposition by the Supreme Court.

A party who desires a continuous stay of the mandate, therefore, has less than 51 days in which to file a petition for *certiorari*. (A stay of mandate is issued within 21 days after judgment and it lasts for 30 days, within which time the court of appeals must receive notice from the Supreme Court of the filing of the petition for *certiorari*.) According to the Supreme Court Rules a party who loses in the court of appeals has 90 days in which to petition for *certiorari*. Sup. Ct. R. 31. If, however, the party believes that a continuous stay of the mandate is important and the court of appeals does not extend the mandate beyond the 30 days, the party must file the petition for certiorari

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[1] A proposed amendment to Rule 41(a) provides that in cases involving the United States, the parties have 45 days to file a petition for panel rehearing or petition for rehearing in banc, and the mandate will not issue until 7 days after the expiration of the time for filing a petition or, if a petition is filed, 7 days after denial of the petition. The proposed amendments will be presented to the Judicial Conference this fall.

earlier.

The National Association of Criminal Defense Lawyers points out that the 30-day presumptive period for a stay pending *certiorari* was written into the rule when the period for filing a petition for a writ of *certiorari* in a criminal case was only 30 days. Because the period for filing a petition for *certiorari* is now 90 days in both criminal and civil cases, the association argues that the presumptive period should also be expanded to 90 days. Alternatively, the association suggests that the period be expanded to at least 60 days so that a party has a "reasonable amount of time within which to prepare and file a petition for a writ of certiorari."

The 30-day period may be beneficial because it provides incentive for a party to move quickly to prepare the petition for a writ of *certiorari*. The expenditure of time and money associated with the preparation of a petition for a writ of *certiorari* provides some evidence of the seriousness of the party's belief in his/her position and, therefore, if the petition is filed during the period of the stay, it results in extension of the stay until disposition by Supreme Court. The 30-day period, therefore, insures that the mandate is not stayed for an extended period in a case in which the party may never petition for *certiorari*.

The proposed changes to Rule 41(b) which require a motion for a stay to show that a petition for *certiorari* would present a substantial question and that there is good cause for a stay, may mean that the 30-day period is not needed. If both those criteria are satisfied, is it important to limit the period of the stay to 30 days? If the petition would present a substantial question and if there is good cause for a stay, why should the party be required to prepare the petition in a shorter period than the usual 90 days?

The language of Rule 41(b) creates only a presumptive period for the stay, and the period can be shortened or lengthened in any appropriate case. Therefore, the Committee is asked to consider the generally appropriate period, realizing that in any case the court may shorten or lengthen the period as needed.

Attachment A
Amendments presented to
Judicial Conference 9/93

Rule 41. Issuance of Mandate; Stay of Mandate

* * * * *

(b) *Stay of Mandate Pending ~~Application~~ Petition for Certiorari.* ~~--A stay of the mandate pending application to the Supreme Court for a writ of certiorari may be granted upon motion, reasonable notice of which shall be given to all parties.~~ A party who files a motion requesting a stay of mandate pending petition to the Supreme Court for a writ of certiorari must file, at the same time, proof of service on all other parties. The motion must show that a petition for certiorari would present a substantial question and that there is good cause for a stay. The stay ~~shall~~ cannot exceed 30 days unless the period is extended for cause shown ~~.—If~~ or unless during the period of the stay, ~~there is filed with the clerk of the court of appeals~~ a notice from the clerk of the Supreme Court is filed showing that the party who has obtained the stay has filed a petition for the writ ~~in that court~~, in which case the stay ~~shall~~ will continue until final disposition by the Supreme Court. ~~Upon the filing of a copy of an order of the Supreme Court denying the~~

~~petition for writ of certiorari the mandate shall issue immediately. A~~ The court of appeals must issue the mandate immediately when a copy of a Supreme Court order denying the petition for writ of certiorari is filed. The court may require a bond or other security ~~may be required~~ as a condition to the grant or continuance of a stay of the mandate.

AGENDA ITEM - V. D
Denver, Colorado
April 25-26, 1994

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

FROM: Carol Ann Mooney, Reporter

DATE: September 13, 1993

SUBJECT: 93-5, amendment of Rule 26.1 re: use of the term affiliates

At the Committee's April 1993 meeting it reviewed Fed. R. App. P. 26.1 and an amendment to it which had been published earlier in the year; the amendment dealt with the number of copies problem. During the discussion, Mr. Spaniol noted that although the language of Rule 26.1 had been patterned after the Supreme Court Rule, the Supreme Court had recently amended its rule to omit references to "affiliates."

The first sentence of Fed. R. App. P. 26.1 provides:

> 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 Committee briefly discussed the meaning of the term "affiliates." Judge Boggs stated that he thought the term encompassed "brother" and "sister" corporations; *i.e.*, those owned in whole or in part by the same parent. Judge Williams noted that the term "affiliate" is used in virtually every antitrust consent decree.

Nine circuits have local rules supplementing Fed. R. App. P. 26.1. (The local rules are appended to this memorandum.) Of those nine, six use the term affiliate in their rules. Two of the six define "affiliate" for purposes of the rule.

The D.C. rule states: "For purposes of this rule, 'affiliate' shall be a person that directly, or indirectly through one or more intermediaries, controls, is controlled by, or is under common control with, the specified entity . . .."[1] The Sixth Circuit's definition is similar; it states: "A corporation shall be considered an affiliate of a publicly owned corporation for purposes of this rule if it controls, is controlled by, or is under common control with a publicly owned corporation."[2]

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[1] D.C. Cir. R. 6A.

[2] 6th Cir. R. 25.

Because Fed. R. App. P. 26.1 explicitly requires disclosure of parent and subsidiary corporations, it is the "under common control" provisions of the definitions that is helpful, and it appears to require disclosure of "brother" and "sister" corporations. Disclosure of their existence is required under the rule, however, only if they have issued shares to the public. The disclosure, therefore, of the existence of "full brother" or "sister" corporations, those wholly owned by an entity's parent, would not be required. Disclosure of the existence of affiliates that have issued shares to the public would seem appropriate.

The Seventh Circuit's rule does not require the disclosure of subsidiaries or of "brother" or "sister" corporations. It requires the disclosure only of parent corporations and of publicly held companies owning 10% or more of the stock of the party. The underlying assumption apparently is that a decision adverse to the party would harm significantly only those corporations owning at least 10% of the stock of the party and that an adverse decision would not have sufficient impact upon a subsidiary or sister corporation to require recusal of a judge who owned stock in the subsidiary or sister.

Without further guidance from the Committee, I am uncertain how to proceed.

D.C. Cir. R. 6A.[3] Disclosure of Interests of Parties

A corporation, association, joint venture, partnership, syndicate or other similar entity appearing as a party or amicus in any proceeding shall file a disclosure statement identifying all parent companies, subsidiaries (except wholly-owned subsidiaries), and affiliates that have issued shares or debt securities to the public. For purposes of this rule, "affiliate" shall be a person that directly, or indirectly through one or more intermediaries, controls, is controlled by, or is under common control with, the specified entity; "parent" shall be an affiliate controlling such entity directly, or indirectly through intermediaries; and "subsidiary" shall be an affiliate controlled by such entity directly, or indirectly through one or more intermediaries.

* * * * *

Third Cir. R. 25. Disclosure of corporate affiliations and financial interest.

1) All parties to a civil or bankruptcy case and all corporate defendants in a criminal case shall file a corporate affiliate/financial interest disclosure statement. A negative report is also required.

(2) Whenever a corporation which is a party to an appeal, or to a motion or other proceedings relating to an appeal, is a subsidiary or affiliate of any publicly owned corporation not named in the appeal, counsel for the corporation which is a party shall advise the Clerk in writing of the identity of the parent corporation or affiliate and the relationship between it and the corporation which is a party to the appeal.

* * * * *

Fourth Cir. R. 26.1 Disclosure of Corporate Affiliations and Other Entities with a Direct Financial Interest in Litigation.

(a) All parties to a civil or bankruptcy case, and all corporate defendants in a criminal case, whether or not they are covered by the terms of Federal Rule of Appellate Procedure 26.1, shall file a corporate affiliate/financial interest disclosure statement. This rule does not apply to the United States, to state and local governments in cases in which the opposing party is proceeding without counsel, or to parties proceeding in forma pauperis.

(b) The statement shall set forth the information required by Federal Rule of Appellate Procedure 26.1 and the following:

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[3] Proposed D.C. Cir. R. 26.1 may replace this rule. The proposed rule retains the same language.

(1) A trade association shall identify in the disclosure statement all members of the association and their parents, subsidiaries (other than wholly owned subsidiaries), and affiliates that have issued shares to the public.

* * * * *

Fifth Cir. R. 28.2.1. ***Certificate of Interested Persons***

A certificate will be furnished by counsel for all private (non-governmental) parties, both appellants and appellees, which shall be incorporated on the first page of each brief before the table of contents or index, and which shall certify a complete list of all persons, associations of persons, firms, partnerships, corporations, guarantors, insurers, affiliates, parent corporations or other legal entities who or which are financially interested in the outcome of the litigation. . . .

Sixth Cir. R. 25. Disclosure of Corporate Affiliations and Financial Interest.

* * * * *

(b) *Financial interest to be disclosed.*

(1) Whenever a corporation which is a party to an appeal, or which appears as amicus curiae, is a subsidiary or affiliate of any publicly owned corporation not named in the appeal, counsel for the corporation which is a party or amicus shall advise the clerk in the manner provided by subdivision (c) of this rule of the identity of the parent corporation or affiliate and the relationship between it and the corporation which is a party or amicus to the appeal. A corporation shall be considered an affiliate of a publicly owned corporation for purposes of this rule if it controls, is controlled by, or is under common control with a publicly owned corporation.

* * * * *

Seventh Cir. R. 26.1. Certificate of Interest

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or *amicus curiae,* or a private attorney representing a governmental party, must furnish a certificate of interest stating the following information:

* * * * *

(2) If such a party or *amicus* is a corporation:

(i) its parent corporation, if any; and

(ii) a list of stockholders which are publicly held companies owning 10% or more of the stock of the party or *amicus*.

* * * * *

Eighth Cir. R. 26.1A. Certificate of Interested Persons.

Within ten days after receipt of notice that the appeal has been docketed in this court, each nongovernmental party shall certify a complete list of all persons, associations, firms, partnerships, or corporations with a pecuniary interest in the outcome of the case. This certificate enables judges of the court to evaluate possible bases for disqualification or recusal. . . .

Eleventh Cir. R. 26.1-1. Certificate of Interested Persons and Corporate Disclosure Statement; Contents.

A certificate shall be furnished by appellants, appellees, intervenors and amicus curiae which contains a complete list of the trial judge(s), all attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of the particular case, including subsidiaries, conglomerates, affiliates and parent corporations, and other identifiable legal entities related to a party. In criminal and criminal-related cases, the certificate shall also disclose the identity of the victim(s).

Federal Cir. R. 47.4. Certificate of Interest.

(a) *Contents.* To determine whether recusal is necessary or appropriate, an attorney for a party or amicus curiae other than the United States must furnish a certificate of interest (in the form set forth in the appendix of these rules) stating:

(1) The full name of every party or amicus represented by the attorney in the case;

(2) The name of the real party in interest if the party named in the caption is not the real party in interest;

(3) The corporate disclosure statement prescribed in Rule 26.1 of the Federal Rules of Appellate Procedure; and

(4) The names of all law firms whose partners of associates have appeared for the party in the lower tribunal or are expected to appear for the party in this court. . . .

AGENDA ITEM - VI. A
Denver, Colorado
April 25-26, 1994

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

February 9, 1994

Honorable Ann C. Williams
Chair, Committee on Court Administration
and Case Management
United States Courthouse
219 South Dearborn Street
Chicago, Illinois 60604

Honorable Rya W. Zobel
Chair, Committee on
Automation and Technology
John W. McCormack Post Office and
Courthouse, Room 1802
90 Devonshire Street
Boston, Massachusetts 02109

Dear Judges Williams and Zobel:

On behalf of the Committee on Rules of Practice and Procedure, I am sending to you the enclosed draft of "Standards for Facsimile Transmission." The standards were reviewed and revised by the five advisory rules committees and were discussed at length and approved by the Standing Committee at its January meeting. I am also sending to you a two-page excerpt of an informational item in the Committee's report to the Judicial Conference explaining its views on fax filing.

Please call me at (202) 273-1800 if you have any questions on these materials.

Sincerely,

Peter G. McCabe
Secretary

Enclosures

M. Shapiro

COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT

JUDICIAL CONFERENCE of the UNITED STATES

Honorable Ann C. Williams
Chair

March 22, 1994

Honorable Alicemarie H. Stotler
United States District Court
Post Office Box 12339
Santa Ana, California 92712

Dear Judge Stotler:

Thank you for forwarding the draft of "Standards for Facsimile Transmission." I appreciate the opportunity to comment on the changes proposed by the Standing Committee on Rules of Practice and Procedure.

In consideration of the comments and proposals of the Standing Committee on Rules of Practice and Procedure, the Committee on Court Administration and Case Management will revisit whether or not to continue to support the routine filing of papers by facsimile transmission as a local option, at our next Committee meeting in June. I anticipate that, given the concerns of your Committee as well as the Committee on Automation and Technology, this Committee may well withdraw its recommendation regarding routine filing by facsimile transmission.

At the same time, I must express some concern related to the proposed guidelines. The purpose of the proposed guidelines for filing by facsimile, as presented by the Committee on Court Administration and Case Management, was to provide guidance to those courts which elected to enact local rules to allow for the acceptance of filings by facsimile transmission on a routine basis. Thus, the guidelines were designed specifically to apply to a more expansive policy on the acceptance of papers than presently is authorized under Judicial Conference policy.[1] Indeed, if these restrictive guidelines were to apply to current policy, they would greatly increase any burdens on the clerks of court. It is important to maintain maximum flexibility for emergency situations, especially for the appellate courts and for last minute filings in death penalty cases. Although the guidelines clearly would serve a purpose if routine facsimile transmission were allowed, our Committee does not want these restrictions to hamper the clerks' ability to accept emergency filings.

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[1] Currently, the Judicial Conference allows the acceptance of papers transmitted by facsimile transmission in narrow circumstances: (a) in compelling circumstances or (b) under a practice which was established prior to May 1, 1991.

Moreover, our Committee recognized both the complexity and lengthy duration of the local rules enactment process, and it was never our purpose to complicate a court's ability to accept papers by facsimile transmission, as allowed by Judicial Conference policy, by imposing the mechanics of local rulemaking procedures for a policy that would serve merely as an interim measure. If the Judicial Conference were to adopt the view that the present policy should remain in place until such time as a more advanced technology were commonly available (e.g., electronic filing), then we should not burden the legal community with a rulemaking process that would result in a rule outmoded by the time of its enactment.

In addition, we are providing the draft of "Standards for Facsimile Transmission" prepared by your Committee to the Appellate, District, and Bankruptcy Clerks' Advisory Groups for their comment.

Again, I want to thank you for the opportunity to review and comment on the proposals of your Committee.

Sincerely,

Ann C. Williams

Ann C. Williams

STANDARDS FOR FACSIMILE TRANSMISSION

I. General Purpose and Scope:

(1) Purpose of the Standards: The Standards for Facsimile Transmission are established by the Judicial Conference of the United States and apply in those courts that permit their clerks, under the Federal Rules of Appellate, Civil, and Criminal Procedure, to receive documents for filing by means of facsimile transmission.

(2) Compliance with Rules of Procedure: These Standards for Facsimile Transmission are designed to guide the activities of litigants and court personnel relating to facsimile transmission consistent with, and where authorized by, all applicable rules of procedure adopted under 28 U.S.C. § 2072. They do not amend, modify, or excuse noncompliance with, any applicable rules.

II. Definitions:

(1) "Facsimile transmission" means sending a copy of a document by a system that encodes a document into electronic signals, transmits these electronic signals, and reconstructs the signals so a duplicate of the original document can be printed at the receiving end.

(2) "Receive by facsimile" means a clerk's receiving by a facsimile machine in the clerk's office a facsimile transmission of a document.

(3) "Facsimile machine" means a machine, used to transmit or receive documents, that meets the requirements stated in part III of these standards.

(4) "Fax" is an abbreviation for "facsimile" and, as indicated by the context, may refer to a facsimile transmission or to a document so transmitted.

III. Technical Requirements:

For purposes of these standards, in order for courts to receive by facsimile the following technical requirements must be met.[1]

(1) Facsimile Machine Standards:

(a) A facsimile machine must be able to send or receive a facsimile transmission using the international standards for scanning, coding, and transmission established for Group 3 machines by the Consultative Committee of International Telegraphy and Telephone of the International Telecommunications Union (CCITT), in regular resolution.

(b) The receiving unit must produce a permanent image on plain paper. Thermal and chemical images are not allowed.

(2) Additional Facsimile Standards for Senders:

(a) Each sender must satisfy or exceed the following equipment standards:

(i) CCITT Compatibility - Group 3[2]

(ii) Model Speed - 9600-2400 bps (bits per second) with automatic stepdown; and

(iii) Image Resolution - standard 203 x 98.

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[1] The Administrative Office will monitor technological advances and will recommend modifications to these standards when necessary.

[2] Group 3 fax machines are currently the most common, accounting for 97% of the devices on the market. Group 3 compatibility is mandatory for public applications at the present time. Group 3 fax can utilize the public telephone network (voice grade lines) and does not require special data lines. Group 3 fax devices transmit at under 1 minute per page, may have laser printing capability, and use various standard data compression techniques to increase transmission speed.

(b) A facsimile machine used to send documents to a clerk of the court must be able to produce a transmission record as proof of transmission at the time transmission is completed.

IV. Fees:

(1) Payment of filing fees and any additional charges prescribed or authorized by the Judicial Conference for the use of the facsimile filing option shall be made in a manner determined by the Administrative Office.

(2) If a court authorizes the filing of papers by facsimile, the clerk must ensure that appropriate filing fees and any additional charges are paid.

(3) Other Fees for Filing by Fax[3]

(a) When documents are received on the court's fax equipment, the court shall collect the following fees, in addition to any other filing fees required by law:

For the first ten pages of the document, excluding the cover sheet and special handling instruction sheet. $5.00

For each additional page . . . . . $ .75

For each page of any necessary copies to be reproduced by the court[4] . . . . .$ .50

(b) No fees are to be charged for services rendered on behalf of the United States or any agency or any official of the United States acting in his or her official capacity.

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[3] These fees may be collected once the Judicial Conference approves amendments to the Miscellaneous Fee Schedules promulgated under 28 U.S.C. §§ 1913, 1914, and 1930.

[4] See Miscellaneous Fee Schedule.

V. **Fax Filing.** The procedures and requirements imposed upon facsimile filings should be in rules readily available to parties and their attorneys. Because current fax transmissions are relatively slow and produce less than desirable images, transmissions directly to the clerk should be permitted only in emergencies or by permission of the court. Also, because electronic transmission is evolving and fax appears to be an interim technology to be replaced eventually by more sophisticated systems, difficult-to-change national rules seem undesirable. Nevertheless, uniformity is desirable since fax filing is most likely from remote locations and across jurisdictional boundaries. For these reasons uniform local rules in the following form are suggested as appropriate for both district and circuit courts:

MODEL LOCAL RULES

Loc. R.( ).1 **Facsimile Filing.** The court will accept for filing a single copy of a paper transmitted directly to the clerk by facsimile (fax) if authorized by the court in a particular case or by the clerk in an emergency or other appropriate circumstance. The fax transmission must comply with the Judicial Conference Standards For Facsimile Transmission, which (are attached or can be obtained from the clerk's office on request).

Loc. R.( ).2 **When Filing is Complete.** Mere fax transmission does not constitute filing. The paper actually must be received by the clerk. Filing is accomplished as of the time the sending machine completes transmission if the fax is directly to the clerk and is printed out in the clerk's office from the same transmission.

Loc. R.( ).3 **Signature.** The image of an original signature on a fax paper is an original signature for filing purposes.

Loc. R.( ).4 **Cover Sheet.** A paper faxed directly to the clerk must have a fax cover sheet (in addition to any other cover required by the rules) showing the following:

a. the name of the case and the case number, if known;
b. the title of the document or documents being faxed;
c. the sender's name, address, telephone number and fax number;
d. the number of pages, including the cover sheet, being faxed;
e. the date and time faxed; and
f. whether acknowledgment of receipt is requested.

This cover sheet does not count against page limitations otherwise applicable to the document.

Loc. R.( ).5 **Acknowledgment of Receipt.** If the sender so requests in writing on the cover sheet required by Local R.( ).4, the clerk will acknowledge receipt of papers faxed directly to the clerk by faxing to the sender a copy of the cover sheet. The clerk also will note any transmission defect on the copy of the cover sheet before faxing it to the sender.

Loc. R.( ).6 **Additional Copies.** Documents filed by fax transmission to the clerk must be followed by additional copies with a print resolution of at least 300 dots per inch and which comply in all respects, including number of copies, with federal rules applicable to nonfax filings, unless excused by the court. The additional copies must be mailed or delivered to the clerk before the end of the next business day. When circumstances require, the clerk may make copies of faxed papers for use by the court and charge the filing party for these copies. All applicable filing fees must accompany the additional copies.

Loc. R.( ).7 **Facsimile Transmission to a Fax Filing Agent.** A paper may be transmitted to a person or entity (fax filing agent) who undertakes to present the paper to the clerk for filing. The paper presented must have a permanent image on plain paper. The fax filing agent must pay all applicable fees at the time the agent presents the paper for filing. The filing is governed by all applicable filing rules, except that Loc. R.( ).4 governs signatures, and a single copy may be filed if additional copies are mailed or delivered to the clerk in compliance with Loc. R.( ).6.

Agenda F-19
Rules
March 1994

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES:

Your Committee on Rules of Practice and Procedure met in Tucson, Arizona, on January 12-14, 1994. All members of the Committee attended the meeting, except Judge George C. Pratt and Alan C. Sundberg, Esquire. The immediate past chair, Judge Robert E. Keeton, and former member, Professor Charles Alan Wright, also attended. Representing the advisory committees were: Judge James K. Logan, Chair, and Professor Carol Ann Mooney, Reporter, of the Advisory Committee on Appellate Rules; Judge Paul Mannes, Chair, and Professor Alan N. Resnick, Reporter, of the Advisory Committee on Bankruptcy Rules; Judge Patrick E. Higginbotham, Chair, and Dean Edward H. Cooper, Reporter, of the Advisory Committee on Civil Rules; Judge D. Lowell Jensen, Chair, and Professor David A. Schlueter, Reporter, of the Advisory Committee on Criminal Rules; and Dean Margaret A. Berger, Reporter, of the Advisory Committee on Evidence Rules.

II. Information Items

A. Facsimile Filing Standards

At its September 1993 session, the Judicial Conference referred to the Committee on Rules of Practice and Procedure, in coordination with the Committees on Automation and Technology and Court Administration and Case Management, for a report to the September 1994 Conference, the question of whether, and under what technical guidelines, filing by facsimile on a routine basis should be permitted.

The chair of your Committee has kept the chairs of the two other respective Committees informed of the action taken by the Advisory Committees and your Committee on this matter.

The Advisory Committee on Appellate Rules devoted a substantial portion of their September 1993 meeting reviewing and revising a draft of the facsimile filing guidelines immediately following the Conference session. Extensive redrafting was later added by the Reporter and individual members of that Committee. The revised draft reorganized the guidelines into: (1) a national set of technical guidelines on equipment, and (2) a set of model local rules governing attorney responsibilities regarding facsimile filing.

The Advisory Committee on Civil Rules later carefully studied the redrafted guidelines. It generally approved the revisions, but favored a more uniform national approach on the procedures to assist members of the bar who practice nationally. The Advisory

Committee on Bankruptcy Rules has continued to oppose unanimously the application of the facsimile guidelines to bankruptcy proceedings for a variety of reasons, particularly the practical consequences on bankruptcy clerks' offices and its outmoded technology. The Advisory Committees on Criminal and Evidence Rules expressed no objections to the facsimile guidelines.

Your Committee considered at length views of the various committees on and the several versions of the guidelines, and it concluded unanimously that facsimile filing should not be permitted on a routine basis. Among the principal problems with routine facsimile filing are the following: (1) the procedures would impose great burdens on clerks' offices; (2) the technical equipment requirements would not be honored by those members of the bar who have obsolete equipment, and it would be difficult to police compliance effectively; and (3) the guidelines may create a trap for members of the bar who rely on last minute filings but are frustrated because others are using the same transmission line.

Your Committee, however, agreed that facsimile filing should be permitted on a non-routine and locally approved basis to reflect actual practices in the courts. Accordingly, it revised the latest draft of the facsimile filing guidelines to facilitate such an approach, and it will furnish the Committees on Automation and Technology and Court Administration and Case Management with copies for their consideration. A report on the results of the coordinated effort will be given to the Conference at its September 1994 session.