MINUTES OF THE TELEPHONE CONFERENCE
OF THE ADVISORY COMMITTEE ON APPELLATE RULES
MAY 1, 1996

Judge James K. Logan began the telephone conference at 4:00 EDT on May 1, 1996. In addition to Judge Logan the following Advisory Committee members participated in the conference: Chief Justice Pascal Calogero, Judge Will L. Garwood, Judge Alex Kozinski, Mr. Michael Meehan, Mr. Luther Munford, Mr. John Charles Thomas, and Judge Stephen Williams. Mr. Robert Kopp represented Solicitor General Days. Judge Frank Easterbrook, the liaison member from the Standing Committee, participated as did Mr. Patrick Fisher, representing the circuit clerks. Professor Carol Ann Mooney, the reporter, and Mr. John Rabiej from the Administrative Office also participated.

Proposed Rule 5

As requested at the April meeting the reporter had prepared and circulated a draft Rule 5 that would replace both existing Rules 5 and 5.1. That draft was circulated on April 19. Committee members then submitted suggestions for improvement in the draft and a new draft was circulated on April 29. The draft under discussion was that later draft. A copy of that draft is attached to these minutes.

The Committee members expressed general satisfaction with the basic approach.

It was noted that the caption to the rule was titled "Appeal by Leave" but subdivision (a) was titled "Petition for Permission to Appeal." The consensus was that the rule should consistently use either "leave" or "permission" but not both By a vote of 5 to 3 it was decided to use "permission."

Discussion then turned to lines 3 through 5. To eliminate the word "may" at the end of line 4 the sentence was rewritten, with unanimous approval, to read as follows:

> "To request permission to appeal when an appeal is within the court of appeals' discretion, a party must file a petition for permission to appeal."

One member questioned the need for paragraph (a)(3). Paragraph (a)(3) was added to the second draft to deal with the possibility that a problem that existed before the 1967 adoption of Rule 5 might resurface. The problem concerns a district court's amendment of an order to include the § 1292(b) statement when the order originally entered did not include such a statement. The problem was whether the 10-day period for filing an interlocutory appeal

should be measured from entry of the original order or from entry of the amended order. A split in the circuits arose until the 1967 adoption of Rule 5

Since 1967 Rule 5 has said that if a district court amends an order to contain the statement prescribed by § 1292(b), the petition must be filed within 10 days after entry of the amended order. The April 19 draft did not include that provision on the assumption that with the passage of time and the habits developed under Rule 5 the problem would not resurface. Two members agreed with that approach believing that the chance of the problem returning was remote. Others thought that the addition of (a)(3), while not absolutely necessary, provided helpful clarification and removed a litigable issue. Judge Logan called for a vote on retention of paragraph (a)(3); all members voted in favor of retaining it.

Lines 40 through 43 were amended, with unanimous approval, to improve the flow of the language. As amended they provide that a petition must include a copy of the order complained of and any related opinion or memorandum, "including any stating the district court's permission or finding of any necessary conditions to appeal, if required."

Line 45 of the draft says that a response or a cross-petition must be filed within 7 days after the petition is served. One member suggested that the response time should be 14 days. Another suggested 10 days. Another noted that the respondent has not only 7 days but also all the time the petitioner has. Since most petitions are denied, it was suggested that expanding the response time beyond 7 days would cause unnecessary delay. The consensus was to retain the 7-day response time.

Lines 47 through 49 state that oral argument occurs only if the court orders it. It was suggested that there should be a provision in the rules, perhaps in Rule 34, that oral argument is heard as to the substance of an appeal, but as to all other matters the presumption is that there will be no oral argument. The reporter was asked to add that suggestion to the table of agenda items.

The second draft added language at lines 64-67. Existing Rule 5 says that if permission to appeal is granted no notice of appeal is necessary The new language says that "the date when the order granting permission to appeal is entered serves as the date of the notice of appeal for calculating time under these rules." Mr. Fisher confirmed that the new language simply clarifies existing practice. The Committee approved the change unanimously and requested the reporter to amend the Committee Note to state that its purpose is simply to clarify existing practice.

Judge Logan had spoken with Judge Stotler that morning. She asked what the Committee would want to do with the proposed Rule 5 if the amendments to Rule 23 do not move forward at this time. The consensus was that even if the Rule 23 amendments do not go forward, the consolidation of Rules 5 and 5.1 is a good idea and should move forward. In addition the expansion of the rule so that it covers any new type of interlocutory appeal by permission would eliminate the need for future amendments to the Rule.

A subsidiary question is the timing of the publication. Judge Logan asked whether the rule should be published this summer or after the conclusion of the publication period for the style package. It was decided to recommend July publication. With July publication, this change could become effective simultaneously with the restyled rules.

Form 4

As promised at the April meeting Mr. Fisher revised the bankruptcy form used for in forma pauperis (IFP) applications to make the form appropriate for use in the courts of appeals and in the Supreme Court.

One of the first questions was whether the form was too long and complex for the task. It was noted that the CJA form is shorter although much greater sums of money - attorney fees - are at stake The IFP form is for filing fees, transcripts, and copying costs. It was noted, however, that quite detailed financial information is needed to establish that a person is unable to pay as small a sum as the filing fee. Whereas less detail is needed to establish that a person is unable to pay a larger sum such as attorney fees. While that is logically true, one member still questioned whether the amount of paperwork is justified by the sums of money at stake

One member suggested that the CJA and IFP forms could be combined. If a person is too poor to pay filing fees, then one should be able to assume that the person is unable to pay attorney fees. Another member, however, felt that the forms should be kept separate because there are many IFP applications but far fewer CJA applications. The suggestion was tabled. It was noted that any such move would need to be coordinated with the Committee on Defender Services as well as with the Advisory Committee on Criminal Rules.

Judge Logan called for a vote on whether to proceed with development of a more detailed Form 4. Four members voted to proceed, 2 opposed proceeding, and 1 abstained.

In the opening paragraphs on the first page it was unanimously decided to amend the language to conform to the statutory language in 28 U.S.C. § 1915(a). It was also decided that both of the opening paragraphs would include the "under penalty of perjury" language that currently appears only at the end of the form. And question 13 was amended to read: "Please provide any other information that helps to explain why you are unable to pay the docket fee or costs of your appeal."

Throughout the form it was decided that additional space should be provided for information about the spouse's income, assets, expenses, etc.

On pages 2 and 5 the word "prorate" was used. It was decided to change that to "adjust".

On page 3 question 5 was amended to say: "State the amount of cash you have" rather than the amount of "cash on hand".

Mr Fisher agreed to revise the form to reflect the decisions made during the conference and to circulate it among the members for further comment.

The conference concluded at 6:00 p.m. EDT.

Respectfully submitted,

Carol Ann Mooney
Reporter

Rule 5 Appeal by Leave

(a) Petition for Permission to Appeal.

(1) When granting an appeal is within the court of appeals' discretion, a party may file a petition for permission to appeal. The petition must be filed with the circuit clerk with proof of service on all other parties to the district-court action

(2) The petition must be filed within the time specified by the statute or rule authorizing the appeal or, if no such time is specified, within the time provided by Rule 4(a) for filing a notice of appeal.

(3) If a party cannot petition for appeal unless a district court first enters an order granting permission to do so or stating that the necessary conditions are present, a district court order may be amended to include the required statement and the time to petition runs from entry of the amended order.

(b) Contents of the Petition; Answer or Cross-Petition.

(1) The petition must include the following:

(A) the facts necessary to understand the question to be presented;

(B) the question itself;

(C) the relief sought;

(D) the reasons why, in the opinion of the petitioner, the appeal should be allowed -- including reasons that the appeal is within the grounds, if any, established by the statute or rule claimed to authorize the appeal; and

(E) an attached copy of the order, decree, or judgment complained of and any related opinion or memorandum, including any in which the district court's permission to appeal, if required, is stated.

(2) A party may file an answer in opposition

or a cross-petition within 7 days after the petition is served.

(3) The petition and answer will be submitted without oral argument unless the court of appeals orders otherwise.

(c) Form of Papers; Number of Copies. All papers must conform to Rule 32(a)(1). Three copies must be filed with the original, unless the court requires a different number by local rule or by order in a particular case.

(d) Grant of Permission; Fees; Cost Bond; Filing the Record.

(1) Within 10 days after the entry of the order granting permission to appeal, the appellant must:

(A) pay the district clerk all required fees; and

(B) file a cost bond if required under Rule 7.

(2) A notice of appeal need not be filed <u>but the date when the order granting leave to appeal is entered serves as the date of</u>

the notice of appeal for calculating time under these rules.

(3) The district clerk must notify the circuit clerk once the petitioner has paid the fees. Upon receiving this notice, the circuit clerk must enter the appeal on the docket. The record must be forwarded and filed in accordance with Rules 11 and 12(c).

Committee Note

The amendment of Federal Rule of Civil Procedure 23, under the power conferred by 28 U.S.C. § 1292(e), prompts the amendment of this Rule 5 and the elimination of Rule 5.1.

In 1992 Congress added paragraph (e) to 28 U.S.C. § 1292. Paragraph (e) says that the Supreme Court has power to prescribe rules that "provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for" in section 1292. Federal Rule of Civil Procedure 23 has been amended to permit interlocutory appeal from an order granting or denying class certification. Such an appeal is permitted in the sole discretion of the court of appeals.

The Committee believes that the amendment of Civil Rule 23 is only the first of what may eventually be several interlocutory appeal provisions. Rather than add a separate rule governing each such appeal, the Committee believes it is preferable to amend Rule 5 so that it will govern all such appeals.

In addition Rule 5.1 has been largely repetitive of

Rule 5 and the Committee believes that its provisions could also be subsumed into Rule 5. Although Rule 5.1 did not deal with an interlocutory appeal, the similarity to Rule 5 was based upon the fact that both rules governed discretionary appeals.

This new Rule 5 is intended to govern all discretionary appeals from district court orders, judgments, or decrees. At this time that includes interlocutory appeals under 28 U.S.C. § 1292(b),(c), and (d) and Federal Rule of Civil Procedure 23(f), and the discretionary appeal under 28 U.S.C. § 636(c) from a district-court judgment entered after an appeal from a judgment entered on direction of a magistrate judge in a civil case. If additional interlocutory appeals are authorized under §1292(e), the new Rule is intended to govern them if the appeals are discretionary.

Subdivision (a). Paragraph (a)(1) says that when granting an appeal is within a court of appeals' discretion, a party may file a petition for permission to appeal The time for filing provision states only that the petition must be filed within the time provided in the statute or rule authorizing the appeal or, if no such time is specified, within the time provided by Rule 4(a) for filing a notice of appeal.

Section 1292(b), (c), and (d) provide that the petition must be filed within 10 days after entry of the order containing the statement prescribed in the statute. Existing Rule 5(a) provides that if a district court amends an order to contain the prescribed statement, the petition must be filed within 10 days after entry of the amended order. The new rule similarly says that if a party cannot petition without the district court's permission or statement that necessary circumstances are present, the district court may amend its order to include such a statement and the time to petition runs from entry of the amended order.

The provision that the Rule 4(a) time for filing a notice of appeal should apply if the statute or rule is silent about the filing time was drawn from existing Rule 5.1.

Subdivision (b). The changes made in the provisions

in paragraph (b)(l) are intended only to broaden them sufficiently to make them appropriate for all discretionary appeals.

In paragraph (b)(2) a uniform time — 7 days — is established for filing an answer in opposition or a cross-petition. Seven days is the time for responding under existing Rule 5 and is an appropriate length of time when dealing with an interlocutory appeal. Although existing Rule 5 1 provides 14 days for responding, the Committee does not believe that the longer response time is necessary because an appeal under § 636(c)(5) is a second appeal and the party involved will have had sufficient time to develop a response or cross-petition.

Subdivisions (c) and (d). Subdivision (c) and (d) are substantively unchanged.