ADVISORY COMMITTEE
ON
APPELLATE RULES

Washington, D.C.

April 20-21, 1993

TENTATIVE AGENDA
MEETING OF THE ADVISORY COMMITTEE ON APPELLATE RULES
APRIL 20 & 21, 1993

I. RECONSIDERATION OF THE PUBLISHED RULES IN LIGHT OF THE COMMENTS SUBMITTED CONCERNING THEM.

A. Item 86-10. The proposed amendment to Rule 38 affords an appellant notice and opportunity to respond before damages or costs are assessed for filing a frivolous appeal.

B. Item 91-2. Proposed amendments to Rules 40 and 41 lengthen the time for filing a petition for rehearing in civil cases involving the United States.

C. Item 91-4. Several amendments to Rule 32, governing the form of documents, were proposed and published.

D. Item 91-5. Rule 49 is a proposed new rule authorizing the use of special masters in the courts of appeals.

E. Item 91-8. The proposed amendment to Rule 25 provides that whenever service is accomplished by mailing, the proof of service shall include the addresses to which the papers were mailed.

F. Item 91-9. The proposed amendment to Rule 32 requires counsel to include their telephone numbers on the covers of briefs and appendices.

G. Item 91-11. The proposed amendment to Rule 25 provides that a clerk may not refuse to file a paper solely because the paper is not presented in the proper form.

H. Item 91-12. Rule 33, governing appeal conferences, was completely rewritten.

I. Item 91-13. The proposed amendments to Rule 41 provied that a motion for stay of mandate must show that a petition for certiorari would present a substantial question and that there is good cause for a stay.

J. Item 91-22. Rule 9 governing review of a release decision in a criminal case was completely rewritten and published for comment.

K. Item 91-26. The proposed amendment to Rule 28 requires a brief to contain a summary of argument.

L. Item 91-27. This item was a proposal to amend all pertinent appellate rules regarding the number of copies

of documents that must be filed with a court of appeals. Item 91-27 resulted in publication of amendments to the following rules:

1. Rule 3
2. Rule 5
3. Rule 5.1
4. Rule 13
5. Rule 25
6. Rule 26.1
7. Rule 27
8. Rule 30
9. Rule 31
10. Rule 35

IX. ITEMS REMANDED TO THE ADVISORY COMMITTEE BY THE STANDING COMMITTEE

A. Items 89-5 and 90-1. A proposed amendment to Rule 35 was submitted to the Standing Committee at its July 1992 meeting. The proposed amendment added language to Rule 35 making it clear that the filing of a suggestion for rehearing in banc does not toll the time for filing a petition for certiorari. The Standing Committee did not approve the proposal for publication. Instead, the Standing Committee asked the Advisory Committee to reconsider an amendment that would treat a suggestion for rehearing in banc like a petition for panel rehearing. The result of such a change would be that a suggestion for a rehearing in banc would also suspend the finality of the court's judgment and thus toll the time for filing a petition for certiorari.

B. Item 91-14. A proposed amendment to Rule 21 was submitted to the Standing Committee at its December 1992 meeting. The proposal provided that a petition for mandamus should not bear the name of the judge and that the judge would be represented pro forma by the party opposing the relief. The Standing Committee did not approve the proposal for publication. Instead, the Standing Committee asked the Advisory Committee to consider further amendment of Rule 21 to make it clear that a mandamus action really is an interparties proceeding like an appeal.

C. Item 92-1. The proposal is to amend Rule 47 to require that local rules follow a uniform numbering system and delete repetitious language. Uniform language was developed at the December meeting by a subcommittee consisting of Chairs and Reporters of all the Advisory Committees. The Standing Committee has asked that each of the Advisory Committees integrate the language into its rules and submit the proposed amendments at the July meeeting.

It is anticipated that this matter will be submitted to the Committee for a mail vote in advance of the meeting.

D. Item 92-2. The proposal is to permit technical amendment of the national rules without need for Supreme Court of Congressional Review. Uniform language was developed at the December meeting by a subcommittee consisting of the Chairs and Reporters of all the Advisory Committees. The Standing Committee has asked that each of the Advisory Committees integrate the language into its rules and submit the proposed amendments at the July Meeting. It is anticipated that this matter will be submitted to the Committee for a mail vote in advance of the meeting.

E. Item 92-10. The Committee must reconsider some of the language of amended Rule 4(a)(4). When the Standing Committee approved the publication of the proposed amendments to the Bankruptcy Rules that parallel the changes in 4(a)(4), the Standing Committee asked the Advisory Committee on Appellate Rules to reconsider one particular phrase in the amendments and to report back at the June meeting.

III. ACTION ITEMS

A. Item 86-23, concerning the receipt of mail by institutionalized persons.

B. Items 86-24 and 92-8, concerning sanctions under Rule 38. A subcommittee consisting of Judges Boggs, Mr. Froeb, Judge Hall, and Mr. Munford has been asked to consider these items and lead the discussion.

C. Item 91-28, amendment of Rule 27 to update motions practice.

D. Item 92-3, examine Rule 4(b) in light of § 3731.

E. Item 92-4, amendment of Rule 35 to include intercircuit conflict as a ground for seeking a rehearing in banc.

F. Item 92-5, amendment of Rule 25 concerning the "most expeditious form of delivery except special delivery."

G. Item 92-6, amendment of Rule 25 to eliminate the mailbox rule for a brief or appendix.

H. Item 92-7, amendment of Rule 30(a)(3) to require that a copy of a notice of appeal be included in an appendix.

I. Item 92-9, amendment of Rule 10(b)(1) to conform to Rule 4(a)(4).

IV. DISCUSSION ITEMS

A. Item 91-3, defining a final decision by rule and expanding by rule the instances in which an interlocutory decision may be appealed.

B. Item 91-6, concerning the allocation of word processing equipment costs between producing originals and producing copies.

C. Item 91-15, uniform effective date for local rules.

D. Item 91-17, unpublished opinions.

E. Item 92-11, consideration of local rules that do not exempt government attorneys from joining a court bar or from paying admission fees.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE 4/20/93

(Standing Committee)

Chairman:

Honorable Robert E. Keeton
United States District Judge
Room 306, John W. McCormack
Post Office & Courthouse
Boston, Massachusetts 02109

Area Code 617
223-9242

FAX-617-223-9241

Members:

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

Area Code 215
597-1588

FAX-215-597-2371

Honorable George C. Pratt
United States Circuit Judge
Uniondale Avenue
at Hempstead Turnpike
Uniondale, New York 11553

Area Code 516
485-6510

FAX-516-485-6582

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

Area Code 312
435-5808

FAX-312-435-7543

Honorable William O. Bertelsman
United States District Judge
P.O. Box 1012
Covington, Kentucky 41012

Area Code 606
655-3800

FAX-606-431-0296

Honorable Thomas S. Ellis, III
United States District Judge
P.O. Box 21449
200 South Washington Street
Alexandria, Virginia 22320

Area Code 703
557-7817

FAX-703-557-2830

Honorable Alicemarie H. Stotler
United States District Judge
751 West Santa Ana Boulevard
P.O. Box 12339
Santa Ana, California 92701

Area Code 714
836-2055

FAX-714-836-2062

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE (CONTD.)

Honorable Edwin J. Peterson
Chief Justice, Supreme Court
of Oregon
Supreme Court Building
1163 State Street
Salem, Oregon 97310

Area Code 503
378-6026
FAX-503-373-7536

Professor Charles Alan Wright
The University of Texas at Austin
School of Law
727 East 26th Street
Austin, Texas 78705

Area Code 512
471-5151
FAX-512-477-8149

Professor Thomas E. Baker
Texas Tech University
School of Law
18th & Hartford, Box 40004
Lubbock, Texas 79409-0004

Area Code 806
742-3992
FAX-806-742-1629

William R. Wilson, Esquire
Wilson, Engstrom, Corum & Dudley
809 West Third Street
Little Rock, Arkansas 72201

Area Code 501
375-6453
FAX-501-375-5914

Alan W. Perry, Esquire
Forman, Perry, Watkins & Krutz
188 East Capitol Street, Suite 1200
P.O. Box 22608
Jackson, Mississippi 39225-2608

Area Code 601
960-8600
FAX-601-960-8613

Alan C. Sundberg, Esquire
Carlton, Fields, Ward, Emmanuel,
Smith & Cutler, P.A.
5th Floor, First Florida Bank Bldg.
P.O. Drawer 190
Tallahassee, Florida 32302

Area Code 904
224-1585
FAX-904-222-0398

Attorney General (ex officio)
U.S. Dept. of Justice
10th & Constitution Ave., N.W.
Washington, D.C. 20530

Reporter:

Daniel R. Coquillette, Dean
and Professor of Law
Boston College Law School
885 Centre Street
Newton, Massachusetts 02159

Area Code 617
552-4340
FAX-617-552-2615

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE (CONTD.)

Liaison Member:

Honorable Wilfred Feinberg
United States Circuit Judge
United States Courthouse
Foley Square
New York, New York 10007

Area Code 212
791-0901

FAX-212-791-8738

Consultants:

Joseph F. Spaniol, Jr.
Committee on Rules of
Practice and Procedure
Washington, DC 20544

Area Code 202
273-1820

FAX-202-273-1826

Mary P. Squiers, Asst. Prof.
Boston College Law School
885 Centre Street
Newton, Massachusetts 02159

Area Code 617
552-8851

FAX-617-552-2615

Bryan A. Garner
LawProse, Inc.
Sterling Plaza, 5949 Sherry Lane
Suite 1280, L.B. 115
Dallas, Texas 75225

Area Code 214
691-8588

FAX-214-691-9294
358-5380

Secretary:

Peter G. McCabe
Secretary, Committee on Rules of
Practice and Procedure
Washington, DC 20544

Area Code 202
273-1820

FAX-202-273-1826

ADVISORY COMMITTEE ON APPELLATE RULES

Chairman:

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

Area Code 219
236-8744

FAX-219-236-8784

Members:

Honorable E. Grady Jolly
United States Circuit Judge
James O. Eastland Courthouse Bldg.
245 E. Capitol St., Room 202
Jackson, Mississippi 39201

Area Code 601
965-4165

FAX-601-965-5436

Honorable James K. Logan
United States Circuit Judge
100 East Park, Suite 204
P.O. Box 790
Olathe, Kansas 66061

Area Code 913
782-9293

FAX-913-782-9855

Honorable Stephen F. Williams
United States Circuit Judge
United States Courthouse
3rd & Constitution Avenue, NW
Washington, DC 20001

Area Code 202
273-0638

FAX-202-273-0976

Honorable Danny J. Boggs
United States Circuit Judge
220 Gene Snyder U.S. Courthouse
6th & Broadway
Louisville, Kentucky 40202

Area Code 502
582-6492

FAX-502-582-6500

Honorable Cynthia H. Hall
United States Circuit Judge
125 South Grand Avenue
P.O. Box 91510
Pasadena, California 91109-1510

Area Code 818
405-7300

FAX-818-405-7126

Honorable Arthur A. McGiverin
Chief Justice, Supreme Court of Iowa
State Capitol
Des Moines, Iowa 50319

Area Code 515
281-5174

FAX-515-242-6164

Solicitor General (ex officio)
(Robert Kopp)
United States Department
of Justice
Washington, DC 20530

Area Code 202
514-3311

FAX-202-514-8151

ADVISORY COMMITTEE ON APPELLATE RULES (CONTD.)

Donald F. Froeb, Esquire
Mitten, Goodwin & Raup
3636 North Central Avenue
Suite 1200
Phoenix, Arizona 85012

Area Code 602
650-2012

FAX-602-264-7033

Luther T. Munford, Esquire
Phelps Dunbar
2829 Lakeland Drive
Jackson, Mississippi 39208

Area Code 601
939-3895

FAX-601-932-6411

Reporter:

Professor Carol Ann Mooney
University of Notre Dame
Law School
Notre Dame, Indiana 46556

Area Code 219
631-5866

FAX-219-631-6371

Liaison Member:

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

Area Code 215
597-1588

FAX-215-597-2371

Secretary:

Peter G. McCabe
Secretary, Committee on Rules of
Practice and Procedure
Washington, DC 20544

Area Code 202
273-1820

FAX-202-273-1826

ADVISORY COMMITTEE ON CIVIL RULES

Chairman:

Honorable Sam C. Pointer, Jr.
Chief Judge, United States
District Court
882 United States Courthouse
1729 5th Avenue North
Birmingham, Alabama 35203

Area Code 205
731-1709

FAX-205-731-2243

Members:

Honorable Anthony J. Scirica
United States Circuit Judge
22614 United States Courthouse
Independence Mall West
601 Market Street
Philadelphia, Pennsylvania 19106

Area Code 215
597-0859

FAX-215-597-6913

Honorable Paul V. Niemeyer
United States Circuit Judge
101 West Lombard Street, Suite 910
Baltimore, Maryland 21201

Area Code 410
962-4210

FAX-410-962-2277

Honorable David S. Doty
United States District Judge
609 United States Courthouse
110 South 4th Street
Minneapolis, Minnesota 55401

Area Code 612
348-1929

FAX-612-348-1820

Honorable Stewart A. Newblatt
United States District Judge
140 Federal Building
600 Church Street
Flint, Michigan 48502

Area Code 313
766-5040

FAX-313-766-5027

Honorable Richard W. Holmes
Chief Justice, Supreme Court of Kansas
Kansas Judicial Center
301 West Tenth Street
Topeka, Kansas 66612

Area Code 913
296-4898

FAX-913-296-1863

Honorable Wayne D. Brazil
United States Magistrate Judge
U.S. District Court
450 Golden Gate Avenue, P.O. Box 36008
San Francisco, California 94102

Area Code 415
556-2442

FAX-415-556-6147

Attorney General (ex officio)
(Dennis G. Linder, Esquire
U.S. Dept. of Justice
Washington, DC 20530

Area Code 202
514-3314
FAX-202-616-8202

ADVISORY COMMITTEE ON CIVIL RULES (CONTD.)

Dean Mark A. Nordenberg
University of Pittsburgh
School of Law
3900 Forbes Avenue
Pittsburgh, Pennsylvania 15260

Area Code 412
648-1401
FAX-412-648-2647

Carol J. Hansen Fines, Esquire
Giffin, Winning, Cohen & Bodewes, P.C.
One West Old State Capitol Plaza
Suite 600
P.O. Box 2117
Springfield, Illinois 62705

Area Code 217
525-1571
FAX-217-525-1710

Mark O. Kasanin, Esquire
McCutchen, Doyle, Brown & Enersen
Three Embarcadero Center
San Francisco, California 94111

Area Code 415
393-2144
FAX-415-393-2286

Francis H. Fox, Esquire
Bingham, Dana & Gould
150 Federal Street
Boston, Massachusetts 02110

Area Code 617
951-8000
FAX-617-951-8736

Phillip A. Wittmann, Esquire
Stone, Pigman, Walther,
Wittmann & Hutchinson
546 Carondelet Street
New Orleans, Louisiana 70130-3588

Area Code 504
581-3200
FAX-504-581-3361

Reporter:

Edward H. Cooper
Associate Dean
University of Michigan Law School
312 Hutchins Hall
Ann Arbor, Michigan 48109-1215

Area Code
313-764-4347

FAX-313-764-8309

Liaison Member:

Honorable William O. Bertelsman
United States District Judge
P.O. Box 1012
Covington, Kentucky 41012

Area Code 606
655-3800
FAX-606-431-0296

Secretary:

Peter G. McCabe
Secretary, Committee on Rules of
Practice and Procedure
Washington, DC 20544

Area Code 202
273-1820

FAX-202-273-1826

ADVISORY COMMITTEE ON CRIMINAL RULES

Chairman:

Honorable William Terrell Hodges
United States District Judge
United States Courthouse, Suite 512
311 West Monroe Street
Jacksonville, Florida 32202

Area Code 904
232-1852

FAX-904-232-2245

Members:

Honorable W. Eugene Davis
United States Circuit Judge
556 Jefferson Street, Suite 300
Lafayette, Louisiana 70501

Area Code 318
264-6664

FAX-318-264-6685

Honorable Sam A. Crow
United States District Judge
430 U.S. Courthouse
444 SE Quincy Street
Topeka, Kansas 66683-3501

Area Code 913
295-2626

FAX-913-295-7615

Honorable D. Lowell Jensen
United States District Judge
P.O. Box 36060
450 Golden Gate Avenue
San Francisco, California 94102

Area Code 415
556-9222

FAX-415-556-2625

Honorable George M. Marovich
United States District Judge
United States District Court
219 South Dearborn Street
Chicago, Illinois 60604

Area Code 312
435-5590

FAX-312-435-7578

Honorable Joseph H. Rodriguez
United States District Judge
418 United States Courthouse
and Post Office
401 Market Street
Camden, New Jersey 08101

Area Code 609
757-5002

FAX-609-757-5175

Honorable B. Waugh Crigler
United States Magistrate Judge
United States District Court
255 West Main Street, Room 328
Charlottesville, Virginia 22901

Area Code 804
296-7779
FAX-804-296-5585

Attorney General (ex officio)
Roger Pauley, Esquire
Director, Office of Legislation
U.S. Department of Justice
Criminal Division, Room 2244
Washington, DC 20530

Area Code 202
514-3202

FAX-202-514-4042

ADVISORY COMMITTEE ON CRIMINAL RULES (CONTD.)

Professor Stephen A. Saltzburg
George Washington University
National Law Center
720 20th Street, NW, Room 308
Washington, DC 20052

Area Code 202
994-7089

FAX-202-994-9446

John Doar, Esquire
Doar, Devorkin, & Rieck
233 Broadway, 10th Floor
The Woolworth Building
New York, New York 10279

Area Code 212
619-3730
FAX-212-962-5037

Tom Karas, Esquire
Tom Karas, Ltd.
101 North First Avenue, Suite 2470
Phoenix, Arizona 85003

Area Code 602
271-0115
FAX-602-271-0914

Rikki J. Klieman, Esquire
Klieman, Lyons, Schindler,
Gross & Pabian
21 Custom House Street
Boston, Massachusetts 02110

Area Code 617
737-4777

FAX-617-737-4778

Edward F. Marek, Esquire
Federal Public Defender
1660 West 2nd Street, Suite 750
Cleveland, Ohio 44113

Area Code 216
522-4856

FAX-216-522-4321

Reporter:

Professor David A. Schlueter
St. Mary's University of San Antonio
School of Law
One Camino Santa Maria
San Antonio, Texas 78284

Area Code 512
436-3308

FAX-512-436-3717

Liaison Member:

William R. Wilson, Esquire
Wilson, Engstrom, Corum & Dudley
809 West Third Street
Little Rock, Arkansas 72201

Area Code 501
375-6453

FAX-501-375-5914

Secretary:

Peter G. McCabe
Secretary, Committee on Rules of
Practice and Procedure
Washington, DC 20544

Area Code 202
273-1820

FAX-202-273-1826

ADVISORY COMMITTEE ON BANKRUPTCY RULES

Chairman:

Honorable Edward Leavy
United States Circuit Judge
216 Pioneer Courthouse
555 S.W. Yamhill Street
Portland, Oregon 97204-1396

Area Code 503
326-5665

FAX-503-326-5718

Members:

Honorable Alice M. Batchelder
United States Circuit Judge
143 West Liberty Street
Medina, Ohio 44256

Area Code 216
722-8852

FAX-216-723-4410

Honorable Harold L. Murphy
United States District Judge
P.O. Drawer 53
Rome, Georgia 30162-0053

Area Code 706
291-5626

FAX-404-291-5688

Honorable Joseph L. McGlynn, Jr.
United States Senior District Judge
16614 United States Courthouse
Independence Mall West
601 Market Street
Philadelphia, Pennsylvania 19106

Area Code 215
597-3622

FAX-215-597-2134

Honorable Adrian G. Duplantier
United States District Judge
United States Courthouse
500 Camp Street
New Orleans, Louisiana 70130

Area Code 504
589-2795

FAX-504-589-4479

Honorable James J. Barta
United States Bankruptcy Judge
One Metropolitan Square
211 North Broadway, Seventh Floor
St. Louis, Missouri 63102-2734

Area Code 314
425-4222,Ext.321

FAX-314-425-4753

Honorable James W. Meyers
Chief Judge, United States
Bankruptcy Court
940 Front Street
San Diego, California 92189

Area Code 619
557-5622

FAX-619-557-5536

Honorable Paul Mannes
Chief Judge, United States
Bankruptcy Court
451 Hungerford Drive
Rockville, Maryland 20850

Area Code 301
443-7023

FAX-301-227-6452

ADVISORY COMMITTEE ON BANKRUPTCY RULES (CONTD.)

Professor Charles J. Tabb
University of Illinois
College of Law
504 East Pennsylvania Avenue
Champaign, Illinois 61820

Area Code 217
333-2877

FAX-217-244-1478

Ralph R. Mabey, Esquire
LeBouef, Lamb, Leiby and MacRae
1000 Kearns Building
136 South Main Street
Salt Lake City, Utah 84101

Area Code 801
355-6900

FAX-809-359-8256

Herbert P. Minkel, Jr., Esquire
Fried, Frank, Harris, Shriver
and Jacobson
One New York Plaza, Suite 2500
New York, New York 10004-1980

Area Code 212
820-8035

FAX-212-747-1525

Henry J. Sommer
Community Legal Services, Inc.
3207 Kensington Avenue, 5th Floor
Philadelphia, Pennsylvania 19134

Area Code 215
427-4898

FAX-215-427-4895

Kenneth N. Klee, Esquire
Stutman, Treister & Glatt
3699 Wilshire Boulevard, Suite 900
Los Angeles, California 90010

Area Code 213
251-5100

FAX-213-251-5288

Gerald K. Smith, Esquire
Lewis and Roca
40 North Central Avenue
Phoenix, Arizona 85004-4429

Area Code 602
262-5348

FAX-602-262-5747

Reporter:

Professor Alan N. Resnick
Hofstra University School of Law
Hempstead, New York 11550

Area Code 516
463-5930
FAX-516-481-8509

Liaison Member:

Honorable Thomas S. Ellis, III
United States District Judge
P.O. Box 21449
200 South Washington Street
Alexandria, Virginia 22320

Area Code 703
557-7817

FAX-703-557-2830

ADVISORY COMMITTEE ON BANKRUPTCY RULES (CONTD.)

Bankruptcy Clerk:

Richard G. Heltzel
Clerk, United States Bankruptcy Court
8038 United States Courthouse
650 Capitol Mall
Sacramento, California 95814

Area Code 916
551-2678

FAX-916-551-2569

Representative from Executive Office for United States Trustees:

John E. Logan, Esquire
Director
Executive Office for
United States Trustees
901 E Street, NW, Room 700
Washington, DC 20530

Area Code 202
307-1391

FAX-202-307-0672

Secretary:

Peter G. McCabe
Secretary, Committee on Rules of
Practice and Procedure
Washington, DC 20544

Area Code 202
273-1820

FAX-202-273-1826

ADVISORY COMMITTEE ON EVIDENCE RULES

Chairman:

Honorable Ralph K. Winter, Jr.
United States Circuit Judge
Audubon Court Building
55 Whitney Avenue
New Haven, Connecticut 06511

Area Code 203
773-2353

FAX-203-773-2415

Members:

Honorable Jerry E. Smith
United States Circuit Judge
12621 United States Courthouse
515 Rusk Avenue
Houston, Texas 77002-2698

Area Code 713
250-5101

FAX-713-250-5719

Honorable Fern M. Smith
United States District Judge
United States District Court
P.O. Box 36060
450 Golden Gate Avenue
San Francisco, California 94102

Area Code 415
556-4971

FAX-415-556-9291

Honorable Milton I. Shadur
United States District Judge
United States District Court
219 South Dearborn Street
Room 2388
Chicago, Illinois 60604

Area Code 312
435-5766

FAX-312-435-7578

Honorable James T. Turner
United States Court
of Federal Claims
717 Madison Place, NW
Washington, DC 20005

Area Code 202
219-9574

FAX-202-219-9997

Honorable Harold G. Clarke
Chief Justice
Supreme Court of Georgia
Room 572
244 Washington Street, SW
Atlanta, Georgia 30334

Area Code 404
656-3472

FAX 404-656-2253

Professor Kenneth S. Broun
University of North Carolina
School of Law
CB #3380, Van Hecke-Wettach Hall
Chapel Hill, North Carolina 27599

Area Code 919
962-4112 (a.m.)
and
968-2714 (p.m.)
FAX-919-962-1277

ADVISORY COMMITTEE ON EVIDENCE RULES (CONTD.)

Gregory P. Joseph, Esquire
Fried, Frank, Harris,
Shriver & Jacobson
One New York Plaza
New York, New York 10004-1980

Area Code 212
820-8052

FAX-212-820-8584

James K. Robinson, Esquire
Honigman Miller Schwartz & Cohn
2290 First National Building
Detroit, Michigan 48226

Area Code 313
256-7534

FAX-313-962-0176

John M. Kobayashi, Esquire
Kobayashi & Associates, P.C.
1775 Sherman Street, Suite 2100
Denver, Colorado 80203

Area Code 303
861-2100

FAX-861-1944

Liaison Members:

Honorable Wayne D. Brazil
United States Magistrate Judge
United States District Court
450 Golden Gate Avenue
P.O. Box 36008
San Francisco, California 94102

Area Code 415
556-2442

FAX-415-556-3973

Professor Stephen A. Saltzburg
George Washington University
National Law Center
720 20th Street, NW, Room 308
Washington, DC 20052

Area Code 202
994-7089

FAX-202-994-9446

Reporter:

Margaret A. Berger
Associate Dean and
Professor of Law
Brooklyn Law School
250 Joralemon Street
Brooklyn, New York 11201

Area Code 718
780-7941

FAX-718-797-1403

Secretary:

Peter G. McCabe
Secretary, Committee on Rules of
Practice and Procedure
Washington, DC 20544

Area Code 202
273-1820

FAX-202-273-1826

LIAISON MEMBERS

Appellate:

Chief Judge Dolores K. Sloviter

Bankruptcy:

Judge Thomas S. Ellis, III

Civil:

Judge William O. Bertelsman

Criminal:

William R. Wilson, Esquire

Evidence:

Magistrate Judge Wayne D. Brazil

Professor Stephen A. Saltzburg

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

Staff:

John K. Rabiej
Chief, Rules Committee
Support Office
Administrative Office of the
United States Courts
Washington, DC 20544

Area Code 202
273-1820

FAX-202-273-1826

Judith W. Krivit
Staff Assistant, Rules Committee
Support Office
Administrative Office of the
United States Courts
Washington, DC 20544

Area Code 202
273-1820

FAX-202-273-1826

Anne Rustin
Secretary, Rules Committee
Support Office
Administrative Office of the
United States Courts
Washington, DC 20544

Area Code 202
273-1820

FAX-202-273-1826

Patricia S. Channon
Deputy Assistant Chief, Bankruptcy
Division
Administrative Office of the
United States Courts
Washington, DC 20544

Area Code 202
273-1900

FAX-202-273-1917

AGENDA I-(A-L)
GAP Report
April 20-21, 1993

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

FROM: Carol Ann Mooney, Reporter

DATE: April 9, 1993

SUBJECT: GAP Report concerning the proposed amendments published January 1993

In January 1993, the Standing Committee published a packet of proposed amendments to the Fed. R. App. P. The period for public comment closes on April 15. At the Advisory Committee's meeting on April 20 and 21 the Committee must consider all the comments and decide if any amendments should be made in the published rules. If the Committee decides to make amendments, the Committee has the further task of deciding whether the amendments are substantial. If substantial amendments are made, it is necessary to republish the rule(s). If only minor amendments are made, republication is not necessary.

I have prepared materials dealing with all the comments received to date. There are not many. In addition to the comments received as a result of publication, I have received some "internal" comments; they are from Mr. Spaniol, Mr. Kopp, and Mr. Munford, a new member of the Advisory Committee.

As you can see from the agenda prepared for the meeting, we will consider the proposed rules in order of their advisory committee item number.

In addition to the specific comments summarized in the following pages, two general comments were received.

1. A practitioner, Mr. Green, opposes the change from "shall" to "must." He points out that unless Congress is also making the same changes, the rules and statutes will use different terminology to refer to the same thing. He also points out that the use of must is inconsistent even in the proposed rules; in some places the proposed rules use shall and in others must. As you know, the change is advocated by the Style Subcommittee. At the time of drafting these amendments the Style Subcommittee asked that "must" be used with the passive voice and "shall" with the active voice. That directive has now been changed, and "must" must be used in all instances. Throughout the amended drafts must has been changed to shall except in those instances where it is used to indicate the future tense.

2. Mr. Munford questions the wisdom of citing specific local rules in the Committee Notes. He points out not only that local rules change frequently, but also that the purpose of an

amendment in some instances is to supplant the local rule. He suggests referring generally to "local rules of the First, Sixth, and Eighth Circuits" rather than citing to specific rules. The revised drafts attached to this memorandum still contain citations to the local rules but if the Committee decides they should be removed, that can be easily accomplished.

A. Item 86-10. The proposed amendment to Rule 38 affords an appellant notice and opportunity to respond before damages or costs are assessed for filing a frivolous appeal.

NO COMMENTS HAVE BEEN RECEIVED

B. Item 91-2. Proposed amendments to Rules 40 and 41 lengthen the time for filing a petition for rehearing in civil cases involving the United States.

One public comment and two internal comments have been received.

1. Judge Jon O. Newman, the immediate past chair of this Committee, makes two suggestions:
   a. He believes that the additional time for requesting a rehearing under Rule 40 should be extended only to the United States or an agency or officer thereof, and not to all parties in a civil appeal involving the government.
   b. He believes that there is no need for Rule 41 to delay the issuance of the mandate until 7 days after the time for seeking rehearing has expired. He states that a court should be able to issue a mandate immediately. Judge Newman's suggestion deals with a portion of the rule that the Advisory Committee had not amended.
2. Mr. Spaniol points out that Rule 41 uses both "petition" for certiorari and "application." He suggests that "petition" should be used throughout.
3. Mr. Munford points out that the 7 day time period for obtaining a stay is too short a time to get a ruling from a court of appeal, thus requiring an interim stay. He suggests alternatively that Fed. R. App. P. 26(a) be amended to conform to Fed. R. Civ. P. 6(a), which excludes weekends from consideration whenever the period for action is less than 11 days; or, extending the time under Fed. R. App. P. 41(a) to 14 days. The current rule uses the same 7 day time frame.

Reporter's Notes:

1. The draft of Rule 40 attached to this memorandum has been amended in accord with suggestion 1.a. The underlined sentence beginning at line 5 allows 45 days for filing a petition for rehearing in a civil case only for the United States or an agency or officer thereof. Other parties to the same case must file within the usual 14 day period. The Committee Note has been amended to reflect this change.

2. The draft of Rule 41(a) has been amended at line 12 to provide that the mandate must issue <u>within</u> 7 days after entry of the order denying a petition for rehearing. This implements suggestion 1.b. This change appears to be consistent with the provision in 41(b) that a court of appeals must issue the mandate <u>immediately</u> after receiving a copy of a Supreme Court order denying a petition for writ of certiorari.

3. The word "application" has been changed to "petition" at lines 14 and 19 of the draft of Rule 41. This implements suggestion 2.

4. No changes have been made to implement suggestion 3. Some members of the Committee will recall that several years ago, the Criminal, Bankruptcy, and Appellate Advisory Committees all proposed to amend their rules to conform to Fed. R. Civ. P. 6(a) concerning the computation of time. The project was abandoned when it was discovered that such a change would cause substantial disruption in bankruptcy practice and some difficulty in criminal cases. The appellate community did not object to the change, but when the move to uniformity was abandoned saw no need to change a rule that did not seem to cause any difficulties. Therefore, I think it best to leave this suggestion for further committee discussion.

C. Item 91-4. Proposed amendments to Rule 32, governing the form of documents.

Two public comments and two internal comments were received.

1. Judge Newman supports the effort to standardize type styles but suggests several changes:
   a. Normal text should be in roman font.
   b. For non-typographic processes, the "11 characters per inch" standard is not clear enough. If the effort is to prohibit proportional fonts, the rule should say so and give an example such as "courier."
   c. Textual footnotes should not be double spaced; requiring that they be in the same size type is adequate.
   d. Requiring all briefs produced by non-typographic processes to be double-spaced may have unintended consequences. Word processors can produce text that is visually indistinguishable from standard typographic process. A brief prepared by such a technique should be subject to the same rules that govern the standard typographic process.

As to all four of the proceeding points, Judge Newman suggests review of the new second circuit local rule. A copy of the second circuit rule is attached to this page.

   e. The rule should not require that all briefs and appendices be bound to permit them to lie flat because coil bindings take extra space and become entangled with other documents.

2. Mr. Cole, a practitioner, makes no general comment about the proposed changes in the Rule but focuses upon the binding requirement. He favors the change but suggests that the language be more specific and require spiral binding. He also suggests that the committee consider a uniform rule as to whether briefs produced in any manner other than standard typographic process use only one side of each sheet or both.

3. Mr. Spaniol notes that Rule 32(a) refers to "parties allowed to proceed in forma pauperis." The statute, 28 U.S.C. § 1915 uses the term "persons" rather than "parties." Mr. Spaniol further notes that both Rule 32 and Rule 31 make reference to "carbon" copies. Because carbon copies are so infrequently used, he suggests dropping the term.

4. Mr. Munford makes several suggestions:
   a. He points out that an eleven characters per inch requirement eliminates proportional typeface. He recommends that proportions spacing be allowed if

twelve point type is used.

b. He objects to the double spacing of textual footnotes.

c. He asks what the title of an appellant's principal brief should be --"Brief for Appellant" (new Rule 32(a)(4)); "Brief of the Appellant" (former Rule 28(a); or "Appellant's Brief" (new Rule 28(a))?

d. He also points out that in the committee note, the word "insure" in the first paragraph should be "ensure."

Reporter's Notes:

1. I have made no changes with regard to the questions of fonts or binding. I leave those for committee discussion. I also did not delete the use of the term "carbon" copies. I recall that there was discussion of that issue at the October meeting, and a decision was made to retain the provision.

2. The draft of Rule 32 has been amended to provide that footnotes may be single spaced. The change was made at line 16. In the published version, the sentence beginning at line 16 provided: "Headings and footnotes may be single spaced except that footnotes that are not limited to citations must be spaced the same as the text." The change implements suggestions 1.c. and 4.b.

3. The draft has been amended to refer to persons proceeding in forma pauperis. The changes occur at lines 8 and 65. These changes implement suggestion 3.

4. The committee note has been amended to substitute the word "ensure" for "insure." This implements suggestion 4.d.

5. With regard to the question of the title of an appellant's principal brief, is uniformity of title required? The change in Rule 28(a) from Brief of the Appellant to Appellant's Brief was made at the suggestion of the Style Subcommittee. If the title is to include the party's name, the title used in 32(a)(4) works best. If uniformity is desired, 28(a) can be changed once again.

Second Circuit Local Rule

Local Rule 32. Form of Briefs; the Appendix; and Other Papers

(a) **Standard typographic printing.** In all documents (including briefs, appendices, motions, and petitions for rehearing) produced by standard typographic printing (or other method that is visually identical to standard typographic printing), text and footnotes shall appear in 11-point or larger type with a 2-point or more leading between lines. Sans serif type and compacted or otherwise compressed printing features are prohibited. Page dimensions are set forth in FRAP 32(a).

(b) **Other document production processes.** In all documents (including briefs, appendices, motions, and petitions for rehearing) produced by duplicating, copying, word-processing, or means other than standard typographic printing (except for a method that is visually identical to standard typographic printing), text and footnotes shall appear in non-proportional (e.g., Courier) typeface no smaller than 11-point produced by a typewriting element or print font. Proportional fonts, italics (except for case citations, emphasis, and similar customary uses), sans serif type, and compacted or otherwise compressed printing features are prohibited. All text in such documents shall be double-spaced. Quoted material and footnotes may be single-spaced. Page dimensions are set forth in FRAP 32(a).

(c) **Brief covers.** The number of the case shall be printed in type at least one inch high in the upper right-hand corner of the cover of each brief and appendix, and the cover of every brief must clearly indicate the name of the party on whose behalf the brief is filed.

D. Item 91-5. New Rule 49 is proposed. It authorizes the use of special masters in the courts of appeals

NO COMMENTS WERE RECEIVED.

E. Item 91-8. The proposed amendment to Rule 25 provides that whenever service is accomplished by mailing, the proof of service must include the addresses to which the papers were mailed.

One internal comment was received.
Mr. Munford asks why the address is required only when service is accomplished by mail. He suggests that the same questions arise if service is accomplished by hand delivery or by facsimile.

Reporter's Note

The draft of Rule 25 has been amended to provide that a certificate of service include not only the addresses to which papers were mailed, but also the addresses at which papers were delivered.

F. Item 91-9. The proposed amendment to Rule 32 requires counsel to include their telephone numbers on the covers of briefs and appendices.

NO COMMENTS WERE RECEIVED.

G. Item 91-11. The proposed amendment to Rule 25 provides that a clerk may not refuse to file a paper solely because the paper is not presented in the proper form.

NO COMMENTS WERE RECEIVED.

H. Item 91-12. Rule 33, governing appeal conferences, was completely rewritten.

There is one public comment and one internal comment.

1. Judge Newman does not comment generally on the proposed amendments but suggests specifically that the language be amended to make it clear that the choice of an in-person or telephone conference is the court's not the parties. He suggests adding ", as the court directs," after the word telephone on line 24 of the published rule.

2. The Solicitor General's office has suggested amending the third paragraph of the Committee Note.
   a. First, they suggest deleting the third sentence, "The Committee realizes that when the party is a corporation or government agency, the party can attend only through agents." The sentence is merely a truism and may be misleading. In many suits concerning the government, the party is not an agency but a government official but it is still necessary to send an agent. There should not be an inference that suits against government officials are different from suits against government agencies.
   b. Second, they recommend rewriting the fourth sentence as follows:

      The language of the rule is broad enough to allow a court to determine that an executive or employee (other than the general counsel) <u>of a corporation or government agency</u> with authority ~~over~~ <u>regarding</u> the matter at issue, constitutes "the party."

Reporter's Notes:

1. The draft has been amended at line 19 to indicate that the court determines whether a conference will be in-person or by telephone. This implements suggestion 1.

2. The Solicitor General's suggested changes have been made in paragraph three of the Committee Note.

I. Item 91-13. The proposed amendments to Rule 41 provide that a motion for stay of mandate must show that a petition for certiorari would present a substantial question and that there is good cause for a stay.

NO COMMENTS WERE RECEIVED.

J. Item 91-22. Rule 9 governing review of a release decision in a criminal case was completely rewritten.

There is one public comment.

Judge Dorsey, a United States District Judge, makes no general comment about the proposed amendments to Rule 9 but suggests that subdivision (c) should refer to 18 U.S.C. § 3145 (c). He states that the difficulty of resolving the interrelation between §§ 3142 and 3143 with § 3145(c) suggests that the rule should also refer to § 3145(c).

Reporter's Note:

The suggested change has been made. Subdivision (c) deals with criteria for release. Section 3145(c) provides:

> **(c) Appeal from a release or detention order.--** An appeal from a release or detention order, or from a decision denying revocation or amendment of such an order, is governed by the provisions of section 1291 of title 28 and section 3731 of this title. The appeal shall be determined promptly. A person subject to detention pursuant to section 3143(a)(2) or (b)(2), and who meets the conditions of release set forth in section 3143(a)(1) or (b)(1), may be ordered released, under appropriate conditions, by the judicial officer, if is clearly shown that there are exceptional reasons why such person's detention would not be appropriate. (Emphasis added.)

K. Item 91-26. The proposed amendment to Rule 28 requires a brief to contain a summary of argument.

There is one public comment.

Judge Newman states that requiring a brief to contain a summary of the argument is ill-advised. He does not believe that it is useful; a judge must still read the main argument. He doubts that an argument is clearer because a summary is provided. He suggests that the choice should be left to each court and to the parties in courts that do not require a summary.

Reporter's Note:

If the Committee agrees that the change is ill-advised, the proposal may be dropped and current Rule 28 will remain unchanged.

L. Item 91-27. This item involved amendment of all appellate rules requiring the filing of copies of documents with a court of appeals.

NO COMMENTS WERE RECEIVED.

Reporter's Note:

Although no comments were received dealing with the number of copies problem, Mr. Spaniol submitted a comment concerning Rule 26.1, one of the rules amended as part of this process. Rule 26.1 requires a corporate disclosure statement to identify all "parent companies, subsidiaries (except wholly owned subsidiaries), and affiliates that have issued shares to the public." Mr. Spaniol notes that the Supreme Court dropped "affiliates" from its list because no one understood what it meant. The term was used in a number of local rules at the time of the drafting of Rule 26.1. The Committee may wish to discuss the possibility of dropping the term.

Rule 3. Appeal as of Right - How Taken

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

* * *

Committee Note

Subdivision (a). The amendment requires a party filing a notice of appeal to provide the court with sufficient copies of the notice for service on all other parties.

Rule 5. ~~Appeals~~ Appeal by Permission under 28 U.S.C. § 1292(b)

* * *

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

* * *

Committee Note

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

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

* * *

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

* * *

Committee Note

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

~~Rule 9. Release in criminal cases~~

~~(a) Appeals from orders respecting release entered prior to a judgment of conviction. An appeal authorized by law from an order refusing or imposing conditions of release shall be determined promptly. Upon entry of an order refusing or imposing conditions of release, the district court shall state in writing the reasons for the action taken. The appeal shall be heard without the necessity of briefs after reasonable notice to the appellee upon such papers, affidavits, and portions of the record as the parties shall present. The court of appeals or a judge thereof may order the release of the appellant pending the appeal.~~

~~(b) Release pending appeal from a judgment of conviction. Application for release after a judgment of conviction shall be made in the first instance in the district court. If the district court refuses release pending appeal, or imposes conditions of release, the court shall state in writing the reasons for the action taken. Thereafter, if an appeal is pending, a motion for release, or for modification of the conditions of release, pending review may be made to the court of appeals or to a judge thereof. The motion shall be determined promptly upon such papers, affidavits, and portions of the record as the parties shall present and after reasonable notice to the appellee. The court of appeals or a judge thereof may order the release of the appellant pending disposition of the motion.~~

~~(c). Criteria for release. The decision as to release~~

~~pending appeal shall be made in accordance with Title 18, U.S.C. § 3143. The burden of establishing that the defendant will not flee or pose a danger to any other person or to the community and that the appeal is not for purpose of delay and raises a substantial question of law or fact likely to result in reversal or in an order for a new trial rests with the defendant.~~

Rule 9. Release in a Criminal Case

(a) Appeal from an Order Regarding Release Before Judgment. - The district court must state in writing, or orally on the record, the reasons for an order regarding release or detention of a defendant in a criminal case. A party appealing from the order, as soon as practicable after filing a notice of appeal with the district court, must file with the court of appeals a copy of the district court's order and its statement of reasons. An appellant who questions the factual basis for the district court's order must file a transcript of any release proceedings in the district court or an explanation of why a transcript has not been obtained. The appeal must be determined promptly. It must be heard, after reasonable notice to the appellee, upon such papers, affidavits, and portions of the record as the parties present or the court may require. Briefs need not be filed unless the court so orders. The court of appeals or a judge thereof may order the release of the defendant pending decision of the appeal.

(b) Review of an Order Regarding Release After Judgment of Conviction. -- A party entitled to do so may obtain review of a district court's order regarding release that is made after a judgment of conviction by filing a notice of appeal from that order with the district court, or by filing a motion with the court of appeals if the party has already filed a notice of appeal from the judgment of conviction or the terms of the sentence. Both the order and the review are subject to Rule 9(a). In addition, the papers filed by the applicant for review must include a copy of the judgment of conviction.

(c) Criteria for Release. The decision regarding release must be made in accordance with applicable provisions of Title 18 U.S.C. §§ 3142, 3143 and 3145(c).

Committee Note

Rule 9 has been entirely rewritten. The basic structure of the rule has been retained; subdivision (a) governs appeals from bail decisions made before sentencing, subdivision (b) governs review of bail decisions made after sentencing and pending appeal.

Subdivision (a). The subdivision applies to appeals from "an order regarding release or detention" of a criminal defendant before judgment of conviction, i.e., before sentencing. The old rule applied only to a defendant's appeal from an order "refusing or imposing conditions of release." The new broader language is needed because the government is now permitted to appeal bail decisions in certain circumstances. 18 U.S.C. §§ 3145 and 3731. For the same reason, the rule now requires a district court to state reasons for its decision in all instances, not only when it refuses release or imposes conditions on release.

The rule requires a party appealing from a district court's decision to supply the court of appeals with a copy of the district court's order and its statement of reasons. In addition, an

appellant who questions the factual basis for the district court's decision must file a transcript of the release proceedings, if possible. The rule also permits a court to require additional papers. A court must act promptly to decide these appeals; lack of pertinent information can cause delays. The old rule left the determination of what should be filed entirely within the party's discretion; it stated that the court of appeals would hear the appeal "upon such papers, affidavits, and portions of the record as the parties shall present."

Subdivision (b). This subdivision applies to review of a district court's decision regarding release made after judgment of conviction. Implicit in the first sentence, but less clear than in subdivision (a), is the requirement that the initial decision regarding release after sentencing must be made by the district court. As in subdivision (a), the language has been changed to accommodate the government's ability to seek review.

The word "review" is used in this subdivision, rather than "appeal" because review may be obtained, in some instances, upon motion. Review may be obtained by motion if the party has already filed a notice of appeal from the judgment of conviction or from the terms of the sentence. If the party desiring review of the release decision has not filed such a notice of appeal, review may be obtained only by filing a notice of appeal from the order regarding release.

The requirements of subdivision (a) apply to both the order and the review. That is, the district court must state its reasons for the order. The party seeking review must supply the court of appeals with the same information required by subdivision (a). In addition, the party seeking review must also supply the court with information about the conviction and the sentence.

Subdivision (c). This subdivision has been amended to include references to the correct statutory provisions.

Rule 13. Review of a Decisions of the Tax Court

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

* * *

Committee Note

Subdivision (a). The amendment requires a party filing a notice of appeal to provide the court with sufficient copies of the notice for service on all other parties.

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

* * *

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

Committee Note

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

Rule 25. Filing and Service

(a) Filing. - ~~Papers~~ A paper required or permitted to be filed in a court of appeals must be filed with the clerk. Filing may be accomplished by mail addressed to the clerk, but filing is not timely unless the clerk receives the papers within the time fixed for filing, except that briefs and appendices are treated as filed on the day of mailing if the most expeditious form of delivery by mail, except special delivery, is used. 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 declaration (in compliance with 28 U.S.C. § 1746) setting forth the date of deposit and stating that first-class postage has been prepaid. If a motion requests relief that may be granted by a single judge, the judge may permit the motion to be filed with the judge, in which event the judge ~~shall~~ must note thereon the ~~date of~~ filing date and thereafter give it to the clerk. A court of appeals may, by local rule, permit papers to be filed by facsimile or other electronic means, provided such means are authorized by and consistent with standards established by the Judicial Conference of the United States. The clerk shall not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or by any local rules or practices.

* * *

(d) Proof of Service.-- Papers presented for filing ~~shall~~ must contain an acknowledgment of service by the person served or proof of service in the form of a statement of the date and manner of service, ~~and~~ of the names of the persons served, and of the addresses to which the papers were mailed or at which they were delivered, certified by the person who made service. Proof of service may appear on or be affixed to the papers filed. The clerk may permit papers to be filed without acknowledgment or proof of service but ~~shall~~ must require such to be filed promptly thereafter.

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

Committee Note

Subdivision (a). Several circuits have local rules that authorize the office of the clerk to refuse to accept for filing papers that are not in the form required by these rules or by local rules. This is not a suitable role for the office of the clerk and the practice exposes litigants to the hazards of time bars; for these reasons, such rules are proscribed by this rule. This provision is similar to Fed. R. Civ. P. 5(e) and Fed. Bankr. R. 5005.

The Committee wishes to make it clear that the provision prohibiting a clerk from refusing a document does not mean that a clerk's office may no longer screen documents to determine whether they comply with the rules. A court may delegate to the clerk authority to inform a party about any noncompliance with the rules and, if the party is willing to correct the document, to determine a date by which the corrected document must be resubmitted. If a party refuses to take the steps recommended by the clerk or if in the clerk's judgment the party fails to correct the noncompliance, the clerk must refer the matter to the court for a ruling.

service must state the addresses to which the papers were mailed or at which they were delivered. The information may be helpful when service is disputed. The Federal Circuit has a similar local rule, Fed. Cir. R. 25.

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

A party must consult local rules to determine whether the court requires a different number than that specified in these national rules. The Committee believes it would be helpful if each circuit either: 1) included a chart at the beginning of its local rules showing the number of copies of each document required to be filed with the court along with citation to the controlling rule; or 2) made available such a chart to each party upon commencement of an appeal; or both. If a party fails to file the required number of copies, the failure does not create a jurisdictional defect. Rule 3(a) states: "Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate . . ."

Rule 26.1 Corporate Disclosure Statement

Any non-governmental corporate party to a civil or bankruptcy case or agency review proceeding and any non-governmental corporate defendant in a criminal case ~~shall~~ must file a statement identifying all parent companies, subsidiaries (except wholly owned subsidiaries), and affiliates that have issued shares to the public. The statement ~~shall~~ must be filed with a party's principal brief or upon filing a motion, response, petition or answer in the court of appeals, whichever first occurs, unless a local rule requires earlier filing. Whenever the statement is filed before a party's principal brief, an original and three copies of the statement must be filed unless the court requires the filing of a different number by local rule or by order in a particular case. The statement ~~shall~~ must be included in the front of the table of contents in a party's principal brief even if the statement was previously filed.

Committee Note

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

Rule 27. Motions

* * *

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

Committee Note

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

Rule 28. Briefs

(a) Appellant's Brief.-- The brief of the appellant must contain, under appropriate headings and in the order here indicated:

* * *

(5) A summary of argument. The summary should contain a succinct, clear, and accurate statement of the arguments made in the body of the brief. It should not be a mere repetition of the argument headings.

~~(5)~~ (6) An argument. ~~The argument may be preceded by a summary.~~ The argument must contain the contentions of the appellant on the issues presented, and the reasons therefor, with citations to the authorities, statutes, and parts of the record relied on. The argument must also include for each issue a concise statement of the applicable standard of review; this statement may appear in the discussion of each issue or under a separate heading placed before the discussion of the issues.

~~(6)~~ (7) A short conclusion stating the precise relief sought.

(b) Appellee's Brief.--The brief of the appellee must conform to the requirements of paragraphs (a)(1)-~~(5)~~ (6) , except that none of the following need appear unless the appellee is dissatisfied with the statement of the appellant:

(1) the jurisdictional statement;

(2) the statement of the issues;

(3) the statement of the case;

(4) the statement of the standard of review.

Committee Note

Subdivision (a). The amendment adds a requirement that an appellant's brief contain a summary of the argument. A number of circuits have local rules requiring a summary and the courts report that they find the summary useful. See, D.C. Cir. R. 11(a)(5); 5th Cir. R. 28.2.2; 8th Cir. R. 28A(i)(6); 11th Cir. R. 28-2(i); and Fed. Cir. R. 28.

Subdivision (b). The amendment adds a requirement that an appellee's brief contain a summary of the argument.

Rule 30. Appendix to the Briefs

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

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

* * *

Committee Note

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

Rule 31. Filing and Service of a Briefs

* * *

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

* * *

Committee Note

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

Rule 32. Form of a Briefs, ~~the~~ an Appendix, and Other Papers

(a) Form of a Briefs and ~~the~~ an Appendix. -- ~~Briefs and appendices~~ A brief or appendix may be produced by standard typographic printing or by any duplicating or copying process ~~which~~ that produces a clear black image on white paper. Carbon copies of ~~briefs and appendices~~ a brief or appendix may not be submitted without the court's permission ~~of the court~~, except in behalf of ~~parties allowed to proceed~~ pro se persons proceeding in forma pauperis.

A brief or appendix produced by the standard typographic process must be printed in 11 point type or larger; those produced by any other process must be printed with not more than 11 characters per inch with double spacing between each line of text. Quotations and footnotes must appear in the same size type as the text. Quotations more than two lines long may be indented and single spaced. Headings and footnotes may be single spaced.

All printed matter must ~~appear in at least 11 point type~~ be on opaque, unglazed paper. ~~Briefs and appendices~~ A brief or appendix produced by the standard typographic process ~~shall~~ must be bound in volumes having pages 6-1/8 by 9-1/4 inches and type matter 4-1/6 by 7-1/6 inches. Those produced by any other process ~~shall~~ must be bound in volumes having pages 8-1/2 by 11 inches and type matter not exceeding 6-1/2 by 9-1/2 inches~~, with double spacing between each line of text~~. A brief or appendix must be stapled or bound in any manner that is secure, does not

obscure the text, and that permits it to lie flat when open. ~~In patent cases the pages of briefs and appendices may be of such size as is necessary to utilize copies of patent documents.~~

Copies of the reporter's transcript and other papers reproduced in a manner authorized by this rule may be inserted in the appendix; such pages may be informally renumbered if necessary.

~~If briefs are produced by commercial printing or duplicating firms, or, if produced otherwise and the covers to be described are available,~~ Except for pro se parties, the cover of the appellant's brief ~~of the appellant should~~ must be blue; ~~that of the appellee~~ the appellee's, red; ~~that of~~ an intervenor's or amicus curiae's, green; ~~that of~~ and any reply brief, gray. The cover of ~~the appendix, if separately printed, should~~ a separately printed appendix must be white. The front ~~covers of the briefs and of appendices, if separately printed, shall~~ cover of a brief and of a separately printed appendix must contain:

(1) the name of the court and the number of the case; the number of the case must be centered at the top of the front cover;

(2) the title of the case (see Rule 12(a));

(3) the nature of the proceeding in the court (e.g., Appeal, Petition for Review) and the name of the court, agency, or board below;

(4) the title of the document including the name of the party or parties for whom the document is filed (e.g., Brief for

Appellant J. Doe ~~, Appendix~~); and

(5) the ~~names~~ name, ~~and~~ office addresses~~s~~ , and telephone number of counsel representing the party ~~on whose behalf~~ for whom the document is filed.

(b) Form of Other Papers.-- ~~Petitions~~ A petition for rehearing, a suggestion for rehearing in banc, and any response to such petition or suggestion must ~~shall~~ be produced in a manner prescribed by subdivision (a).

~~Motions and other papers~~ A motion or other paper may be produced in like manner, or ~~they~~ it may be typewritten ~~upon~~ on opaque, unglazed paper 8-1/2 by 11 inches in size. Lines of typewritten text ~~shall~~ must be double spaced. Consecutive sheets ~~shall~~ must be attached at the left margin. Carbon copies may ~~be used for filing and service if they are legible~~ not be filed or served without the court's permission except by pro se persons proceeding in forma pauperis. A motion or other paper addressed to the court ~~shall~~ need not have a cover but must contain a caption ~~setting forth~~ that includes the name of the court, the title of the case, the ~~file~~ case number, and a brief descriptive title indicating the purpose of the paper.

Committee Note

Subdivision (a). A number of stylistic and substantive changes have been made in subdivision (a). A new paragraph has been added governing the printing of a brief or appendix. The old rule simply stated that a brief or appendix produced by the standard typographic process must be printed in at least 11 point type or, if produced in any other manner, the lines of text must

be double spaced. Today few briefs are produced by commercial printers or by typewriters; most are produced on and printed by computers. The availability of computer fonts in a variety of sizes and styles has given rise to local rules limiting type styles. D.C. Cir. R. 11(a); 5th Cir. R. 32.1; 7th Cir. R. 32; 10th Cir. R. 32.1; 11th Cir. R. 32-3; and Fed. Cir. R. 32(a). The Advisory Committee believes that some standards are needed both to ensure that all litigants have an equal opportunity to present their material and to insure that the documents are easily legible. The standard adopted in this rule for documents produced by any method other than the standard typographic process is that the text, including quotations and footnotes, must be printed with no more than 11 characters per inch. That standard is identical to that used by the Seventh Circuit and was chosen for its ease of administration. The rule permits single spaced and indented quotations.

The rule allowing a person proceeding in forma pauperis to file carbon copies has been limited to pro se persons proceeding in forma pauperis. Because photocopying is inexpensive and widely available, the Committee believes that it is appropriate to prohibit parties represented by assigned counsel from filing carbon copies unless the court orders otherwise.

The rule requires a brief or appendix to be bound or stapled in any manner that is secure, does not obscure the text, and that permits the document to lie flat when open. Many judges and most court employees do much of their work at computer keyboards and a brief that lies flat when open is more than a minor advantage. The Federal Circuit already has such a requirement, Fed. Cir. R. 32(b) and the Fifth Circuit rule states a preference for it, 5th Cir. R. 32.3.

The rule requires that the number of the case be centered at the top of the front cover of a brief or appendix. This will aid in identification of the document and again the idea was drawn from a local rule. 2d Cir. R. 32. The rule also requires that the title of the document include the name of the party or parties on whose behalf the document is filed. In those instances in which there are multiple appellants or appellees, this information is very useful to the court. The rule also requires that attorneys' telephone numbers appear on the front cover of a brief or appendix.

Having amended the national rule to provide additional detail, it is the Committee's hope that there will be little need for local variation and that many of the existing local rules will be repealed. It is the Committee's further hope that before a circuit adopts a local rule governing the form or style of

papers, the circuit will carefully weigh the advantage of the proposed local rule against the difficulties and inefficiencies local variations create for national practitioners.

Subdivision (b). The old rule required a petition for rehearing to be produced in the same manner as a brief or appendix. The new rule also requires that a suggestion for rehearing in banc and a response to either a petition for panel rehearing or a suggestion for rehearing in banc be prepared in the same manner.

With regard to motions or other papers, the only substantive change is to restrict the use of carbon copies to pro se persons who are proceeding in forma pauperis. This change parallels the change in subdivision (a).

~~Rule 33. Prehearing conference~~

~~The court may direct the attorneys for the parties to appear before the court or a judge thereof for a prehearing conference to consider the simplification of the issues and such other matters as may aid in the disposition of the proceeding by the court. The court or judge shall make an order which recites the action taken at the conference and the agreements made by the parties as to any of the matters considered and which limits the issues to those not disposed of by admissions or agreements of counsel, and such order when entered controls the subsequent course of the proceeding, unless modified to prevent manifest injustice.~~

Rule 33. Appeal Conferences

The court may direct the attorneys, and in appropriate cases the parties, to participate in one or more conferences to address any matter that may aid in the disposition of the proceedings, including the simplification of the issues and the possibility of settlement. A conference may be conducted in person or by telephone, as the court directs, and be presided over by a judge or other person designated by the court for that purpose. Before a settlement conference, attorneys must consult with their clients and obtain as much authority as feasible to settle the case. As a result of a conference, the court may enter an order controlling the course of the proceedings or implementing any

settlement agreement.

Committee Note

Rule 33 has been entirely rewritten. The new rule makes several changes.

The caption of the rule has been changed from "Prehearing Conference" to "Appeal Conferences" to reflect the fact that occasionally a conference is held after oral argument.

The rule permits the court to require the parties to attend the conference in appropriate cases. The Committee does not contemplate that attendance of the parties will become routine, but in certain instances the parties' presence can be useful. The language of the rule is broad enough to allow a court to determine that an executive or employee (other than the general counsel) of a corporation or government agency with authority regarding the matter at issue, constitutes "the party."

The rule includes the possibility of settlement among the possible conference topics.

The rule recognizes that conferences are often held by telephone.

The rule allows a judge or other person designated by the court to preside over a conference. A number of local rules permit persons other than judges to preside over conferences. 1st Cir. R. 47.5; 6th Cir. R. 18; 8th Cir. R. 33A; 9th Cir. R. 33-1; and 10th Cir. R. 33.

The rule requires an attorney to consult with his or her client before a settlement conference and obtain as much authority as feasible to settle the case. An attorney can never settle a case without his or her client's consent. Certain entities, especially government entities, have particular difficulty obtaining authority to settle a case. The rule requires counsel to obtain only as much authority "as feasible."

Rule 35. Determination of Causes by the Court in Banc

* * *

(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.

Committee Note

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

Rule 38. Damages and Costs for ~~delay~~ Frivolous Appeals

If a court of appeals shall determine that an appeal is frivolous, it may, after notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee.

Committee Note

The amendment requires a court of appeals to give notice and opportunity to respond before imposing sanctions. The amendment reflects the basic principle enunciated in the Supreme Court's opinion in Roadway Express, Inc. v. Piper, 447 U.S. 752, 767 (1980), that notice and opportunity to respond must precede the imposition of sanctions. The form of the notice and opportunity purposely are left to the court's discretion. However, the amendment requires that the court notify a party that it is contemplating sanctions. Requests, either in briefs or motions, for sanctions have become so commonplace that it is unrealistic to expect careful responses to such requests without any indication that the court is actually contemplating such measures.

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 the time within which the United States or an agency or officer thereof 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 within which the United States or an agency or officer thereof may file a petition for rehearing in a civil case from 14 to 45 days. It

has no effect upon the time for filing in criminal cases or for nongovernmental parties in civil 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 within 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 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.~~ 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 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 within 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 issue a mandate. See, e.g., Barnes v. E-Systems, Inc. Group Hospital Medical & Surgical Insurance Plan, 112 S.Ct. 1 (Scalia, Circuit Justice 1991).

Rule 49. Masters

A court of appeals may appoint a special master to hold hearings, if necessary, and to make recommendations as to factual findings and disposition in matters ancillary to proceedings in the court. Unless the order referring a matter to a master specifies or limits the master's powers, a master shall have power to regulate all proceedings in every hearing before the master and to do all acts and take all measures necessary or proper for the efficient performance of the master's duties under the order including, but not limited to, requiring the production of evidence upon all matters embraced in the reference and putting witnesses and parties on oath and examining them. If the master is not a judge or court employee, the court shall determine the master's compensation and whether the cost will be charged to any of the parties.

Committee Note

This rule authorizes a court of appeals to appoint a special master to make recommendations concerning ancillary matters. The courts of appeals have long used masters in contempt proceedings where the issue is compliance with an enforcement order. See Polish National Alliance v. NLRB, 159 F.2d 38 (7th Cir. 1946); NLRB v. Arcade-Sunshine Co., 132 F.2d 8 (D.C. Cir. 1942); NLRB v. Remington Rand, Inc., 130 F.2d 919 (2d Cir. 1942). There are other instances when the question before a court of appeals requires a factual determination. An application for fees or eligibility for Criminal Justice Act status on appeal are examples.

Ordinarily when a factual issue is unresolved, a court of appeals remands the case to the district court or agency that originally heard the case. It is not the Committee's intent to alter that practice. However, when factual issues arise in the

first instance in the court of appeals, such as fees for representation on appeal, it would be useful to have authority to refer such determinations to a master for a recommendation.

AGENDA II-A
Items 89-5 and 90-1
April 20-21, 1993

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

FROM: Carol Ann Mooney, Reporter

DATE: March 12, 1993

SUBJECT: Items 89-5 and 90-1, amendment of Fed. R. App. P. 35(c)

At its June 1992 meeting, the Standing Committee did not approve the draft amendments to Rule 35 proposed by the Advisory Committee on Appellate Rules. The Standing Committee asked the Advisory Committee to reconsider an approach previously considered and rejected by the Advisory Committee.

The draft submitted to the Standing Committee for consideration made no substantive change in the Rule 35; the draft simply included within the text of the rule the principle enunciated in Supreme Court Rule 13.4, that the pendency of a suggestion for rehearing in banc does not extend the time for filing a petition for certiorari. A copy of the proposal is attached and is labeled Appendix A.

The Standing Committee did not approve the draft because it was persuaded that the Advisory Committee should reconsider the original proposal, *i.e.*, to treat a suggestion for rehearing in banc like a petition for panel rehearing so that a request for a rehearing in banc will also suspend the finality of the court's judgment and thus extend the period in which to file a petition for certiorari.

In order to aid the April discussion, this memorandum will first outline the existing problem sought to be corrected and second summarize the actions taken by the Advisory Committee.

The Problem

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

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

document that requests both a panel rehearing and a rehearing in banc.[1]

This confusion gives rise to problems in two situations: First, when a suggestion for rehearing in banc is filed without a petition for rehearing; second, when the nature of the document filed is unclear, as when a "petition for rehearing in banc" is filed.[2]

When a party files a suggestion for rehearing in banc without a petition for rehearing, the party often wrongly assumes that the time for filing a petition for certiorari is extended. Several circuits have solved that problem by treating every suggestion for rehearing in banc as containing both a petition for panel rehearing and a suggestion for rehearing in banc.[3]

If a party files an ambiguous document, such as a "petition for rehearing in banc," there is no problem if the court treats the paper as including a petition for panel rehearing. Missouri

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[1] The Fifth Circuit prohibits such a combined document and requires that a suggestion for rehearing in banc be filed separately. Fifth Cir. R. 35.2.

[2] Of course, technically there is no provision for filing a "Petition for Rehearing in Banc." However, the Advisory Committee Note to Fed. R. App. P. 35 states that "the suggestion of a party that a case be reheard in banc is frequently contained in a petition for rehearing, commonly styled 'petition for rehearing in banc.' Such a petition is in fact merely a petition for a rehearing, with a suggestion that the case be reheard in banc."

Some circuits treat such a document as containing only a suggestion for rehearing in banc. *See* United States v. Buljubasic, 828 F.2d 426 (7th Cir. 1987).

[3] 1st Cir. I.O.P. X. provides: ". . . A suggestion for rehearing en banc will also be treated as a petition for rehearing before the original panel." 5th Cir. I.O.P. for Rule 35 states: ". . . A suggestion for rehearing en banc will be treated as a petition for rehearing by the panel if no petition is filed." 11th Cir. R. 35-6 provides: ". . . 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."

The tenth circuit treats some, but apparently not all, suggestions for rehearing in banc as petitions for panel rehearing. 10th Cir. R. 35.7 provides: "Procedural and interim matters, for example, stay orders, injunctions pending appeal, appointment of counsel, leave to appeal in forma pauperis, and leave to appeal from a non-final order, are not matters subject to en banc consideration under Fed. R. App. P. 35. En banc suggestions will not be entertained in such matters, but will be referred as a petition for rehearing to the judge or panel that entered the order sought to be reheard."

In contrast, the federal circuit states that it has not adopted the practice of referring a suggestion for rehearing in banc to the panel that heard the appeal as if it were a combined petition for rehearing and suggestion for rehearing in banc. Fed. Cir. R. 35, Practice Note.

v. Jenkins, 110 S. Ct. 1651. If, however, the court treats the paper solely as a suggestion for rehearing in banc, the same problem occurs as when a party files only a suggestion.

As many as one hundred petitions for certiorari are ruled untimely each year because the party has assumed that the filing of a suggestion for rehearing in banc has extended the time for filing a petition for certiorari. In an apparent effort to alert parties to the problem, the Supreme Court amended its Rule 13, the rule governing the time for filing a petition for certiorari, effective January 1, 1990. Rule 13.4 provides that if a timely petition for rehearing is filed, the time for filing the petition for a writ of certiorari runs from the date of the denial of the petition for rehearing or the entry of a subsequent judgment. The amendment added a sentence to 13.4 stating: "A suggestion made to a United States court of appeals for a rehearing in banc pursuant to Rule 35(b), Federal Rules of Appellate Procedure, is not a petition for rehearing within the meaning of this Rule."

At about the same time Mr. St. Vrain, the Clerk of the Eighth Circuit, wrote to the Committee and suggested that the FRAP Rules be amended so that a suggestion for rehearing in banc has the same staying effect that a request for panel rehearing has.

The Advisory Committee Deliberations

In October 1990 the Advisory Committee first discussed the suggestion and considered three possible responses:

1. take no further action;
2. follow the Supreme Court's lead and try to make the trap obvious by adding language to Rule 35 that would indicate that a suggestion for rehearing in banc does not effect the time for filing a petition for certiorari; and,
3. amend the rules so that a suggestion for rehearing in banc extends the time for filing a petition for certiorari.

Drafts for both the second and third possibilities had been prepared and were before the Committee. A straw vote of the Committee disclosed that the members favored the third approach. The Committee was uncertain, however, whether the recent amendment of the Supreme Court Rule 13.4 indicated that further suggestions from the Advisory Committee would be disfavored, or whether the amendment was simply an attempt by the Court to help litigants avoid the time trap. Judge Ripple was asked to speak with Mr. Spaniol, who was at that time the Clerk of the Supreme Court, about the motivation for the amendment.

Because Mr. Spaniol indicated that the amendment of the Supreme Court rule was not intended to preclude any further suggestions, the topic was placed on the agenda for the Advisory Committee Meeting in April 1991. Because of the press of business, the topic was held over until the Fall of 1991.

At the December 1991 meeting the Advisory Committee considered draft Amendments to FRAP Rules 35 and 41. The intent of those amendments was to give a request for a rehearing in banc the same effect as a petition for panel rehearing. Copies of the drafts are

attached; they are labeled Appendix B.

The December 1991 drafts were rejected by the Advisory Committee. The major stumbling block was that if a request for a rehearing in banc tolls the time for filing a petition for certiorari, there must be a date certain from which the time begins to run anew. Under current culture, a court has no obligation to vote or otherwise act upon a suggestion for rehearing in banc. Therefore, the draft provided that if no vote is taken on a suggestion within 30 days of its filing, the court must either enter an order denying the petition or extending the time for considering it. After lengthy discussion, the Committee concluded that requiring any sort of action within a time certain (whether it be 30, 60, or 90 days) is undesirable. The Committee believed that such a change would disturb collegial processes -- such as the shaping of opinions -- that currently operate when a court is considering a request for a rehearing in banc.

Because the Committee had abandoned the course it had earlier favored, the Committee considered alternate approaches such as requiring every suggestion for rehearing in banc to be accompanied by a simultaneous petition for panel rehearing. If both requests were placed before the court, the court would be likely, but not required, to dispose of both simultaneously and thus start the running of the time for petitioning for certiorari. That approach was rejected because it might require the pro forma filing of a petition that the parties know is useless and because it would not guarantee the elimination of the trap unless courts could be compelled to dispose of both requests simultaneously.

Ultimately, the Committee decided that rather than change the effect of a suggestion for rehearing in banc, or require the simultaneous filing of a petition for panel rehearing, the most straight forward approach would be to insert language in Rule 35(c) stating that the pendency of a suggestion for rehearing in banc does not extend the time for filing a petition for certiorari. In short, the Committee decided to make the trap obvious rather than eliminate it. The reporter was asked to prepare drafts for the spring 1992 meeting.

At the April 1992 meeting, the Advisory Committee approved the draft that was rejected by the Standing Committee.

The Advisory Committee is asked to reconsider an approach that would give a suggestion for rehearing in banc the same staying effect that a petition for panel rehearing has.

Rule 35. Determination of a Causes by ~~the~~ a Court in Banc

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

Committee Note

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

suggestions for rehearing in banc" or whether it was an attempt by the Court to help litigants avoid the time trap that prompted proposals 89-5 and 90-1.

Judge Ripple agreed to speak with Mr. Spaniol, the Clerk of the Supreme Court, about the motivation underlying the amendment of Sup. Ct. R. 13.4. Judge Ripple's memorandum of January 3, 1991, states that Mr. Spaniol was of the opinion that the amendment of Rule 13.4 was not intended to preclude any further suggestions that the Advisory Committee might have.

The straw vote at the last meeting indicated that a majority of the committee members favored treating a suggestion for rehearing in banc like a petition for panel rehearing so that a request for a rehearing in banc will also suspend the finality of the court of appeals' judgment and thus extend the time for filing a petition for certiorari.

Drafts

If the committee believes that a request for a rehearing in banc should have the same effect as a petition for rehearing in banc, amendment of both Fed. R. App. P. 35 and 41 is necessary. (The Supreme Court also would need to amend Sup. Ct. R. 13.4.)

DRAFT 1

Rule 35. Determination of causes by the court in banc

* * *

(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. No response shall be filed

unless the court shall so order. The clerk shall transmit any such ~~suggestion~~ petition 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~~. If no vote is taken on such a petition within 30 days of its filing, the court shall enter an order denying the petition unless the court enters an order extending the time for considering the petition.

(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 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~~ and shall be included with the party's petition for rehearing if one is filed. ~~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.~~

Analysis

The purpose of the amendment is to treat a suggestion for a rehearing in banc like a petition for a panel rehearing so that a

request for a rehearing in banc will also suspend the finality of the court of appeals' judgment and thus extend the period for filing a petition for writ of certiorari. The deletion of the last sentence of Rule 35(c) stating that a suggestion for rehearing in banc does not affect the finality of the judgment or stay the issuance of the mandate does not affirmatively accomplish that objective; it simply sets the stage for such an amendment. In order to affirmatively accomplish that objective, Sup. Ct. R. 13.4 must be amended. The change in terminology from "suggestion for rehearing in banc" to "petition for rehearing in banc" is not necessary to accomplish the committee's objective but it reflects the committee's intent to treat the two requests similarly.

Because of the discretionary nature of the in banc procedure, the filing of a suggestion for rehearing in banc does not require a vote; a vote is taken only when requested by a judge. 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. However, if a request for rehearing in banc tolls the time for filing a petition for a writ of certiorari, some regularized procedure for the disposition of such requests is needed so that there is a date certain from which the time for petitioning for certiorari begins to run anew. Therefore, the draft suggests that if no vote is taken within 30 days, the court shall enter an order denying the petition. The 30 day period is arbitrary and may be either shortened or lengthened as the committee deems appropriate.

DRAFT 2

Rule 41. Issuance of mandate; stay of mandate

(a) *Date of issuance.* The mandate of the court shall issue 21 days after the entry of judgment unless 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, or of a petition for rehearing in banc, will stay the mandate until disposition of the petitions unless otherwise ordered by the court. If the petition ~~is~~ or petitions are denied, the mandate shall issue 7 days after entry of the order denying the last of such petitions unless the time is shortened or enlarged by order.

Analysis

Once again, amending rule 41 so that a timely filing of a petition for rehearing in banc stays the mandate only advances the committee's objective of tolling the time for filing a writ of certiorari by negative implication; it does not affirmatively accomplish that objective. Amendment of Sup. Ct. R. 13.4 is needed to accomplish the desired end.

AGENDA II-B
Item 91-14
April 20-21, 1993

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

FROM: Carol Ann Mooney, Reporter

DATE: March 12, 1993

SUBJECT: Item 91-14, amendment of Rule 21 so that a petition for mandamus does not bear the name of the judge and the judge is represented *pro forma* by counsel for the party opposing the relief unless the judge requests an order permitting the judge to appear.

At its December 1992 meeting, the Standing Committee did not approve for publication the draft amendment of Rule 21 proposed by the Advisory Committee. The Standing Committee asked the Advisory Committee to consider further amendment of Rule 21. The Standing Committee's discussion focused upon two issues: first, a judge should be able to appear to oppose the relief sought in a petition for mandamus without needing to request permission to appear; second, in most instances a mandamus action is actually an adversarial proceeding between the parties and further changes in the rule might be desirable to emphasize the similarity of mandamus to an interlocutory appeal.

Before presenting new drafts, this memorandum will review the history of the proposal.

Background

Currently Fed. R. App. P. 21 provides that a petition for mandamus should name the judge as a party and the judge must be treated as a party with respect to service of papers. Nine of the circuits, however, have local rules providing that a petition for mandamus shall not bear the name of the judge.

Although Rule 21 anticipates that a judge may not wish to appear in the proceeding, the rule requires the judge to so advise the clerk and all parties by letter. Six of the circuits, however, presume that the judge will not want to appear. Those circuits provide that, unless otherwise ordered, even when relief is requested of a particular judge, the judge shall be represented *pro forma* by counsel for the party opposing the relief and the counsel appears in the name of the party and not of the judge. A judge who wishes to appear apparently must seek an order permitting the judge to appear. Copies of the local rules are attached and labeled Appendix A.

The Local Rules Project suggested that the Advisory Committee consider amending Rule 21 to reflect the presumptions in the local rules. At the Advisory Committee's October 1992 meeting the Committee approved the amendments to Rule 21 which were forwarded to the Standing Committee for its December meeting. A copy of the proposal that the Advisory Committee submitted to the Standing Committee is attached to this memorandum and labeled

Appendix B.

New Proposals

1. The Judge May Choose to Respond.

The first of the two issues that concerned the Standing Committee was that under the draft a judge who wants to respond to a petition must seek permission to do so. Although infrequent, there are instances in which no party opposes the relief requested in the petition for mandamus[1] or the party who opposes the relief would not adequately represent the interests of the judiciary. In such instances, some members of the Committee believe that the judge should be able to respond without requesting permission to do so.

The Advisory Committee should discuss the need and desirability of allowing a trial court judge to participate whenever the judge desires to do so. Is the absence of an advocate for the judge's position any more problematic when the issue comes before a court of appeals by mandamus than when it arises after trial? Are the reasons given by the trial judge in opinions or statements supporting the order sufficient?[2]

The following draft differs from the one submitted to the Standing Committee in that it provides at line 28, that the judge may choose to respond whenever the court requires a response.

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[1] In Maloney v. Plunkett, 854 F.2d 152 (7th Cir. 1988), mandamus was sought to vacate an order denying both sides the right to employ peremptory challenges. In such an instance, and presumably others, it is likely that neither party would oppose the writ.

[2] Because Judge Easterbrook was an active participant in the Standing Committee's discussion about mandamus, Judge Ripple invited him to offer any suggestions he might have for further amendment of Rule 21. Judge Easterbrook disagrees that it is necessary to permit a trial judge to participate if the trial judge wishes to do so. He states:

> The argument on behalf of these procedures should come in one of two forms: from the district judge in opinions or statements supporting the order; and from briefs of amici curiae, perhaps local bar associations. Either way, the district judge "participates" in the sense that his or her reasons are considered, but not in the sense of being an adversary of a litigant. Inviting the participation of such groups is properly the task of the court of appeals.

See the copy of Judge Easterbrook's letter of March 8 attached to this memorandum.

Draft 1.

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

(a) *Mandamus or Prohibition to a Judge or Judges; Petition for Writ; Service and Filing.* - ~~Application~~ A party applying for a writ of mandamus or of prohibition directed to a judge or judges ~~shall be made by filing~~ must file a petition therefor with the clerk of the court of appeals with proof of service on the ~~respondent~~ judge or judges and on all parties to the action in the trial court. The petition shall be titled simply, In re [name of petitioner], Petitioner. All parties to the action in the trial court other than the petitioner are respondents for all purposes. The petition ~~shall contain a statement of the facts necessary to an understanding of the issues presented by the application; a statement of~~ must state the issues presented and ~~of~~ the relief sought; state the facts necessary to understand the issues presented by the application; ~~a~~ state~~ment of~~ the reasons why the writ should issue; and include a copy ~~copies~~ of any order or opinion or parts of the record ~~which~~ that may be essential to ~~an~~ understand~~ing of~~ the matters set forth in the petition. ~~Upon receipt of~~ When the clerk receives the prescribed docket fee, the clerk ~~shall~~ must docket the petition and submit it to the court.

(b) *Denial, Order Directing Answer.* - ~~If the court is of the opinion that the writ should not be granted, it shall deny the petition.~~ The court may deny the petition without an answer. Otherwise, it ~~shall~~ must order that the respondents ~~an~~ answer ~~to the petition be filed by the respondents~~ within the time fixed by the order. The ~~order~~ clerk ~~shall be served by the clerk~~ must serve the order on the judge or judges ~~named respondents~~ to whom the writ would be directed if granted, and on all respondents ~~other parties to the action in the trial court~~. Two or

more respondents may answer jointly. ~~All parties below other than the petitioner shall also be deemed respondents for all purposes. Two or more respondents may answer jointly. If the judge or judges named respondents do not desire to appear in the proceeding, they may so advise the clerk and all parties by letter, but the petition shall not thereby be taken as admitted.~~ To the extent that relief is requested of a particular judge, counsel for the party opposing the relief, who shall appear in the name of the party and not of the judge, shall represent the judge pro forma unless the judge chooses to appear or the court otherwise orders. If briefs or oral argument are required, ~~T~~ the clerk shall advise the parties, ~~of the dates on which briefs are to be filed, if briefs are required, and of the date of oral argument.~~ The proceeding ~~shall~~ must be given preference over ordinary civil cases.

Committee Note

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

Subdivision (b). The amendment provides that even if relief is requested of a particular judge, the judge shall be represented *pro forma* by counsel for the party opposing the relief who appears in the name of the party and not of the judge. That is, arguments made on behalf of the party opposing the relief are treated as if also made on behalf of the judge. However, this provision does not create an attorney client relationship between the attorney and the judge, nor does it give rise to any right to compensation from the judge. A judge who wishes to appear may do so, and if the court desires to hear from the judge, the court may order the judge to respond.

2. Mandamus, Like Appeal, Is Ordinarily an Adversarial Proceeding Between the Parties

The second concern expressed by some members of the Standing Committee was that simply removing the judge's name from the caption and allowing the party opposing the relief to represent the judge are steps in the right direction but they do not go far enough. One member of the Committee stated that a Petition for Mandamus is no more personally directed at the judge than is a Notice of Appeal; in both instances a party is complaining about actions taken by the trial court. It was suggested that the action is actually an interparties proceeding and the rule should be amended to reflect that fact.[3]

In those instances in which the purpose of mandamus is to determine the intrinsic merits of a judicial act, it has been recognized that the judge should at most be named as a nominal party with no real interest in the outcome because the proceeding is in reality an adversary proceeding between the litigants.[4]

The following draft deletes all references to a writ being directed to a judge but because of the concerns expressed above, the draft allows the trial court judge to choose to respond and also authorizes the court of appeals to order the judge to respond.

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[3] Judge Easterbrook's March 8 letter to Judge Ripple presented the issue as follows:

> . . . when available [mandamus] should be handled as a dispute *between* the litigants, and *about* the judge's order, rather than as a dispute between litigant and judge. Personalizing the dispute frustrates the neutrality that the bench should attempt to achieve. Once litigants and judge become formal adversaries, reasonable observers would doubt that the appearance of justice is being served in future proceedings in the case. Judges may be hard pressed to put their feelings and wounded pride aside; and those who can do so may be unable to convince observers that this has occurred.

[4] At least one case has found that mandamus may be an adversarial proceeding between litigants. Walker v. Columbia Broadcasting System, Inc., 443 F.2d 33 (7th Cir. 1971). Similarly, other courts have found that the judge's involvement is only nominal and that the judge has no real interest in the outcome. See, *e.g.*, United States v. King, 482 F.2d 768 (D.C. Cir. 1973); United States v. Haldeman, 559 F.2d 31 (D.C. Cir. 1976); Century Casualty Co. v. Security Mut. Casualty Co., 606 F. 2d 301 (10th Cir. 1979).

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

(a) *Mandamus or Prohibition ~~to a Judge or Judges~~; Petition for Writ; Service and Filing.* - ~~Application~~ A party applying for a writ of mandamus or of prohibition ~~directed to a judge or judges shall be made by filing~~ must file a petition therefor with the clerk of the court of appeals with proof of service on ~~the respondent judge or judges and on~~ all parties to the action in the trial court. The petition shall be titled simply, In re [name of petitioner] , Petitioner. All parties to the action in the trial court other than the petitioner are respondents for all purposes. The petition ~~shall contain a statement of the facts necessary to an understanding of the issues presented by the application; a statement of~~ must state the issues presented and ~~of~~ the relief sought; state the facts necessary to understand the issues presented by the application; ~~a~~ state~~ment of~~ the reasons why the writ should issue; and include copies of any order or opinion or parts of the record ~~which~~ that may be essential to ~~an~~ understand~~ing of~~ the matters set forth in the petition. ~~Upon receipt of~~ When the clerk receives the prescribed docket fee, the clerk ~~shall~~ must docket the petition, ~~and~~ submit it to the court, and send a copy of the petition to the clerk of the trial court.

(b) *Denial, Order Directing Answer.* - ~~If the court is of the opinion that the writ should not be granted, it shall deny the petition.~~ The court may deny the petition without an answer. Otherwise, it ~~shall~~ must order that the respondents ~~an~~ answer ~~to the petition be filed by the respondents~~ within the time fixed by the order. ~~The order shall be served by the clerk on the judge or judges named respondents and on all other parties to the action in the trial court.~~ The

clerk must serve the order on all respondents and send a copy to the clerk of the trial court. Two or more respondents may answer jointly. ~~All parties below other than the petitioner shall also be deemed respondents for all purposes. Two or more respondents may answer jointly. If the judge or judges named respondents do not desire to appear in the proceeding, they may so advise the clerk and all parties by letter, but the petition shall not thereby be taken as admitted.~~ The trial court judge need not respond unless the court of appeals orders the trial court judge to do so; however, the trial court judge may respond if the judge chooses to do so. If briefs or oral argument are required, ~~T~~ the clerk shall advise the parties. ~~of the dates on which briefs are to be filed, if briefs are required, and of the date of oral argument.~~ The proceeding ~~shall~~ must be given preference over ordinary civil cases.

Committee Note

In most instances, a writ of mandamus or of prohibition is not actually directed to a judge in any more personal way than is an order reversing a court's judgment. Most often a writ of mandamus seeks review of the intrinsic merits of a judge's action and is in reality an adversary proceeding between the parties. See, *e.g.*, *Walker v. Columbia Broadcasting System, Inc.*, 443 F.2d 33 (1971). In order to change the tone of the rule and of mandamus proceedings generally, the Rule is amended so that the judge is not treated as a respondent. The caption and subdivision (a) are amended by deleting the reference to a writ of mandamus or prohibition as being "directed to a judge or judges."

Subdivision (a) is also amended so that a petition for a writ of mandamus or prohibition does not bear the name of the judge. Another amendment requires the clerk of the court of appeals to send a copy of the petition to the clerk of the trial court. Although most petitions for mandamus are actually adversarial proceedings, there are instances in which a petition for mandamus complains about a judge's conduct which is extrinsic to the merits of a decision or in which both parties support the mandamus. In such instances, the judge may wish to appear to oppose issuance of the writ. In order to make the judge aware of the filing of the petition, a trial court may instruct its clerk to provide a judge involved in a mandamus with a copy of the petition.

Subdivision (b). The amendment provides that even if relief is requested of a particular judge, the judge shall be represented *pro forma* by counsel for the party opposing the relief who

appears in the name of the party and not of the judge. That is, arguments made on behalf of the party opposing the relief are treated as if also made on behalf of the judge. However, this provision does not create an attorney client relationship between the attorney and the judge, nor does it give rise to any right to compensation from the judge. A judge who wishes to appear may do so, and if the court desires to hear from the judge, the court may order the judge to respond. Once again, so that the judge is aware of the time for responding, the amendment requires the clerk of the court of appeals to send the trial court a copy of the order requesting an answer.

Draft 3.

Judge Easterbrook's letter, attached to this memorandum, contains another draft. His draft amends the rule so that the trial judge is not treated as a party and it permits the trial court judge to participate only if ordered to do so by the court of appeals. The draft also authorizes a court of appeals to invite an amicus curiae to defend the order in question. Judge Easterbrook's draft will be considered as draft three.

D.C. Cir. R. 7.

(j) Petitions for Special Writs

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

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

1st Cir. R. 21.

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

2nd Cir. R. 21.

Petitions for Writs of Mandamus and Prohibition

A petition for writ of mandamus or writ of prohibition pursuant to Rule 21 shall nor bear the name of the district judge, but shall be entitled simply, in re _____, Petitioner. To the extent that relief is requested of a particular judge, unless otherwise ordered, the judge shall be represented pro forma by counsel for the party opposing the relief, who shall appear in the name of the party and not that of the judge.

4th Cir. R. 21.

Petitions for Special Writs.

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

5th Cir. R. 21.

Writs of Mandamus and Prohibition Directed to a Judge or Judges and Other Extraordinary

Petition for Writ. A petition for writ of mandamus, writ of prohibition, or other extraordinary writ shall not bear the name of the District Judge, but shall be entitled, In re: _____, Petitioner. To the extent that relief is requested of a particular Judge, unless otherwise

ordered, the Judge shall be represented pro forma by counsel for the party opposing the relief, who shall appear in the name of the party and not that of the Judge.

* * *

8th Cir. R. 21A.

Petitions for Writs of Mandamus and Prohibition

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

In re _____, Petitioner.

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

9th Cir. R. 21-4.

Captions

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

11th Cir. R. 21-1.

Writs of Mandamus and Prohibition Directed to a Judge or Judges
and Other Extraordinary Writs

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

* * *

Fed. Cir. R. 21.

Writs of Mandamus and Prohibition Directed to a Judge or Judges
and Other Extraordinary Writs

(a) *Title; copies; fee; answer.* -- A petition for writ of mandamus or writ of prohibition shall be entitled simply: "in Re [Name of Petitioner] , Petitioner." . . . No answer shall be filed by any respondent unless ordered by the court.

Appendix B

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

(a) *Mandamus or Prohibition to a Judge or Judges; Petition for Writ; Service and Filing.* - ~~Application~~ A party applying for a writ of mandamus or of prohibition directed to a judge or judges shall ~~be made by filing~~ file a petition therefor with the clerk of the court of appeals with proof of service on the ~~respondent~~ judge or judges and on all parties to the action in the trial court. The petition shall be titled simply, In re _____, Petitioner. All parties below other than the petitioner are respondents for all purposes. The petition ~~shall~~ must contain a statement of the facts necessary to an understanding of the issues presented by the application; a statement of the issues presented and of the relief sought; a statement of the reasons why the writ should issue; and copies of any order or opinion or parts of the record ~~which~~ that may be essential to an understanding of the matters set forth in the petition. Upon receipt of the prescribed docket fee, the clerk shall docket the petition and submit it to the court.

(b) *Denial, Order Directing Answer.* - If the court ~~is of the opinion~~ concludes that the writ should not be granted, it shall deny the petition. Otherwise, it shall order that the respondents ~~an~~ answer ~~to~~ the petition ~~be filed by the respondents~~ within the time fixed by the order. Two or more respondents may answer jointly. The ~~order~~ clerk shall ~~be served by the clerk~~ serve the order on the judge or judges ~~named respondents~~ to whom the writ would be directed if granted, and on all other parties to the action in the trial court. ~~All parties below other than the petitioner shall also be deemed respondents for all purposes. Two or more respondents may answer jointly. If the judge or judges named respondents do not desire to~~

~~appear in the proceeding, they may so advise the clerk and all parties by letter, but the petition shall not thereby be taken as admitted.~~ To the extent that relief is requested of a particular judge, unless otherwise ordered, counsel for the party opposing the relief, who shall appear in the name of the party and not of the judge, shall represent the judge pro forma. If briefs or oral argument are required, ~~T~~ the clerk shall advise the parties, ~~of the dates on which briefs are to be filed, if briefs are required, and of the date of oral argument.~~ The proceeding ~~shall~~ must be given preference over ordinary civil cases.

Committee Note

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

Subdivision (b). The amendment provides that even if relief is requested of a particular judge, the judge shall be represented *pro forma* by counsel for the party opposing the relief who appears in the name of the party and not of the judge. That is, arguments made on behalf of the party opposing the relief shall be treated as if also made on behalf of the judge. However, this provision does not create an attorney client relationship between the attorney and the judge, nor does it give rise to any right to compensation from the judge. A judge who wishes to appear may seek an order permitting the judge to appear.

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

CHAMBERS OF
FRANK H. EASTERBROOK
CIRCUIT JUDGE

March 8, 1993

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

Dear Ken:

My apology for the delay in submitting suggestions about Appellate Rule 21 (FRAP Item 91-24).

The thought I wanted to convey is that in most cases mandamus should be handled in the same way as an interlocutory appeal. Mandamus is extra-statutory, and correspondingly rare, but when available should be handled as a dispute *between* the litigants, and *about* the judge's order, rather than as a dispute between litigant and judge. Personalizing the dispute frustrates the neutrality that the bench should attempt to achieve. Once litigants and judge become formal adversaries, reasonable observers would doubt that the appearance of justice is being served in future proceedings in the case. Judges may be hard pressed to put their feelings and wounded pride aside; and those who can do so may be unable to convince observers that this has occurred.

Comments Judges Pointer and Bertelsman made at the Standing Committee's meeting about how personally they take a petition for mandamus—and about why litigants try to avoid entering this contest with the judge—strengthen my concern that a change in procedure is necessary. The draft of Rule 21 circulated at the meeting goes part way by changing the caption, but because it treats the judge as the respondent in fact, to be "represented" by the lawyer for the real party in interest, it leaves the source of personal friction in place.

Several comments at the Standing Committee's meeting stemmed from concern that removing the district judge from the process altogether would permit lawyers to evade rules that both sides dislike, but which may be valuable to judicial administration. Take for example an order, entered early in the case, limiting each side to three days' trial time. One side might seek a writ of mandamus, and the other acquiesce, because each wants to take unlimited time. The losers, if the writ were to issue, would be litigants in other cases, who must wait longer for their own trials. Permitting the district judge to have his say, the argument goes, would avoid collusive submissions to the court of appeals.

Although the absence of advocacy on behalf of the district judge's order could be a serious problem, it is no *more* a problem when the issue comes up by mandamus than when it arises after trial. Suppose the trial proceeds with time limits, and the loser appeals. The winner may well fail to defend the district

judge, wanting to be rid of the cap in future cases tried in the same district—although the desire to defend its judgment will lead the victorious party to contend that the error was harmless. A feeble defense of the order in the name of harmless error is not much better than no defense at all. Mandamus, after all, is rare. The party caterwauling about the three-day cap is likely to be told to go away, to raise the issue on appeal from a final judgment. Once that judgment comes, it is all too easy for the court of appeals to say something like: "District judges should not set time limits; but in this case the limit was harmless."

This implies that the genuine, and legitimate, concern is lack of argument on behalf of the district court's chosen procedures. The argument on behalf of these procedures should come in one of two forms: from the district judge in opinions or statements supporting the order; and from briefs of amici curiae, perhaps local bar associations. Either way, the district judge "participates" in the sense that his or her reasons are considered, but not in the sense of being an adversary of a litigant. Inviting the participation of such groups is properly the task of the court of appeals.

All of this leads to the following proposals for Rule 21(a) and (b), which incorporate the many constructive changes the advisory committee recommended:

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

(a) *Mandamus or Prohibition to a Judge or Judges; Petition for Writ; Service and Filing.* ~~Application~~ A party applying for a writ of mandamus or of prohibition directed to a judge or judges shall ~~be made by filing~~ file a petition therefor with the clerk of the court of appeals with proof of service ~~on the respondent judge or judges and~~ on all parties to the action in the trial court. The petition shall be titled simply, In re _____, Petitioner. All parties in the district court other than the petitioner are respondents for all purposes. The petition ~~shall~~ must contain a statement of the facts necessary to an understanding of the issues presented by the application; a statement of the issues presented and of the relief sought; a statement of the reasons why the writ should issue; and copies of any order or opinion or parts of the record ~~which~~ that may be essential to an understanding of the matters set forth in the petition. Upon receipt of the prescribed docket fee, the clerk shall docket the petition and submit it to the court.

(b) *Denial; Order Directing Answer.* If the court ~~is of the opinion~~ concludes that the writ should not ~~be granted~~ issue, it shall deny the

petition. Otherwise, it shall order that the respondents ~~an~~ answer ~~to~~ the petition ~~be filed by the respondents~~ within the time fixed by the order. ~~The order shall be served by the clerk on the judge or judges named respondents and on all other parties to the action in the trial court. All parties below other than the petitioner shall also be deemed respondents for all purposes.~~ Two or more respondents may answer jointly. ~~If the judge or judges named respondents do not desire to appear in the proceeding, they may so advise the clerk and all parties by letter, but the petition shall not thereby be taken as admitted.~~ If briefs or oral argument are required, the ~~The~~ clerk shall advise the parties ~~of the dates on which briefs are to be filed, if briefs are required, and of the date of oral argument~~. The proceeding shall be given preference over ordinary civil cases. If the respondents decline to defend the order of the district court and the court of appeals believes that the petition raises a substantial issue, that court shall take invite an amicus curiae, or the district court, to defend the order.

I think this text would do the trick. The last sentence of Rule 21(b) obviously could take a different form. I don't think the phraseology is important, so long as the upshot is to remove the judge as a litigant in the ordinary case.

One other longstanding issue, this time on FRAP Item 91-6. I really have nothing to say on the calculation of costs for briefs and appendices beyond what appears in *Martin v. United States*, 931 F.2d 453 (7th Cir. 1991). The real need is to do something to (a) recognize that computers have replaced typesetting, and (b) make the calculation as mechanical and simple as possible. The details are relatively unimportant.

All the best.

Sincerely,

Frank H. Easterbrook

cc: Hon. Robert E. Keeton
Prof. Carol Mooney

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

April 16, 1993

MEMORANDUM TO ADVISORY COMMITTEE ON APPELLATE RULES

SUBJECT: Action taken by the Advisory Committee on Bankruptcy Rules regarding uniform language on local rules and technical amendments

At its February 18-19 meeting, the Advisory Committee on Bankruptcy Rules reviewed proposals on the uniform numbering of local rules and authority to make technical amendments to the rules. The same proposals were sent to each advisory rules committee for consideration.

The Bankruptcy Rules Committee approved the proposed language on the uniform numbering of local rules. It also approved the proposed provision on the "procedure when there is no controlling law" with modifications. The committee recommended that the proposed language be revised by: (1) deleting the word "with" before "local rules", (2) deleting the word "statutes" after "federal" and inserting in lieu thereof the word "laws", and (3) deleting "of the district" after the words "local rules".

The Bankruptcy Rules Committee rejected language authorizing the Judicial Conference to make technical amendments to the rules. The committee rejected the proposal primarily because it believed that: (1) it was unnecessary, and (2) it would create a slippery slope that would lead to the issuance of substantive rules changes under the guise of technical changes. If the Standing Rules Committee determines that the proposal should go forward, however, the committee recommended in the alternative that all the language after the word "typography" be deleted.

John K. Rabiej

AGENDA II-E
Item 92-10
April 20-21, 1993

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

FROM: Carol Ann Mooney, Reporter

DATE: March 12, 1993

SUBJECT: Item 92-10, further amendment of Fed. R. App. P. 4(a)(4).

It's like a bad penny; despite all our best efforts 4(a)(4) apparently needs further amendment.

At the December 1992 meeting of the Standing Committee, the Advisory Committee on Bankruptcy Rules submitted for approval amendments to Bankruptcy Rule 8002. Those amendments parallel the proposed amendments to Fed. R. App. P. 4(a)(4). When reviewing the language in Bankruptcy Rule 8002, the Standing Committee questioned language appearing both in that rule and Rule 4(a)(4). As a consequence the Standing Committee asked the Advisory Committee on Appellate Rules to review the corresponding sentence of Rule 4(a)(4).

The proposed amendments to Rule 4(a)(4) are currently before the Supreme Court for its review. The text of the rule as submitted to the Supreme Court is attached to this memorandum. The sentence in question appears at lines 85 through 91.

The Advisory Committee is asked whether, at line 87, the rule should require a party to file "a notice, or amended notice, of appeal." I think that is an appropriate change.

At the Standing Committee's meeting, however, Judge Leavy suggested that no change is needed. He said that because the sentence applies only to appeals from "alteration or amendment of judgment" -- and not to appeals from the judgment -- it necessarily applies only to a party who has already filed a notice of appeal from the judgment. According to his argument, any party who had not previously filed an appeal would simply be appealing from the judgment. While I believe that Judge Leavy is correct, I support the suggested change because I think it will be less confusing. Am I correct? Is any amendment of the Committee Note needed?

Rule 4. Appeal as of Right - When Taken

(a) *Appeals in a Civil Cases.*-

(1) Except as provided in paragraph (a)(4) of this Rule, ~~I~~in a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by

Rule 3 ~~shall~~ must be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after such entry. If a notice of appeal is mistakenly filed in the court of appeals, the clerk of the court of appeals shall note thereon the date ~~on which it was~~ when the clerk received the notice and ~~transmit~~ send it to the clerk of the district court and ~~it shall be deemed~~ the notice will be treated as filed in the district court on the date so noted.

(2) ~~Except as provided in (a)(4) of this Rule 4, a~~ A notice of appeal filed after the ~~announcement of~~ court announces a decision or order but before the entry of

the judgment or order ~~shall be~~ is treated as filed ~~after such entry and on the day thereof~~ on the date of and after the entry.

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

(4) If any party makes a timely motion of a type specified immediately below, the time for appeal for all parties runs from the entry of the order disposing of the last such motion outstanding. This provision applies to a timely motion under the Federal Rules of Civil Procedure: ~~is filed in the district court by any party:~~

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

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

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

~~(iv)~~ (D) for attorney's fees under Rule 54 if a district court under Rule 58 extends the time for appeal;

(E) ~~under Rule 59~~ for a new trial under Rule 59; or

(F) for relief under Rule 60 if the motion is served within 10 days after the entry of judgment.

~~, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying~~

~~any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above.~~ A notice of appeal filed after announcement or entry of the judgment but before disposition of any of the above motions is ineffective to appeal from the judgment or order, or part thereof, specified in the notice of appeal, until the date of the entry of the order disposing of the last such motion outstanding. Appellate review of an order disposing of any of the above motions requires the party, in compliance with Appellate Rule 3(c), to amend a previously filed notice of appeal. A party intending to challenge an alteration or amendment of

the judgment shall file an amended notice of appeal within the time prescribed by this Rule 4 measured from the entry of the order disposing of the last such motion outstanding. No additional fees ~~shall~~ will be required for ~~such~~ filing an amended notice.

* * * * *

(b) *Appeals in a Criminal Cases.*- In a criminal case, a defendant shall file the notice of appeal ~~by a defendant shall be filed~~ in the district court within 10 days after the entry either of ~~(i)~~ the judgment or order appealed from, or ~~(ii)~~ of a notice of appeal by the Government. A notice of appeal filed after the announcement of a decision, sentence, or order--but before entry of the judgment or order--~~shall be~~ is treated as filed ~~after such entry and on the day thereof~~ on the

the 14-day period provided in paragraph (a)(3) of this Rule 4 for another party to file a notice of appeal runs from the date when the district court receives the first notice of appeal. In a criminal case in which a defendant files a notice of appeal in the manner provided in this subdivision (c), the 30-day period for the government to file its notice of appeal runs from the entry of the judgment or order appealed from or from the district court's receipt of the defendant's notice of appeal.

COMMITTEE NOTE

Note to Paragraph (a)(1). The amendment is intended to alert readers to the fact that paragraph (a)(4) extends the time for filing an appeal when certain posttrial motions are filed. The Committee hopes that awareness of the provisions of paragraph (a)(4) will prevent the filing of a notice of appeal when a posttrial tolling motion is pending.

Note to Paragraph (a)(2). The amendment treats a notice of appeal filed after the announcement of a decision or order, but before its formal entry, as if the notice had

been filed after entry. The amendment deletes the language that made paragraph (a)(2) inapplicable to a notice of appeal filed after announcement of the disposition of a posttrial motion enumerated in paragraph (a)(4) but before the entry of the order, see Acosta v. Louisiana Dep't of Health & Human Resources, 478 U.S. 251 (1986) (per curiam); Alerte v. McGinnis, 898 F.2d 69 (7th Cir. 1990). Because the amendment of paragraph (a)(4) recognizes all notices of appeal filed after announcement or entry of judgment-- even those that are filed while the posttrial motions enumerated in paragraph (a)(4) are pending-- the amendment of this paragraph is consistent with the amendment of paragraph (a)(4).

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

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

479 U.S. 930 (1986).

The amendment provides that a notice of appeal filed before the disposition of a specified posttrial motion will become effective upon disposition of the motion. A notice filed before the filing of one of the specified motions or after the filing of a motion but before disposition of the motion is, in effect, suspended until the motion is disposed of, whereupon, the previously filed notice effectively places jurisdiction in the court of appeals.

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

The amendment provides that a notice of appeal filed before the disposition of a posttrial tolling motion is sufficient to bring the underlying case, as well as any

orders specified in the original notice, to the court of appeals. If the judgment is altered upon disposition of a posttrial motion, however, and if a party wishes to appeal from the disposition of the motion, the party must amend the notice to so indicate. When a party files an amended notice, no additional fees are required because the notice is an amendment of the original and not a new notice of appeal.

Paragraph (a)(4) is also amended to include, among motions that extend the time for filing a notice of appeal, a Rule 60 motion that is served within 10 days after entry of judgment. This eliminates the difficulty of determining whether a posttrial motion made within 10 days after entry of a judgment is a Rule 59(e) motion, which tolls the time for filing an appeal, or a Rule 60 motion, which historically has not tolled the time. The amendment comports with the practice in several circuits of treating all motions to alter or amend judgments that are made within 10 days after entry of judgment as Rule 59(e) motions for purposes of Rule 4(a)(4). See, e.g., Finch v. City of Vernon, 845 F.2d 256 (11th Cir. 1988); Rados v. Celotex Corp., 809 F.2d 170 (2d Cir. 1986); Skagerberg v. Oklahoma, 797 F.2d 881 (10th Cir. 1986). To conform to a recent Supreme Court decision, however--Budinich v. Becton Dickinson and Co., 486 U.S. 196 (1988)--the amendment excludes motions for attorney's fees from the class of motions that extend the filing time unless a district court, acting under Rule 58, enters an order extending the time for appeal. This amendment is to be read in conjunction with the amendment of Fed. R.

Civ. P. 58.

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

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

motion, or within 10 days after the entry of judgment, whichever is later. The amendment also changes the language in the third sentence providing that an appeal may be taken within 10 days after the entry of an order denying the motion; the amendment says instead that an appeal may be taken within 10 days after the entry of an order disposing of the last such motion outstanding. (Emphasis added) The change recognizes that there may be multiple posttrial motions filed and that, although one or more motions may be granted in whole or in part, a defendant may still wish to pursue an appeal.

The amendment also states that a notice of appeal filed before the disposition of any of the posttrial tolling motions becomes effective upon disposition of the motions. In most circuits this language simply restates the current practice. See United States v. Cortes, 895 F.2d 1245 (9th Cir.), cert. denied, 495 U.S. 939 (1990). Two circuits, however, have questioned that practice in light of the language of the rule, see United States v. Gargano, 826 F.2d 610 (7th Cir. 1987), and United States v. Jones, 669 F.2d 559 (8th Cir. 1982), and the Committee wishes to clarify the rule. The amendment is consistent with the proposed amendment of Rule 4(a)(4).

Subdivision (b) is further amended in light of new Fed. R. Crim. P. 35(c), which authorizes a sentencing court to correct any arithmetical, technical, or other clear errors in sentencing within 7 days after imposing the sentence. The Committee believes that a sentencing court should be able to act under

Criminal Rule 35(c) even if a notice of appeal has already been filed; and that a notice of appeal should not be affected by the filing of a Rule 35(c) motion or by correction of a sentence under Rule 35(c).

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

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

AGENDA III-A
Item 86-23
April 20-21, 1993

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

FROM: Carol Ann Mooney

DATE: March 25, 1993

SUBJECT: Item 86-23, concerning the difficulty a prisoner may have filing a timely objection to a magistrate's report

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

The problem is the converse of the one addressed by the Committee in response to Houston v. Lack. Houston v. Lack 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 proposal is that an incarcerated person also does not have control over when mail is delivered to him or her -- a problem with incoming mail.

In a number of instances a party must act within a certain number of days after being served with a document.[1] The appellate rules provide that service may be personal or by mail. Fed. R. App. P. 25(c) states that "service by mail is complete on mailing." To compensate for the time the document may take to reach the party, Rule 26(c) provides:

> 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 added to the prescribed period.

Because it may actually take a paper more than three days to reach the intended party, the service by mail provisions may disadvantage a party with a right or obligation to respond within a limited period of time.

The disadvantage for an institutionalized person may be even greater. The time between depositing a paper in the mail and actual receipt of the paper by the intended party 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 necessary screening of 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, additional delay is likely. Extremely long delays occur, although not frequently, when a prisoner is transferred

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[1] *See* Fed. R. App. P. 5(b), 5.1(b), 6(b)(2)(ii), 10(b)(3), 10(c), 24(a), 27(a), 30(c), and 31(a).

without notice to the court or the serving party.

When the Committee discussed this item last October, it was recognized that amendment of the appellate rules could not cure the specific problem that prompted this suggestion -- timely objection to a magistrate judge's report -- because trial court rules are involved. There was, however, some sentiment that the Committee should try to address the general problem of service on institutionalized persons.

The amendments proposed in response to Houston v. Lack provide that a document is filed as soon as an institutionalized person, who is proceeding *pro se*, places the document in the institution's internal mail system. Corollary amendments responsive to the difficulty that prisoners have in receiving mail would require amending the rules so that service on an institutionalized person is not complete until the date of actual delivery to him or her.

An initial reaction to such an amendment might focus upon the uncertainty that such a rule would create. How would one know when an institutionalized person actually was served and, thus, when the responsive document must be filed?[2]

One possible response to the uncertainty problem is to note that the same problem is created by the Houston v. Lack amendments which provide that a document is filed when it is placed in the institutional mail system. In some institutions there will be records indicating the date the inmate deposited the mail in the system, in others there will not be such records. The Houston v. Lack amendments provide that timely filing may be shown by a notarized statement setting forth the date of deposit and stating that first-class postage was prepaid. *See* proposed amendments to Fed. R. App. P. 4(c) & 25(a). (Copies of those proposed amendments are attached to this memorandum.) If an affidavit is sufficient for determining whether a document is timely filed, the committee could determine that an affidavit reciting the date a document was received is sufficient to determine the timeliness of any responsive document.

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[2] When reviewing the FRAP rules in the course of preparing this memorandum, I noticed a provision in Rule 30 that had not previously caught my attention. Rule 30(b) requires an appellee to act within 10 days after receipt of the appellant's designation of the parts of the record if the appellee wants to include additional materials in the appendix. This provision requires action measured from the date of receipt of a document, and presumably raises the same sort of uncertainty problems as the current proposal.

The only other rule that measures the time for action from the date of receipt of a document is Rule 4(a)(6). That rule provides that if a party did not receive notice of the entry of judgment within twenty-one days of its entry, the party may file a motion in the district court to reopen the time for appeal. The motion must be filed within 7 days after receiving notice of the judgment or within 180 days after entry of the judgment, whichever is earlier. Because of the district court's involvement in the motion, there is a mechanism for determining the date of receipt and thus resolving any uncertainty.

Another possible response to the uncertainty problem is that the nature of the problem is different than the one considered in Houston v. Lack. The problem addressed in Houston v. Lack involved the timeliness of a jurisdictional document. In Houston v. Lack, the Supreme Court held that a *pro se* prisoner's notice of appeal is "filed" when it is delivered to prison authorities for mailing. At that point a prisoner has done everything that the prisoner can do to get the document to the court. The holding is particularly important because a court of appeals may not enlarge the time for filing a notice of appeal.[3]

In contrast, if an institutionalized person's receipt of a document is delayed so that it is impossible or impracticable to prepare a timely response, a court of appeals may entertain and, if appropriate, grant a motion to extend the time for responding. The level of uncertainty created by a rule providing that service upon an institutionalized person is complete only upon delivery is similar to the level of uncertainty created by a rule providing that a notice of appeal is filed upon deposit in an institutional mailing system. The need to tolerate the uncertainty created by a change in the service rule, however, may not be as great because an institutionalized person may seek an extension of time for responding to a document that is not received in a timely manner.

The argument that the uncertainty created by the change in the "filing" rule must be tolerated while the uncertainty created by the proposed change in the "service" rule need not be is undercut by actions taken by both the Supreme Court and the Advisory Committee on Appellate Rules. First, following its decision in Houston v. Lack the Supreme Court amended its rules to provide that whenever a document is being filed by an inmate confined in an institution, it is timely if it is deposited in the institution's internal mail system by the last day for filing. Sup. Ct. R. 29.2. The Supreme Court Rule is a general one that applies to the filing of non-jurisdictional documents, such as briefs. Second, the proposed changes to the FRAP rules concerning filing (the Houston v. Lack changes) apply to all documents that must be filed in the course of an appeal, including briefs, motions and other non-jurisdictional documents as to which the court has the authority to expand the time for filing if appropriate. Both the Supreme Court and the Advisory Committee on appellate rules have extended the principle enunciated in Houston v. Lack beyond the filing of notices of appeal.

The following draft rules amend the rules governing service upon inmates so that service is complete only upon receipt of the document by the inmate.

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[3] Fed. R. App. P. 26(b) does not permit a court to enlarge the time for filing a notice of appeals, a petition for allowance, or a petition for permission to appeal. The rule has statutory roots. *See, e.g.*, 28 U.S.C. § 2107 provides that in civil cases ". . . no appeal shall bring any judgment, order, or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within 30 days after the entry of such judgment, order or decree."

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

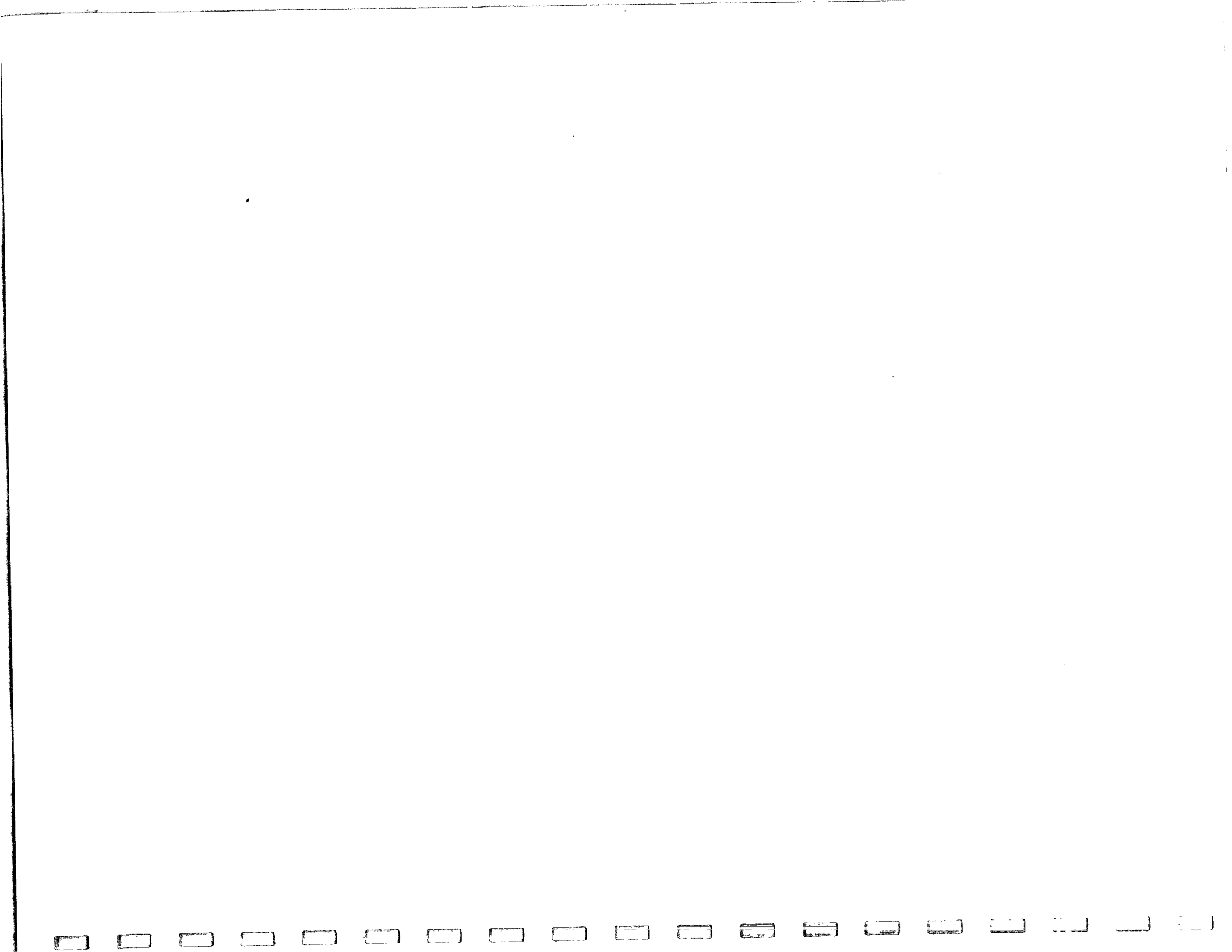
Subdivision (c). This amendment is a companion to the amendment to Rule 25(c). The amendment to Rule 25(c) states that service of a paper upon an inmate confined in an institution is not complete until the copy is delivered to the inmate. This amendment makes it clear that when a copy is mailed to an 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.

AGENDA III-B
Items 86-24 and 92-8
April 20-21, 1993

ORAL PRESENTATION



AGENDA III-C
Item 91-28
April 20-21, 1993

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

FROM: Carol Ann Mooney, Reporter

DATE: October 5, 1992

SUBJECT: 91-28, updating Rule 27

At the December 1991 meeting Mr. Kopp suggested that Rule 27 needs updating. Judge Ripple asked Mr. Kopp to put forward a proposal. The attached memorandum was prepared by Mr. Kopp.

MEMORANDUM CONCERNING
FEDERAL RULE OF APPELLATE PROCEDURE 27

Federal Rule of Appellate Procedure 27 concerns the filing of motions in the courts of appeals. The Rule addresses matters that are common to all motions, such as the service and filing of motions, the right to file a response, determination of motions for procedural orders, and the power of a single judge to decide motions. Otherwise, the Rule does not set forth any requirements for specific types of motions that may be filed, such as motions for an extension of time or motions for summary affirmance.

Each of the circuit courts of appeals has supplemented FRAP 27 with its own rules concerning motions practice. See attached copies. Some of the circuits have adopted extensive rules that regulate motions practice in substantial detail. Other circuits have added little to FRAP 27, while other circuits regulate their motions practice by unwritten rules.

Given the extensive local supplementation of FRAP 27 and the fact that Rule 27 is obsolete on its face in certain respects, it is time to consider a rather thorough amendment of the Rule. For example, FRAP 27 contemplates that motions may be supported by the filing of "briefs". That is not the current practice in any of the circuits. Similarly, FRAP 27 is silent about many issues that concern the format of motions and responses, such as maximum page limits and the types of print and binding that are required. This memorandum will address each of the areas that FRAP 27 could cover, and propose amendments in several of those areas.

A. Form of Motions.

The circuit rules state a number of different requirements with respect to the form of motions. Some of those requirements also can be found in FRAP 27, although FRAP 27 uses different terminology.

1. In Writing.

The D.C. Circuit's rules state that "[e]xcept where otherwise specifically provided by the Federal Rules of Appellate Procedure or by these Rules, and except for motions made in open court when opposing counsel is present, every motion or petition shall be in writing and signed by counsel of record or by the movant if not represented by counsel." D.C. Cir. Rule 7(a)(1). See also 11th Cir. Rule 27(a)(1) ("Motions must be made in writing with proof of service on all parties").

FRAP 27 does not expressly state whether motions must be filed in writing. The Rule implies such a requirement, however, by stating that "[u]nless another form is elsewhere prescribed by these rules, an application for an order or other relief shall be made by filing a motion for such order or relief with proof of service on all other parties."

FRAP 27 should be amended to state explicitly whether, and if so when, motions must be made in writing. The D.C. Circuit's rule provides a sound model to achieve this end, except that the D.C. Circuit rule should be amended to require service on all parties.

The D.C. Circuit rule also is sound in specifying that motions may be made orally in open court when opposing counsel is present. The rules should allow courts the flexibility to hear oral motions under such circumstances, and nothing in the D.C. Circuit rule prevents the panel from requiring an oral motion to be reduced to writing if it desires a written motion. Thus, we recommend adopting the D.C. Circuit's practice on this point, as modified to require proof of service.

2. Page Limits.

FRAP 27 does not establish page limits for motions and responses. The D.C. Circuit's rules limit motions to 20 pages and responses to motions to 10 pages, "except by permission or direction of the Court." D.C. Cir. Rule 7(a)(2). The Federal Circuit and the Second Circuit limit motions and responses to 10 double-spaced pages. See Fed. Cir. Rule 27(b); 2d Cir. Rule 27(a)(2)(b).

It seems anomalous that the FRAP sets page limitations for briefs (see FRAP 28) but not motions. A uniform FRAP concerning this subject also would eliminate the confusion of having to look to circuit rules for guidance concerning page limitations. Ten pages is too strict a rule, particularly when one considers that some motions, such as motions for a stay, can require substantial discussion of a case's merits. Twenty pages appears reasonable to us. Twenty pages should be the limit for a response as well, for the same reasons that responsive briefs have the same page limits as opening briefs under FRAP 28.

3. Format.

FRAP 27(d) states that "[a]ll papers relating to motions may be typewritten." The rules of several circuits are more specific in certain ways. D.C. Circuit Rule 7(a)(3) is the most elaborate of the circuit rules concerning this subject. It provides:

> (3) Format. Motions and petitions, responses thereto, and replies to responses shall be typewritten in pica non-proportional type so as to produce a clear black image on a single side of white, 8 1/2 x 11 inch paper. These submissions shall be double spaced, each page beginning not less than 1 1/4 inches from the top, with side margins of not less than 1 1/2 inches on each side. They shall be fastened at the top-left corner and shall not be backed.

The other circuit rules concerning this subject are generally consistent with the D.C. Circuit's rule, but less comprehensive. 2d Cir. Rule 27(a)(2)(b); 4th Cir. IOP 27.1; 5th Cir. IOP 27.5; 8th Cir. Rule 28A(c); Fed. Cir. Rule 27(a)(2).[1]

The D.C. Circuit rule is sound. For example, we see no justification for requiring backing on a motion. Therefore, the Committee should consider adopting the D.C. Circuit rule. The other circuit rules that address these issues are generally consistent with the D.C. Circuit rule, and a uniform rule would standardize practice in this area.

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[1] The D.C. Circuit is considering amending its Rule 7(a)(3) to delete the requirement that motions be typewritten "in pica nonproportional type" and to state that side margins must be not less than 1 inch (rather than 1 1/2 inch).

4. Proposed Order.

FRAP 27 states that a motion must "set forth the order or relief sought." This provision raises the question whether the moving party must provide a proposed order along with a motion, and the FRAP rule does not provide a clear answer.

The two circuits that have addressed this subject both have adopted rules which explicitly state that moving parties need not provide a proposed order. See 4th Cir. IOP 27.4; 9th Cir. Rule 27-1. This seems to be the correct position on this issue, since there is no apparent need for a proposed order in federal motions practice, and since such a requirement would be anomalous in that area of practice. The Committee should consider amending FRAP 27 to reflect this change.

The confusion in the existing Rule is created by the statement that the movant must "set forth the order or relief sought." Especially in the context of the sentence in which it is used in FRAP 27, the phrase "set forth" can be read to mean "provide," as in provide a proposed order. Thus, one suggestion would be merely to delete the words "set forth" and to make other conforming changes. As revised, the relevant phrase in the Rule would read: "The motion * * * shall state with particularity the grounds on which it is based and the relief sought."

5. Number of Copies.

FRAP 27(d) states that "[t]hree copies shall be filed with the original, but the court may require that additional copies be furnished."

Several of the circuits have adopted rules concerning the number of copies of motions and responses that must be filed. Two circuits require an original plus four copies. D.C. Cir. Rule 7(b); 9th Cir. Rule 27-1. Two other circuits require an original plus three copies for all motions to be decided by the court, and an original plus one copy for motions to be considered by a single judge or by the Clerk. 5th Cir. IOP 27.5; 11th Cir. Rule 27-1(a)(2). One circuit requires an original plus one copy for all motions to be decided by the clerk, and an original plus three copies of all other motions. 8th Cir. Rule 27A(b).

The Committee could rather easily standardize the practice among the circuits in this area by amending FRAP 27 to require an original plus four copies for all motions. Requiring four copies would meet the most demanding circuit rules as they now exist and would not substantially inconvenience the parties or the courts.

We recommend requiring an original plus four copies for all motions, including those that may be disposed of by the clerk or by a single judge. The clerk can easily dispose of extra copies of motions that are assigned for disposition by the clerk or by a single judge, and we believe the benefit of having a single rule outweighs the burden of having to file copies that turn out to be unnecessary. Our proposal also would aid in the disposition of motions which the movant believes should be assigned to the clerk or a single judge, but which the court assigns to a panel. Under our proposal, the panel would have the number of copies necessary to decide the motion in hand when the motion is filed.

6. Supporting Papers.

FRAP 27 states that "[t]he motion shall contain or be accompanied by any matter required by a specific provision of these rules governing such a motion," and that "[i]f a motion is supported by briefs, affidavits or other papers, they shall be served and filed with the motion."

The Second Circuit's rules add to Rule 27 by specifying that affidavits should contain factual information only; that exhibits attached should be only those necessary for the determination of the motion, and that the moving party shall include a copy of the lower court opinion or agency decision as a separately identified exhibit in all motions for substantive relief. See 2d Cir. Rule 27(a)(2).

Although the Second Circuit's additions seem self-evident, we recommend including them in FRAP 27 because there is no strong reason not to do so, and because they will help guide the parties in deciding which materials to provide in support of motions and how to prepare those documents. If the Committee decides to the contrary, however, it also should consider preempting the Second Circuit's additions in order to achieve uniformity.

7. Briefs.

FRAP 27 states that "[i]f a motion is supported by briefs, affidavits or other papers, they shall be served and filed with the motion." This language appears to contemplate that parties may file briefs to support motions. That is not the practice in any of the circuits, and it would be a very bad idea indeed. So,

the rule should be amended to delete the word briefs. Such an amendment would continue to allow the parties to submit briefs that were filed below as exhibits, since such filings could come under the term "other papers."

8. Miscellaneous Form Requirements.

Several of the circuits have adopted additional requirements of form for motions that do not appear to merit consideration for inclusion in FRAP. Some of the requirements are as follows:

- The D.C. Circuit requires the movant to state whether oral argument has been scheduled in the case and, if so, to identify when. D.C. Cir. Rule 7(a)(4).

- The Eleventh Circuit requires that a motion "contain a brief recitation of prior actions of this or any other court or judge to which the motion, or a substantially similar or related application for relief, has been made." 11th Cir. Rule 27-1(a)(1).

- Two Circuits require the submission of a certificate of interested persons. See 11th Cir. Rule 27(a)(1); Fed. Cir. Rule 27(a).

- Two Circuits require all motions to state whether all opposing counsel have been informed of the intended filing of the motion and whether opposing counsel consent to the motion. 4th Cir. Rule 27(b); Fed. Cir. Rule 27(a)(1).

- The Second Circuit requires the moving party to file a notice of motion form, in which the moving party must supply information about the motion and the case. See 2d Cir. Rule 27(a) & appendix (sample form).

Since these miscellaneous items are required by only a small minority of the circuits, we have recommended against including them in FRAP 27. If the Committee decides there is substantial need for one or more of the requirements, however, the Committee should consider including the requirement in FRAP 27 in order to standardize the practice among the circuits.

B. Response to a Motion.

FRAP 27 states that "[a]ny party may file a response in opposition to a motion other than one for a procedural order [for which see subdivision (b)] within 7 days after service of the motion, but motions authorized by Rules 8, 9, 18 and 41 may be acted upon after reasonable notice, and the court may shorten or extend the time for responding to any motion."

The D.C. Circuit's rules specify additionally that a response which seeks affirmative relief must so state, and that such a response may be filed in one document. D.C. Circuit Rule 7(d). The D.C. Circuit's addition seems reasonable, and the Committee should consider adopting it.

In the Fourth Circuit, parties need not file a response to a motion until requested to do so by the Court. 4th Cir. IOP 27.2. This practice is consistent with FRAP 27, since the Federal Rule permits, but does not require, a response to a motion. Thus, the Committee could consider adopting this clarification, or it could reasonably decide that FRAP 27 is clear enough as it exists.

C. Reply to a Response.

FRAP 27 does not state whether parties may file a reply to a response to a motion. The D.C. Circuit's rule concerning replies states:

> (e) Reply to Response. Any reply to a response to a motion or petition, unless the court enlarges or shortens the time, must be filed within three days after service of the response, except when the response includes a motion for affirmative relief; in the latter case, the reply may be joined in the same pleading with a response to the motion for affirmative relief and that pleading may be filed within seven days of service of the motion for affirmative relief.

> The caption of this pleading shall denote clearly that both the reply to the response and the response to the affirmative motion are included in that pleading. A reply shall not reargue propositions presented in the motion or petition, or present matters which are not strictly in reply to the response. After a party files a reply, no further pleading pertaining to the motion or petition may be filed by that party except upon leave of this Court.

D.C. Cir. Rule 7(e). The Fourth Circuit rules state that:

> Any party filing a motion may file a reply to the opposing party's response without seeking leave of Court. No standard time period has been set by the Court for filing a reply, but if counsel wishes to file a reply it should do so as soon as practicable after the filing of the response. The Court will not ordinarily await the filing of a reply before reviewing a motion and response.

4th Cir. IOP 27.3. The Federal Circuit requires the parties to file a motion for leave to file a reply. Fed. Cir. Prac. Note.

The Committee should amend FRAP 27 to provide for the filing of a reply to a motion, for the same reasons FRAP 28 provides for the filing of a reply brief. Moreover, such an amendment would reflect the reality that lawyers will inevitably file replies to responses to motions, whether specified in the rules or not. The D.C. Circuit's rule is comprehensive, and provides a sound model.

D. Preemption of Local Rules.

Given the multiplicity of local rules that now exist concerning the format of motions, the Committee should consider amending FRAP 27 by specifically providing that the Rule preempts local rules concerning the subject. Without such a provision, it will remain unclear whether the circuits are permitted to enforce format rules that are different than what FRAP 27 provides.

E. Oral Argument.

FRAP 27 does not state whether the parties have a right to oral argument with respect to motions. The seven circuits which have addressed this matter in their rules are unanimous that oral argument of motions will not be held unless the court orders it. 1st Cir. Rule 27; 3d Cir. Rule 11; 4th Cir. Rule 27(a); 5th Cir. Rule 27.3; 7th Cir. Rule 27; 9th Cir. Rule 27-6; 11th Cir. Rule 27(e). This is a useful clarification, and the Committee should consider amending FRAP 27 to so provide.

F. Clerk and Single Judge Motions.

FRAP 27(b) states that, pursuant to court rule, procedural orders may be disposed of by the clerk; FRAP 27(c) states that a single judge may dispose of any motion. A number of the circuits have elaborated on these rules by specifying the types of motions that may be disposed of by the clerk or by a single judge. There is no apparent need for a uniform federal rule in this area, and these matters seem to be the type that are best left to the local circuits.

Rule 27. Motions

(a) Form and Content of Motions.

(1) In Writing. Except where otherwise specifically provided by these Rules, and except for motions made in open court when opposing counsel is present, every motion shall be in writing and signed by counsel of record or by the movant if not represented by counsel, with proof of service on all parties.

(2) Accompanying Documents. The motion shall contain or be accompanied by any matter required by any relevant provision of these rules, and shall state with particularity the grounds upon which the motion is based and the relief sought. If a motion is supported by affidavits or other papers, they shall be served and filed with the motion.

(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 the determination of the motion.

(3) Page Limits. Except by permission or direction of the court, motions and responses to motions shall not exceed twenty pages. A reply to a response shall not exceed seven pages.

(4) Format. Motions, responses thereto, and replies to responses shall be typewritten in pica non-proportional type so as to produce a clear black image on a single side of white, 8 1/2 by 11 inch paper. These submissions shall be double-spaced, each page beginning not less than 1 1/4 inches from the top, with side margins of not less than 1 1/4 inches on each side. They shall be fastened at the top-left corner and shall not be backed.

(5) Response. Any party may file a response in opposition to a motion other than one for a procedural order [for which see subdivision (b)] within 7 days after service of the motion, but the court may shorten or extend the time for responding to any motion, and motions authorized by Rules 8, 9, 18, and 41 may be acted upon after reasonable notice. When a party opposing a motion also seeks affirmative relief, that party shall submit with the response a motion so stating. The response and motion for affirmative relief may be included within the same pleading; the caption of that pleading, however, shall denote clearly that the response includes the motion.

(6) Reply to Response. The moving party may file a reply to a response. A reply must be filed within 3 days after service of the response, unless the court shortens or extends the time, and unless the response includes a motion for affirmative relief. In the latter case, the reply may be joined in the same pleading with a response to the motion for affirmative relief and that pleading may be filed within 7 days of service of the motion for affirmative relief. The caption of that pleading shall denote

clearly that both the reply to the response and the response to the affirmative motion are included in that pleading. A reply shall not reargue propositions presented in the motion or present matters which are not strictly in reply to the response.

(b) Determination of Motions for Procedural Orders. Notwithstanding the provisions of (a) of this Rule 27 as to motions generally, motions for procedural orders, including any motion under Rule 26(b), may be acted upon at any time, without awaiting a response thereto, and pursuant to rule or order of the court, motions for specified types of procedural orders may be disposed of by the clerk. Any party adversely affected by such action may, by application to the court, request reconsideration, vacation or modification of such action. A timely opposition to a motion that is filed after the motion is granted in whole or in part shall be treated as a motion to vacate the order granting the motion, unless the opposition is withdrawn.

(c) Power of a Single Judge to Entertain Motions. In addition to the authority expressly conferred by these rules or by law, a single judge of a court of appeals may entertain and may grant or deny any request for relief which under these rules may properly be sought by motion, except that a single judge may not dismiss or otherwise determine an appeal or other proceeding, and except that a court of appeals may provide by order or rule that any motion or class of motions must be acted upon by the court. The action of a single judge may be reviewed by the court.

(d) Number of Copies. Four copies of every motion, response, and reply shall be filed with the original. The number of copies may be increased or decreased by order but not by rule, practice, or internal operating procedure.

(e) Oral Argument. All motions will be decided without oral argument unless the court orders otherwise.

(f) Preemption of Local Rules. These requirements of this Rule concerning the form and content of motions, the filing of responses and replies, the number of copies that must be filed, and oral argument may not be supplemented, subtracted from, or altered by local rule, practice, or internal operating procedure. No circuit may require any additional filing or supporting paper (such as a notice of motion) beyond what this Rule requires.

AGENDA III-D
Item 92-3
April 20-21, 1993

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

FROM: Carol Ann Mooney, Reporter

DATE: October 5, 1992

SUBJECT: 92-3, conflict between Rule 4(b) and 18 U.S.C. § 3731

At the April 1992 meeting Judge Logan noted that there is a conflict between Rule 4(b) and 18 U.S.C. § 3731.

Section 3731 governs appeals by the United States in criminal cases. It provides in pertinent part:

> The appeal in all such cases shall be taken within thirty days after the decision, judgment or order has been rendered and shall be diligently prosecuted.

Rule 4(b) states:

> . . . When an appeal by the government is authorized by statute, the notice of appeal shall be filed in the district court within 30 days after the entry of (i) the judgment or order appealed from or (ii) a notice of appeal by any defendant.

The provision allowing the government to file a notice of appeal within 30 days after a notice of appeal is filed by a defendant extends the time for the government to file beyond the 30 day limit set by section 3731.

Amendment of the statute to conform to the rule may not be necessary. 28 U.S.C. § 2072(b) provides:

> Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

However, amendment could avoid confusion and needless litigation.

U.S. Department of Justice

Office of the Solicitor General

The Solicitor General

Washington, DC 20530

October 15, 1992

Honorable Kenneth F. Ripple
208 Federal Building
204 South Main Street
South Bend, Indiana 46601

Re: Response to Request for Department of Justice's Views Concerning Fed. R. App. P. 4(b) and 18 U.S.C. § 3731

Dear Judge Ripple:

At the Appellate Rules Committee's April 1992 meeting, the Committee raised the question of whether there is a conflict between Fed. R. App. P. 4(b) and 18 U.S.C. § 3731 which requires that Rule 4(b) be amended.[1] Section 3731 requires the government to appeal within thirty days of a court's judgment in certain circumstances.[2] Rule 4(b), by contrast, permits the government to appeal not only within thirty days of the court's judgment or order, but also within thirty days of the filing of a notice of appeal by any defendant. Congress has also provided by statute that "laws in conflict with such rules shall be of no further

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1 Section 3731 reads, in relevant part: "The appeal in all such cases shall be taken within thirty days after the decision, judgment or order has been rendered * * *."

Rule 4(b) provides that "[w]hen an appeal by the government is authorized by statute, the notice of appeal shall be filed in the district court within 30 days after the entry of (i) the judgment or order appealed from or (ii) a notice of appeal by any defendant."

2 Section 3731 pertains to a ruling by a court in a criminal case (i) dismissing an indictment or information, (ii) granting a new trial after verdict or judgment as to any one or more counts, (iii) suppressing or excluding evidence, (iv) requiring the return of seized property prior to a verdict, (v) releasing a person charged with or convicted of an offense, or (vi) denying a motion for revocation of, or modification of the conditions of, a decision or order granting release.

force or effect," and that the Federal Rules shall not affect "any substantive right." 28 U.S.C § 2072(b).[3]

The Committee also discussed a possible amendment to Rule 4(b) that would limit the Rule to appeals from final judgments (as opposed to interlocutory orders).[4]

The Committee deferred consideration of these matters and requested the Department of Justice's views. In response to that request, I have consulted the Department of Justice's Criminal Division and other interested offices. For the reasons outlined below, my recommendation is that the Committee take no immediate action on this subject.

The Tenth Circuit recently addressed the relationship between 18 U.S.C. § 3731, Rule 4(b), and 28 U.S.C. § 2072(b) in United States v. Sasser, 971 F.2d 470 (10th Cir. Nos. 91-6066, 91-6111, July 13, 1992). The court ruled that it lacked jurisdiction over the government's cross-appeal of the district court's dismissal of one count of the indictment, where the notice of appeal was filed more than thirty days after the dismissal but within thirty days of the defendant's notice of appeal. Section 3731's thirty day notice of appeal period, the court held, is a mandatory prerequisite to the existence of the government's appeal authority. Relying on Fed. R. App. P. 1(b),[5] the court observed that "in case of a conflict between a jurisdictional statute and the Rules of Appellate Procedure, the statute controls." Slip op. at 6. I decided not to seek further review in Sasser.

The question of when and to what extent the Federal Rules of Appellate Procedure may preempt time limits prescribed by statute is a difficult and intricate problem, with good arguments to be made on both sides. The issue implicates the age-old debate ove

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3 28 U.S.C. § 2072(b) reads: "Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect."

4 The proposal would insert "after entry of judgment" following "When an appeal by the government." The revised rul would read: "When an appeal by the government after entry of judgment is authorized by statute, the notice of appeal shall filed in the district court within 30 days after the entry of the judgment or order appealed from or (ii) a notice of appeal any defendant."

5 Rule 1(b) provides: "These rules shall not be construed to extend or limit the jurisdiction of the courts o appeals as established by law."

when rules qualify as procedural and when they affect substantive rights and the subject matter jurisdiction of the courts. Compare 28 U.S.C. § 2072(a), 28 U.S.C. § 2072(b), and Fed. R. App. P. 1(b). In addition to Sasser, see generally Hanna v. Plumer, 380 U.S. 460 (1965); Stoot v. Fluor Drilling Servs., Inc., 851 F.2d 1514, 1517 (5th Cir. 1988) ("the time limits set by Fed.R.App.Pro. 4(a)(1) have superceded the periods fixed by [28 U.S.C.] § 2107").

Although we thus recognize that the relationship between section 3731, Rule 4(b), and 28 U.S.C. § 2072(b) is intricate, we recommend that the Committee not address the issue at the present time.

First, it is the general practice of the United States to file notices of appeal authorized by section 3731 within thirty days of the judgment or order, and not to rely upon the extended time frame offered by Rule 4(b). Consequently, the Sasser question will recur infrequently and only in the unusual case of an unintentional misstep by government counsel. Thus, there is little practical need for the Committee to address this issue.

Second, the Department of Justice believes that the Committee's deliberations in this area would be more fully informed if it awaits further percolation of this issue in the courts" (assuming that the Sasser issue ever arises again).

If the Committee disagrees with our recommendation and decides to address the Sasser issue by rule, we suggest that the Committee follow one of two courses of action. First, the Committee could amend Rule 4(b) by adding ", unless a shorter time for appeal is set by the authorizing statute" after "* * * (ii) a notice of appeal by any defendant." Such language would expressly recognize section 3731's primacy, while retaining Rule 4(b)'s time limitations for those appeals where the statute is silent on the time in which to file an appeal (such as sentencing appeals, 18 U.S.C. § 3742).

Second, the Committee could leave the language of Rule 4(b) unchanged and just add a note to the commentary indicating that the matter has been litigated and alerting counsel to the Sasser decision.

Thank you for the opportunity to comment on this matter.

Sincerely,

KENNETH W. STARR
Solicitor General

AGENDA III-E
Item 92-4
April 20-21, 1993

THE FEDERAL JUDICIAL CENTER
One Columbus Circle, N.E.
WASHINGTON, D.C. 20002

RESEARCH DIVISION

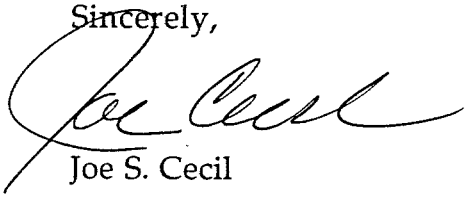
Writer's Direct Dial Number:
202-273-4070
FAX 202- 273-4021

April 8, 1993

TO: Members of the Advisory Committee on Appellate Rules

Judge Kenneth F. Ripple asked that we send the enclosed materials regarding en banc procedures.

Sincerely,



Joe S. Cecil

Enclosures

THE FEDERAL JUDICIAL CENTER
Federal Judiciary Building
1 Columbus Circle, N.E.
WASHINGTON, D.C. 20002

RESEARCH DIVISION

Writer's Direct Dial Number:
202 273-4070

April 8, 1993

The 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:

We are writing in response to your request for information regarding en banc and related procedures in the federal courts of appeals. This material was requested to aid the Advisory Committee on Appellate Rules in considering agenda item 92-4, a proposed revision of the standards for granting an rehearing en banc under rule 35 of the Federal Rules of Appellate Procedure.

This letter provides information from three sources: (1) a recent FJC survey of appellate judges' attitudes and opinions concerning the problems confronting the federal courts and solutions to those problems; (2) research staff review of the extent to which local rules and operating procedures recognize inter-circuit conflict as grounds for a rehearing en banc; and, (3) research staff compilation of procedures short of en banc to avert inter-circuit conflict and to maintain intra-circuit consistency.

Opinions of Appellate Court Judges Regarding Inter-Circuit Conflict

In a recent FJC survey of appellate judges, few respondents considered inter-circuit conflict a "large" problem, while most said intercircuit conflict is a "small" problem or no problem at all.[1] The survey presented judges with a list of 21 possible problems in the federal courts, including "Difficulty discerning national law due to inconsistencies between or among circuits". Inconsistencies in law between or among circuits was identified as "not at all" a problem by 16% of the appellate judges, a "small" problem by 42%, a

[1]As part of the Center's study on alternative structures for the courts of appeals and in support of the Judicial Conference Committee on Long Range Planning, in October 1992 the Center conducted a mail survey of all federal judges on the future of the federal judicial system. Seventy-five percent of appellate judges responded to the survey.

"moderate" problem by 30%, and a "large" problem by 5%. None of the judges regarded inter-circuit conflict as a "grave" problem.

When presented with a list of special procedures to avert or resolve inconsistency in the law, slightly more than half of the judges indicated "strong" or "moderate" support for the use of "en banc review to avert inter-circuit conflict, as well as to maintain consistency of decisions within the circuit" (25% indicated strong support, 32% indicated moderate support). Approximately 20% of the judges opposed this practice. The survey revealed little support for other structural changes for resolving inter-conflicts, such as the creation of a new court or inter-circuit tribunal. The survey did not ask judges if the standard for en banc review should be expanded to explicitly acknowledge inter-circuit conflict as an independent basis for seeking en banc review.

When appellate judges gathered for the 1993 National Workshop for Judges of the U.S. Courts of Appeals, it became clear that for most judges, the problem of inter-circuit conflict paled in comparison with other problems afflicting the appellate judicial system, particularly the volume of cases. In one discussion group of about 20 judges, the participants focused as requested on possible ways of addressing the problem of inter-circuit conflict, until one judge finally asked "Why are we talking about this? Conflict is not the problem, volume is." The group took a vote, overwhelmingly agreed that inter-circuit conflict is not a major problem, and moved on to other structural issues. Other groups reported similar opinions.

Role of Inter-Circuit Conflict in Local Rules and Operating Procedures

We reviewed the federal appellate court rules and practices and found that only four appellate courts -- the Ninth, Seventh, D.C. and Fourth Circuit Courts of Appeals -- explicitly acknowledge the existence of an inter-circuit conflict as a basis for a petition for rehearing or suggestion for rehearing en banc.[2]

Ninth Circuit: Presently, local rule 35-1 indicates:

> "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 rehearing en banc.".

The Executive Committee of the Ninth Circuit Court of Appeals may reconsider the appropriateness of this standard when it reviews the en banc procedure in the near future.

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[2]Inter-circuit conflicts that are persistent and disruptive may meet the "exceptional importance" standard for rehearing en banc under F.R.A.P. 35. We have included only local rules that recognize inter-circuit conflict as an independent basis for en banc, or explicitly note inter-circuit conflicts as a means of demonstrating that the "exceptional importance" standard has been met.

This local rule has apparently had little effect. Professor Arthur Hellman examined memoranda exchanged by judges in 160 cases from the Ninth Circuit Court of Appeals in which a judge called for a vote on rehearing en banc between 1981 and 1986. Professor Hellman does not mention inter-circuit conflict as one of the several categories of reasons judges offered for urging rehearing. He mentions only two cases with published dissents from the denial of en banc rehearing in which the dissenting judges pointed out that the panel's decision had created a conflict with another circuit. In both cases rehearing was denied and the cases were reviewed by the Supreme Court.[3]

Seventh Circuit: The existence of an inter-circuit conflict is regarded as an alternative ground for suggesting that an appeal be heard en banc. Local rule 40(c) states:

> "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." (emphasis added)

District of Columbia Circuit: Existence of an inter-circuit conflict is not an independent ground for granting rehearing en banc, although such a conflict may be considered as part of an argument that the panel decision is in error and requires reconsideration. In setting forth reasons why a case meets the "exceptional importance" standard of F.R.A.P. 35, local rule 15(a)(3) instructs parties to indicate, 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." (emphasis added)

Fourth Circuit: Existence of an inter-circuit conflict is a basis for a suggestion for rehearing en banc if the conflict is not explicitly addressed by the panel decision. According to I.O.P. 40.5(iii), among the appropriate grounds for a petition for rehearing is:

> "the opinion is in conflict with another Court of Appeals and the conflict is not addressed in the opinion." (emphasis added)

Alternatives to Empaneling a Full En Banc Court

We have recently completed a compilation of the appellate courts' case management procedures, including procedures for maintaining inter-circuit

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[3]Arthur D. Hellman, *Maintaining Consistency in the Law of the Large Circuit*, in RESTRUCTURING JUSTICE: THE INNOVATIONS OF THE NINTH CIRCUIT AND THE FUTURE OF THE FEDERAL COURTS, 75, n. 46 (Arthur D. Hellman, ed., 1990).

and intra-circuit consistency. The courts of appeals employ a variety of procedures, both formal and informal, as a means of limiting inter-circuit and intra-circuit conflict short of convening the court en banc. These procedures can be divided into four types of activities. In order of their prevalence in the courts of appeals, they are: Extending an opportunity for reconsideration by the original panel prior to considering the suggestion for en banc, circulating opinions to all judges on the court prior to publication; placing cases raising similar issues before the same panel; and employing a limited en banc with less than the full membership of the active judges.

Opportunity for Reconsideration by Panel: All federal courts of appeals interpret a suggestion for rehearing en banc as a petition for reconsideration by the original panel. Most courts note this practice in a local rule or operating procedure. (These are cited in the accompanying tables.) Other courts employ such a procedure on an informal basis.

Circulation of Opinions Prior to Publication: Nine courts of appeals (D.C., First, Second, Third, Fourth, Fifth, Sixth, Seventh, and Tenth Circuits) circulate some or all of their opinions to the active judges on the court prior to publication. Typically opinions are distributed one week or so before release for publication and judges not on the panel are asked to note conflicts with existing circuit law or other issues that require clarification. In the Fifth, Sixth, and Seventh Circuits the authoring judge is asked to call attention in the letter of transmittal to the fact that the opinion has initiated or continues a conflict with one or more circuits.

Several of the courts that circulate opinions (D.C., First, Seventh Circuits) have adapted the prepublication review to include a footnote in panel decision that resolve an apparent conflict between two prior decisions of the court noting that the resolution has been separately considered and approved by the full court, and thus constitutes the law of the circuit. This practice is sometime referred to as an "Irons Footnote" in recognition of an early case that employed this procedure. (See Irons v. Diamond, 670 F.2d 265, 268 n. 11 (D. C. Cir. 1981).)

Placing Cases Raising Similar Issues Before the Same Panel: Two courts of appeals, the First and Ninth Circuits, examine the issues in pending appeals and attempt to place cases raising similar issues before the same panel as a means of limiting intra-circuit conflict. In the Ninth Circuit identification of issues on appeal is part of an extensive inventory process that staff attorneys conduct for every case that is briefed.

En Banc of Fewer Than All Active Judges: The Ninth Circuit Court of Appeals employs a "limited en banc" procedure in which eleven judges -- ten randomly-selected active judges and the chief judge -- conduct en banc hearings on behalf of the entire court. Notwithstanding the provision for random selection of judges, if a judge is not drawn on any of three successive

en banc courts, that judge's name is placed automatically on the next en banc court.

Please let us know if you require additional information on any of these practices or procedures.

Sincerely,

Joe S. Cecil

Laural Hooper

cc: Professor Carol Ann Mooney, Reporter
Advisory Committee on Appellate Rules

In Banc Consideration in the Federal Courts of Appeals:

Tables Comparing Local Rules and Internal Operating Procedures

Pamela Coukos
and
Laural Hooper

April 8, 1993

The following tables show areas of variation among the local rules of the Federal Courts of Appeals for in banc consideration.[1] They do not include provisions governing timing of submissions or other requirements of form. The information was compiled from each court's published local rules and internal operating procedures only, without any examination of the interpretation or application of these rules through case law.[2]

I. WHEN IN BANC CONSIDERATION IS APPROPRIATE

The first table examines how the courts determine whether in banc consideration is appropriate, including the published standards each court uses in weighing a grant of a hearing or rehearing in banc. Some rely on the standard enunciated in FRAP 35, some refer to the Federal Rules standard and include further elaboration, and others only state a local standard. Most courts use the same standard for determining whether a case should be heard originally in banc as they use to grant rehearing in banc. (See Table III for the two courts that use two different standards.) The language does vary, but all the rules basically restrict in banc consideration to resolving conflicting precedent or resolving extremely important legal issues.

The courts treat the question of conflicting precedent differently, either in the standard enunciated for granting rehearing in banc or in the required forms or statements by counsel. The courts in the First, Third, Fifth, Sixth, Eighth, Tenth, Eleventh circuits state that in banc rehearing is merited when a decision conflicts with decisions of the

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[1] The circuits are split in referring to this procedure as "in banc" or "en banc." The Federal Rules of Appellate Procedure and 6 circuits (1st, 2d, 3d, 4th, 7th and the Federal Circuit) use the "in" spelling, while the remainder (DC, 5th, 6th , 8th, 9th, 10th and 11th) use the "en" spelling. This paper defers to the FRAP delineation.

[2] Sources used for this compilation include: 28 U.S.C.A. Rules, United States Courts of Appeals Rules (West, 1992); FEDERAL LOCAL COURT RULES (Pike and Fischer, Inc., Eds., 1992); FEDERAL CIVIL JUDICIAL PROCEDURE AND RULES (West, 1991); THE COMMITTEE ON FEDERAL COURTS OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, APPEALS TO THE SECOND CIRCUIT (6th Edition, 1988).

local court of appeals (i.e., intra-circuit conflict) or the U.S. Supreme Court. The D.C. and Seventh Circuits also include inter-circuit conflicts. The standard in the Ninth Circuit mentions only a "direct conflict with another court of appeals" and no other standard for evaluating conflicting precedent. In the Fourth Circuit the existence of an inter-circuit conflict is a basis for a suggestion for rehearing en banc if the conflict is not explicitly addressed by the panel decision. The Second Circuit's rules do not discuss conflicting precedents.

A few courts explicitly state that questions of interpreting state law or misapplying existing law do not justify in banc procedures. Some courts require counsel to specifically state the conflicting precedent or important question on a special form or in a special section of the brief or motion. A number of courts include in their rules sanctions for frivolous suggestions of in banc consideration. Some courts explicitly permit in banc procedures for motions or other "interim matters," some explicitly prohibit it, and the remainder do not mention it specifically.

	Standard for Granting (Re)hearing In Banc	Use of Required Forms or Statements	Sanctions Available for "Frivolous" Suggestion?	In Banc Procedure Permitted for Motions & "Interim Matters?"
FRAP	Full court needed to "secure or maintain uniformity" OR "a question of exceptional importance" *FRAP 35(a)*	-----[3]	-----	-----
D.C. Cir.	FRAP	Requires separate introduction section giving reason(s) why case is important OR listing Supreme Court, DC Cir, or any other circuit case(s) in conflict *D.C. Cir.R. 15(3)*	$250 sanction available for "meritless" petitions for rehearing. No indication whether this also applies to suggestions for rehearing in banc. *IOP XIII.B.1*	-----

[3] The dashed line indicates the rule made no mention of the provision. One can reasonably infer either a "no" answer to the question or a deference to FRAP 35 where appropriate.

	Standard for Granting (Re)hearing In Banc	Use of Required Forms or Statements	Sanctions Available for "Frivolous" Suggestion?	In Banc Procedure Permitted for Motions & "Interim Matters?"
1st Cir.	FRAP	Required statements by counsel; must cite conflicting Supreme Court or 1st Circuit case(s) or state important question. *1st Cir.R. 35.1*	$250 sanction. May be personally assessed to counsel. *1st Cir.R. 35.2*	-----
2d Cir.	FRAP	-----	$250 sanction available for "meritless" petitions for rehearing. No indication whether this also applies to suggestions for rehearing in banc. *App. to 2d Cir., p. 51*[4]	Court will accept a suggestion for rehearing in banc of a motion previously ruled on by a panel. *2d Cir.R. 27(i)*

[4] The Second Circuit has not published Internal Operating Procedures, but considers a publication of the Association of the Bar of the City of New York a statement of the operating procedures of the court. *See* THE COMMITTEE ON FEDERAL COURTS OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, APPEALS TO THE SECOND CIRCUIT (6th Edition, 1988).

3d Cir.	FRAP; application of law to facts or questions of state law not considered; in banc required to overrule prior published panel decision. *IOP 9.1, 9.3*[5]	Required statements by counsel; must cite conflicting Supreme Court or 3d Circuit case(s) or state important question. *3d Cir.R. 22*	-----	A majority of Standing Motion Panel may refer a decision to the court in banc. *IOP 10.3.3*

[5]A grant of an original hearing in banc is determined under a different standard than a grant of rehearing in banc: only when the case is controlled by a prior court decision which should be reconsidered & the case is of "immediate importance."*IOP 9.2*

	Standard for Granting (Re)hearing In Banc	Use of Required Forms or Statements	Sanctions Available for "Frivolous" Suggestion?	In Banc Procedure Permitted for Motions & "Interim Matters?"
4th Cir.	FRAP; a material factual or legal matter was overlooked in the decision; a change in the law occurred after the case was submitted and was overlooked by the panel; the opinion is in conflict with another decision of the Court or of another court of appeals and the conflict is not addressed in the opinion. *IOP 40.5*	Required statement of purpose by counsel. *IOP 40.5*	-----	"When deemed advisable" court will accept motions for full court consideration. *IOP 27.5*
5th Cir.	FRAP; questions of state law, application of law to facts, or application of precedent not considered. *IOP, 5th Cir.R. 35*	Required statements by counsel; must cite conflicting Supreme Court or 5th Circuit case(s) or state important question. *5th Cir. R. 35.2*	"Sanctions of its own initiative." *5th Cir. R. 35.1*	-----

6th Cir.	"Precedent-setting error of exceptional public importance" or "direct conflict" with 6th Circuit or Supreme Court precedent; questions of state law, application of law to facts, or application of precedent not considered. *IOP 20.8*	Required statements by counsel; must cite conflicting Supreme Court or 6th Circuit case(s) or state important question. *6th Cir.R. 14(b)*	-----	-----

	Standard for Granting (Re)hearing In Banc	Use of Required Forms or Statements	Sanctions Available for "Frivolous" Suggestion?	In Banc Procedure Permitted for Motions & "Interim Matters?"
7th Cir.	Why appeal is of "exceptional importance" OR which 7th Circuit, Supreme Court, or other circuit case(s) in conflict *7th Cir.R. 40(c)*	"Concise sentence" at beginning of petition. *7th Cir.R. 40(c)*	-----	In banc hearing of motion permitted upon judge request. *IOP 1(2)*
8th Cir.	Issue of "grave constitutional dimension" or great "public importance" OR "direct conflict" with 8th Circuit or Supreme Court precedent; errors in state or federal law, facts, or application of precedent not considered. *8th Cir.R. 35A(a)*	Required statements by counsel; must cite conflicting Supreme Court or 8th Circuit case(s) or state important question. *8th Cir.R. 35A(c)(2)*	$250 sanction. May be personally assessed to counsel. *8th Cir.R. 35A(c)(3)*	-----
9th Cir.	"Directly conflicts" with existing opinion of OTHER court of appeals & "substantially affects" national rule where "overriding need for national uniformity" *9th Cir.R. 35-1*	-----	-----	-----

	Standard for Granting (Re)hearing In Banc	Use of Required Forms or Statements	Sanctions Available for "Frivolous" Suggestion?	In Banc Procedure Permitted for Motions & "Interim Matters?"
10th Cir.	"Issue of exceptional public importance" OR conflicts with Supreme Court or 10th Circuit precedent *10th Cir.R. 35.1*	Requires statements by counsel; must cite conflicting Supreme Court or 10th Circuit case(s) or state important question. *10th Cir.R. 35.2.2*	Sanctions may be assessed for frivolous petitions for rehearing. No indication whether this also applies to suggestions for rehearing in banc.	No in banc hearings for "procedural and interim matters." *10th Cir.R. 35.7*
11th Cir.	A "precedent-setting error of exceptional importance" and panel opinion conflict with Supreme Court or 11th Circuit precedent. *11th Cir.R. 35-3*	Required statements by counsel; must cite conflicting Supreme Court or 11th Circuit case(s) or state important question. *11th Cir.R. 35-6(c)*	-----	No in banc hearings for "administrative and interim matters." *11th Cir.R. 35-4*

Fed. Cir.	A "precedent-setting question of exceptional importance" OR conflict with Supreme Court or Fed. Circuit precedent *Fed. Cir.R. 35(a)*[6]	Required statements by counsel; must cite conflicting Supreme Court or Fed. Circuit case(s) or state important question. *Fed. Cir.R. 35(b)*	Yes. "Appropriate sanctions." *Fed. Cir.R. 35(a)*	-----

[6]A grant of an original hearing in banc is determined under a different standard than a grant of rehearing in banc: only a "precedent-setting question" merits hearing in banc. *Fed. Cir.R. 35(a)*

II. PROCEDURES FOR GRANTING A HEARING/REHEARING IN BANC

A. Who Can Order a Hearing/Rehearing In Banc

The second table discusses where the power for granting a hearing or rehearing in banc resides. The courts do not permit a "petition for rehearing in banc" but require a party to make a "suggestion" for such a rehearing. Any judge in regular active service or any judge serving as a member of the original panel must then call for a vote or poll on whether rehearing in banc should be granted. (The courts of appeals in the First, Third, Tenth, and Federal circuits do not explain this procedure in their local rules or operating procedure. The remaining courts describe it in precisely this way.) In general, a judge or a panel has the power to call for a poll on their own motion. Some courts consider a suggestion for rehearing in banc to include a petition for panel rehearing, and some give the panel precedence in considering panel rehearing before in banc rehearing. A few courts have "automatic" in banc polling for certain types of cases, such as those overruling prior circuit law.

	Court May Order *Sua Sponte?*	Suggestion for Rehearing In Banc Includes Prior or Concurrent Petition for Panel Rehearing?	Procedure for Automatic In Banc Poll?
FRAP	Yes. *Adv. Comm. Notes to Rule 35*	-----	-----
D.C. Cir.	Any active judge or panel member may suggest an in banc rehearing subject to approval by a majority of active judges. *IOP XIII.B.2*	-----	-----
1st Cir.	-----	Any suggestion of rehearing in banc will be also treated as a petition for panel rehearing. *IOP X.C*	-----
2d Cir.	A judge may request an in banc poll at any time. *App. to 2d Cir., p 51*	-----	-----

	Court May Order *Sua Sponte?*	Suggestion for Rehearing In Banc Includes Prior or Concurrent Petition for Panel Rehearing?	Procedure for Automatic In Banc Poll?
3d Cir.	Yes. *IOP 9.4*	Any petition for rehearing OR suggestion of rehearing in banc is presumed to include both. *IOP 9.5.1*	All draft opinions circulated with a request for notification if a judge desires rehearing in banc, and all petitions for rehearing in banc circulated to see if a majority votes for in banc consideration. *IOP 5, 9.5.2* All dissenting judges on original panel presumed to have voted for rehearing in banc. *IOP 9.4.3*
4th Cir.	-----	A suggestion for rehearing in banc must be made at the same time, and in the same document, as a petition for rehearing. *4th Cir.R. 35(a)*	Unless a judge requests a poll be taken on the suggestion, none will be taken. *4th Cir.R. 35(b)*
5th Cir.	Any active judge or panel member may request a poll. *IOP, 5th Cir.R. 35*	Any suggestion of rehearing in banc will be also treated as a petition for panel rehearing. The original panel retains control of the case and may order a rehearing without full court action. *IOP, 5th Cir.R. 35*	Opinions which "express conflict" with the law of another circuit are circulated before release & subject to in banc polling. *IOP, 5th Cir.R. 47.5.3*

	Court May Order *Sua Sponte?*	Suggestion for Rehearing In Banc Includes Prior or Concurrent Petition for Panel Rehearing?	Procedure for Automatic In Banc Poll?
6th Cir.	Yes. Any judge eligible to sit on in banc court may request a vote. *6th Cir.R. 14(a)*	Any suggestion of rehearing in banc is also treated as a petition for panel rehearing. *6th Cir.R. 14(a)*	-----
7th Cir.	Yes. Automatic circulation of opinions in conflict. *7th Cir.R. 40(f)*	-----	Opinions overruling prior decisions or creating inter/intra-circuit conflicts not published until circulated among all active judges and a majority does not vote to rehear in banc. Footnote to that effect added to opinion. *7th Cir.R. 40(f)*
8th Cir.	Any active judge or panel member may request a poll. *IOP IV.D* Any judge may convert a petition for panel rehearing to a petition for in banc rehearing. *8th Cir. R. 40A(2)*	Any in banc rehearing suggestion is also considered to include a petition for panel rehearing. *8th Cir. R. 40A(2)* The original panel retains control of the case and may order a rehearing without full court action. *IOP IV.D*	
9th Cir.	Yes. *General Orders 5.2a, 5.4(c)(1)*	-----	Unless a judge requests a poll be taken on the suggestion, none will be taken.

	Court May Order *Sua Sponte?*	Suggestion for Rehearing In Banc Includes Prior or Concurrent Petition for Panel Rehearing?	Procedure for Automatic In Banc Poll?
10th Cir.	Yes. *10th Cir.R. 35.2.3*	-----	-----
11th Cir.	Any active 11th circuit judge may request a poll. *11th Cir.R. 35-5*	Any in banc rehearing suggestion is also considered to include a petition for panel rehearing. *11th Cir. R. 35-6* The original panel retains control of the case and may order a rehearing without full court action. *IOP 3.a, 11th Cir.R. 35*	-----
Fed. Cir.	Yes. *Practice Notes to Fed. Cir.R. 35*	-----	All suggestions for rehearing in banc are circulated for vote without a request by a judge for a poll. *Practice Notes to Fed. Cir.R. 35*

B. Voting Procedures & Panel Composition for Hearing/Rehearing In Banc

The third table compares voting procedures and panel composition among the appellate courts. Senior judges may not vote on the petition for in banc consideration or sit on the in banc panel, although senior judges who were members of the original panel are permitted to sit in banc for rehearing if they wish. Courts vary on whether recused judges count when determining whether a "majority" of judges has voted for in banc consideration. Most courts do not allow a response to a suggestion for hearing or rehearing in banc as a matter of course, although the Ninth Circuit Court of Appeals requires an opportunity to respond before any vote to hear or rehear a case in banc. Some courts note in a denial of rehearing in banc whether any judges dissented.

	Senior Judges Eligible to Vote on Petition?	**Recused Judges Count as Part of Majority Needed to Approve Petition?**	**Response Permitted or Required Before Vote?**	**Dissent(s) from Denial of Rehearing In Banc Noted?**	**Senior Judges Permitted to Sit on Panel?**
FRAP	No. *Adv. Comm. Notes to Rule 35*	Yes. *FRAP 35(a)*	Not permitted unless court so orders. *FRAP 35(b)*	-----	-----
D.C. Cir.	No. *IOP XIII.B.2*	Yes. *IOP XIII.B.2*	Not permitted unless majority of active judges desire a response. *IOP XIII.B.2*	Names of judges who voted for rehearing in banc shown on order denying rehearing. *IOP XIII.B.2*	A senior judge who sat on the original panel may sit on the in banc panel. *IOP XIII.B.2*

	Senior Judges Eligible to Vote on Petition?	Recused Judges Count as Part of Majority Needed to Approve Petition?	Response Permitted or Required Before Vote?	Dissent(s) from Denial of Rehearing In Banc Noted?	Senior Judges Permitted to Sit on Panel?
1st Cir.	-----	-----	Not permitted unless court so requests. *IOP X.B*	-----	A senior judge who sat on the original panel may sit on the in banc panel. *1st Cir.R. 35.3*
2d Cir.	No. *2d Cir.R. 35*	No. *Rule 35*	-----	Permitted	A senior judge who sat on the original panel may sit on the in banc panel. *App. to 2d Cir., p. 52*
3d Cir.	No. *IOP 9.5.3*	Yes. *IOP 9.5.3*	No response unless 4 judges request an answer or a rehearing. *IOP 9.5.6*	Dissenting judges may request their names be listed on order; any active judge may file and publish an opinion on the denial of the petition. *IOP 9.5.8*	A senior judge who sat on the original panel may sit on the in banc panel. *IOP 9.6.4*

	Senior Judges Eligible to Vote on Petition?	Recused Judges Count as Part of Majority Needed to Approve Petition?	Response Permitted or Required Before Vote?	Dissent(s) from Denial of Rehearing In Banc Noted?	Senior Judges Permitted to Sit on Panel?
4th Cir.	No. *Rule 35(b)*	No. *Rule 35(b)*	-----	Order denying rehearing in banc "reflects the vote" of all judges. *4th Cir.R. 35(b)*	A senior judge who sat on the original panel may sit on the in banc panel. *IOP 9.6.4*
5th Cir.	No. *5th Cir.R. 35.6*	Yes. *5th Cir.R. 35.6*	Not permitted unless court so requests. *5th Cir.R. 35.3*	-----	A senior judge who sat on the original panel may sit on the in banc panel. *5th Cir.R. 35.6*
6th Cir.	No. *IOP 20.7*	Yes. *IOP 20.7*	Not permitted unless court so requests. *IOP 20.3*	-----	A senior judge who sat on the original panel, or a judge who takes senior status after being placed on an in banc panel, may sit on the in banc panel. *6th Cir.R. 14(d)*

	Senior Judges Eligible to Vote on Petition?	Recused Judges Count as Part of Majority Needed to Approve Petition?	Response Permitted or Required Before Vote?	Dissent(s) from Denial of Rehearing In Banc Noted?	Senior Judges Permitted to Sit on Panel?
7th Cir.	No. *IOP 5(d)(1)*	Yes. *IOP 5(d)(1)*	Any active judge or member of original panel may request an answer. Not required for vote. *IOP 5(a)*	Dissents from denial of in banc noted on order unless minority judge(s) request otherwise. *IOP 5(f)*	A senior 7th circuit judge who sat on the original panel may sit on the in banc panel. *IOP 5(g)*
8th Cir.	No. *8th Cir.R. 35A(b)*	Yes. *8th Cir.R. 35A(b)*	-----	-----	A senior judge who sat on the original panel may sit on the in banc panel. *8th Cir.R. 35A(b)*
9th Cir.	No. *Adv. Comm. Notes to 9th Cir.R. 35-3*	No. *Adv. Comm. Notes to 9th Cir.R. 35-3*	Opportunity to respond required before ordering (re)hearing in banc. *9th Cir.R. 35-2*	Dissents included in order at request of any dissenting judge. *Adv. Comm. Notes to 9th Cir.R. 35-3*	A senior judge who sat on the original panel, or a judge who takes senior status after being placed on an in banc panel, may sit on the in banc panel. *Adv. Comm. Notes to 9th Cir.R. 35-3*

	Senior Judges Eligible to Vote on Petition?	Recused Judges Count as Part of Majority Needed to Approve Petition?	Response Permitted or Required Before Vote?	Dissent(s) from Denial of Rehearing In Banc Noted?	Senior Judges Permitted to Sit on Panel?
10th Cir.	No. *10th Cir.R. 35.5*	No. *10th Cir.R. 35.5*	No, except by order of the court.	Permitted.	A senior judge who sat on the original panel may sit on the in banc panel. *10th Cir.R. 35.5*
11th Cir.	No. *IOP 3.a, 11th Cir.R. 35*	Yes. *IOP 3.a, 11th Cir.R. 35*	Not permitted unless court so requests. *11th Cir.R. 35-7*	-----	A senior circuit judge of the 11th circuit who sat on the original panel may sit on the in banc court. Visiting judges are not permitted to sit on the in banc court. *11th Cir.R. 35-10*
Fed. Cir.	No. *Practice Notes to Fed. Cir.R. 35*	Yes. *Practice Notes to Fed. Cir.R. 35*	Response at court request. *Fed. Cir.R. 35(c),(d)*	-----	A senior judge who sat on the original panel may sit on the in banc panel. *Practice Notes to Fed. Cir.R. 35*

III. EFFECTS OF GRANT OF REHEARING IN BANC

The final table compares the effect of granting rehearing in banc. Courts vary on whether a grant of rehearing in banc stays or vacates the panel opinion, which can affect the judgment in the event of a tie of the court sitting in banc. Some courts consider a grant of rehearing before the original panel an automatic denial of a suggestion for rehearing in banc. Rehearing in banc may also affect a simultaneous petition for writ of certiorari. This table also includes a miscellaneous section, listing any other interesting in banc provisions which vary among the courts, such as the Ninth Circuit's "mini" in banc. The Ninth Circuit usually hears or rehears cases "in banc" in front of eleven judges, because a hearing before the full court would be unwieldy. The rule includes a provision for a rehearing before the entire court, but it has never been exercised.[7]

[7] See Arthur D. Hellman, *Maintaining Consistency in the Law of a Large Circuit, in* RESTRUCTURING JUSTICE: THE INNOVATIONS OF THE NINTH CIRCUIT AND THE FUTURE OF THE FEDERAL COURTS (Arthur D. Hellman, Ed.), 70 (1990).

	Stays or Vacates Panel Judgment?	Grant of Panel Rehearing Automatic Denial of Rehearing In Banc?	Effect of Rehearing In Banc on Petition for Certiorari	Other In Banc Provisions
FRAP	Neither stays nor vacates. *FRAP 35(c)*	-----	-----	-----
D.C. Cir.	Vacates panel opinion and judgment "either in whole or in part, as circumstances warrant." *IOP XIII.B.2* A tie of in banc panel affirms the decision under review. *D.C. Cir.R. 15(a)(5)*	-----	Extends time for filing petition for writ of certiorari. *IOP XIII.B.2*	No amicus curiae briefs in support of or response to a suggestion of rehearing in banc permitted. *D.C. Cir.R. 15(7)*
1st Cir.	Vacates prior opinion and judgment. *IOP X.D*	-----	-----	-----
2d Cir.	Tie in banc vote affirms lower court decision. *App. to 2d Cir., p. 52*	Yes. *App. to 2d Cir., p. 52*	Time for filing petition for certiorari tolled until disposition of suggestion for rehearing in banc. ----- Filing a suggestion for rehearing in banc is not a prerequisite for filing a petition for writ of certiorari.	-----

	Stays or Vacates Panel Judgment?	Grant of Panel Rehearing Automatic Denial of Rehearing In Banc?	Effect of Rehearing In Banc on Petition for Certiorari	Other In Banc Provisions
3d Cir.	Vacates panel opinion and judgment. *IOP 9.5.9*	-----	-----	
4th Cir.	Vacates panel opinion and judgment. *4th Cir.R. 35(c)*	-----	-----	The majority of active and participating judges required must be at least four judges to grant a rehearing in banc, and at least six judges to grant an original hearing in banc. *4th Cir.R. 35(c)*

	Stays or Vacates Panel Judgment?	Grant of Panel Rehearing Automatic Denial of Rehearing In Banc?	Effect of Rehearing In Banc on Petition for Certiorari	Other In Banc Provisions
5th Cir.	Vacates panel opinion and judgment; stays mandate *5th Cir.R. 41.3*	-----	-----	-----
6th Cir.	Vacates panel opinion and judgment; stays mandate *6th Cir.R. 14(a)*	-----	Filing a suggestion for rehearing in banc is not a prerequisite for filing a petition for writ of certiorari. *6th Cir.R. 14(c)*	-----
7th Cir.	Order granting rehearing in banc "should specifically state" that panel decision vacated. *IOP 5(f)*	-----	-----	-----
8th Cir.	-----	-----	-----	-----

	Stays or Vacates Panel Judgment?	Grant of Panel Rehearing Automatic Denial of Rehearing In Banc?	Effect of Rehearing In Banc on Petition for Certiorari	Other In Banc Provisions
9th Cir.	Panel opinion remains in effect unless order granting rehearing in banc specifies otherwise. *Adv. Comm. Notes to 9th Cir.R. 35-3*	Yes. *Adv. Comm. Notes to 9th Cir.R. 35-3*	Filing a suggestion for rehearing in banc is not a prerequisite for filing a petition for writ of certiorari. *Adv. Comm. Notes to 9th Cir.R. 35-3*	"Mini-in banc" provision: all proceedings in banc conducted before a panel of 11 judges, including the Chief Judge. A rehearing by the full court is also an option. *9th Cir.R. 35-3*
10th Cir.	The judgment is not vacated until directed by the in banc panel. *Rule 35.6* If a tie occurs the panel decision remains in effect and is not affected. *IOP IX.B.6*	-----	Time for filing petition for certiorari tolled until disposition of suggestion for rehearing in banc. ----- Filing a suggestion for rehearing in banc is not a prerequisite for filing a petition for writ of certiorari. *10th Cir.R. 35.1*	-----
11th Cir.	Panel opinion vacated, mandate stayed. *Rule 35-11*	-----	Filing a suggestion for rehearing in banc is not a prerequisite to filing a petition for writ of certiorari. *11th Cir.R.35-3*	-----

	Stays or Vacates Panel Judgment?	Grant of Panel Rehearing Automatic Denial of Rehearing In Banc?	Effect of Rehearing In Banc on Petition for Certiorari	Other In Banc Provisions
Fed. Cir.	-----	Yes, if the entire relief requested in the petition is granted. *Practice Notes to Fed. Cir. R. 35*	Filing a suggestion for rehearing in banc is not a prerequisite for filing a petition for writ of certiorari. *Local Rule 35(a)* Filing a suggestion for rehearing in banc does not toll the time for filing a petition for certiorari. *Practice Notes to Fed. Cir.R. 40*	

DESCRIPTION OF CIRCUIT PRACTICES REGARDING EN BANC PROCEDURES

Laural Hooper

April 8, 1993

The attached descriptions of practices of federal courts of appeals were provided by the clerks of the courts of appeals and persons authorized by the clerks to address these issues. This information was gathered through telephone interviews as part of a larger study by the Federal Judicial Center seeking a description of the appellate procedures followed by the courts.

DC Circuit

Existence of an inter-circuit conflict is not an independent ground for granting rehearing en banc, although such a conflict may be considered as part of an argument that the panel decision is in error and requires reconsideration. En banc consideration is appropriate only where the criteria of F.R.A.P. 35(a) are satisfied. In setting forth reasons why a case meets the "exceptional importance standard of that rule, local Rule 15(a)(3) instructs parties to indicate

> "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." (emphasis added)

The original panel is always given an opportunity to rehear a case since the suggestion for rehearing en banc is also a petition for rehearing by the original panel. Occasionally the original argument panel will modify the opinion in response to such a motion, but such changes typically clarify the holding rather than alter the substance of the decision.

The court circulates panel decision to every active and senior judge one week prior to publication. This is the primary mechanism relied upon by the court to limit the development of intra-circuit conflicts. This prepublication review often results is suggestions that become incorporated into the decision by the panel.

On occasion the Court may employ such a prepublication review to note specifically an interpretation that resolves an apparent conflict between two prior decisions of the court. When the review indicates that the court is unanimous in supporting the interpretation of the issue by the panel, the court has employed an "Irons Footnote" in which the panel decision indicates that a specific issue that resolves an apparent conflict between two prior decisions has been separately considered and approved by the full court, and thus constitutes the law of the circuit. (See Irons v. Diamond, 670 F.2d 265, 268 n. 11 (D. C. Cir. 1981).)

First Circuit

The First Circuit Court of Appeals does not generally consider inter-circuit conflicts an appropriate ground to grant rehearing en banc. There are no established procedures, formal or informal, that address minimizing inter-circuit conflicts. Generally, a panel is bound by a prior panel decision.

The Court treats all petitions for en banc consideration as petitions for rehearing before the panel. Occasionally, rather than waiting for an en banc petition, a panel will seek to modify circuit precedent by circulating the opinion to all active judges and inserting a footnote stating that the entire court has reviewed and approved the decision. In addition, an attempt is made by the Senior Staff Attorney to group cases with similar issues to be argued on the same day before the same panel. In approximately 25% of the granted petitions, a motion for rehearing en banc will result in a rehearing before the original panel.

Second Circuit

En banc consideration is appropriate only where the criteria of F.R.A.P. 35(a) are satisfied. Every attempt is made to prevent both inter-circuit and intra-circuit conflicts from occurring and thus the subsequent rehearing of a case. Before an opinion is released it is circulated to active judges for comments and criticisms. Upon the filing of a petition for rehearing en banc the original panel votes to determine whether a rehearing by the original panel should be granted. The results of the votes of the original panel are circulated to all active judges and to the chief judge, who tallies the vote and reports the result to his colleagues. A rehearing by the original panel rarely occurs, perhaps one per year.

Third Circuit

A rehearing en banc is an extraordinary occurrence and is disfavored unless the full court determines it is necessary to secure or maintain uniformity in its decisions or the proceeding involves a question of "exceptional importance." The court does not necessarily consider it appropriate to grant rehearing en banc in cases that create or

continue an inter-circuit conflict unless there is an issue of "exceptional importance" presented. In all cases, the original panel is always given the opportunity to rehear the case.

There are two situations where a rehearing is generally denied: (1) when the panel's statement of the law is correct and the controverted issue is solely the application of the law to the circumstances of the case; and (2) when the issue presented is one of state law.

Fourth Circuit

The Court does not generally consider it appropriate to grant rehearing en banc in cases solely where the panel decision would create or continue an inter-circuit conflict. Precedents in other circuits are considered, but are given less weight and consideration when deciding whether to grant rehearing. According to I.O.P. 40.5(iii), among the appropriate grounds for a petition for rehearing is:

> "the opinion is in conflict with another Court of Appeals
> and the conflict is not addressed in the opinion." (emphasis added)

The local rule requires that a suggestion for rehearing en banc be made at the same time, and in the same document, as a petition for rehearing. The petition and suggestion are distributed to all active and senior judges of the court, and to any visiting judge who may have heard and decided the appeal. Absent a request for an answer to the petition by a judge within 10 days after distribution of the petition and suggestion, the authoring judge will include in the court's order disposing of the petition a statement that no poll was requested.

All proposed published opinions are reviewed by all active and senior judges before the decision is issued. After reviewing an opinion, the judges must acknowledge that they have received the opinion and, if appropriate, the judges suggest any opinion changes to the hearing panel. Objections to the substance of the opinion may be raised informally by any judge or formally by a written dissent if the judge was a member of the hearing panel. Dissents rarely occur.

Fifth Circuit

Rehearing of appeals and en banc hearings are not favored or encouraged by this court. Active circuit judges determine by majority vote whether a matter will be reheard by the original panel or heard en banc. The en banc court is composed of all active judges of the court. Any senior circuit judge of this circuit who sat as a member of the original panel deciding the case being reviewed is eligible to participate, at his election as a member of the en banc court.

A suggestion for rehearing en banc is allowed for matters that allege a precedent-setting error of exceptional public importance or an opinion that directly conflicts with prior Supreme Court or Fifth Circuit precedent. According to I.O.P. 47.5.3 --Processing of Opinions-- the Court has determined that:

> "Those [opinions] which initiate an express conflict with the law of another circuit are to be so circulated before [their] release and ... are subject to polling procedures for en banc consideration should any judge request it."

A suggestion for rehearing en banc is sent to the original panel judges (this may include senior and visiting judges) and to all active judges of the court. The panel has the discretion of granting a rehearing without action by the full court. In addition, any active judge of the court or any member of the panel rendering the decision has ten days from the filing date of the suggestion to indicate to the authoring judge whether he or she desires the case be reheard en banc.

Sixth Circuit

The Sixth Circuit Court of Appeals has no policy, formal or informal addressing whether it is appropriate to grant rehearing en banc in cases where the panel decision creates or continues an inter-circuit conflict. In an attempt to reduce intra-circuit conflicts and clarify issues, drafts of all proposed opinions that are to be published are circulated among the entire court for comment. It is the policy of the court that when circulating a proposed opinion or decision of the court, the writing judge shall call attention in the letter of transmittal to the fact that such opinion or decision has initiated or continues a conflict with one or more circuits. Drafts of all opinions that are not designated for full-text publication are circulated to approximately half of the court. The original panel is always given an opportunity to rehear a case.

Seventh Circuit

The Seventh Circuit Court of Appeals considers both intra-circuit and inter-circuit conflicts an appropriate matter for granting rehearing en banc. Local Rule 40(c) states:

> "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." (emphasis added)

Furthermore, Local Rule 40(f) requires that an opinion overruling a prior decision or creating a conflict between or among circuits must be circulated among the active judges prior to publication, and if adopted, include a footnote indicating that the opinion has been circulated among all active judges and a rehearing en banc on the issue is not favored.

Eighth Circuit

The court's local rule governing rehearing en banc states that the petition should only be filed when the attention of the entire court must be directed to an issue of grave constitutional dimension or exceptional public importance, or to an opinion that directly conflicts with Supreme Court of Eighth Circuit precedent. Inter-circuit conflicts are not mentioned in either the local rule or the court's internal operating procedures manual.

A matter will be reheard en banc only if a majority of the judges in active service vote to rehear the matter en banc. Senior judges can not vote on a suggestion for rehearing en banc, but a senior judge may, at the judge's election, participate in the rehearing en banc if the judge was a member of the original panel deciding the case.

Panel opinions are not circulated to the full court prior to release.

Ninth Circuit

Presently, local rule 35-1 indicates that an inter-circuit conflict is an appropriate ground for granting rehearing en banc:

> "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 rehearing en banc."

Inter-circuit conflict rarely succeeds as a grounds for a petition for rehearing or suggestion for rehearing en banc. The executive committee may reconsider the appropriateness of this standard when it reviews the en banc procedure in the near future. The court hears about 15-20 en banc cases, using the limited en banc procedure that employs eleven judges -- ten randomly-selected active judges and the chief judge. The original panel is usually given an opportunity to rehear a case. In less than 5% of the instances of a request for rehearing en banc, the original panel will rehear the case.

Intra-circuit conflicts are reduced by an inventory classification procedure conducted by staff attorneys in every appeal. Classification of issues permits the court to submit cases presenting similar issues to the same panel, and to alert panels that the issue is currently pending before an earlier panel. Pursuant to the Court's general orders, the panels should confer. The panel which first takes the issue under submission has priority.

Tenth Circuit

This court does not routinely grant rehearing en banc solely because the panel decision would create or continue an inter-circuit conflict. Before any opinion is published it is circulated to all active and senior judges for comments. Dissents are rare even in the event an opinion should conflict with the law of another circuit.

Eleventh Circuit

The Eleventh Circuit Court of Appeals does not ordinarily consider inter-circuit conflicts an appropriate ground for granting rehearing en banc; however, despite every effort is made to avoid intra-circuit conflicts.

Pursuant to 11th Cir. R. 35-6, every suggestion of rehearing en banc is also considered as a petition for rehearing before the original argument panel. A suggestion of en banc consideration, whether upon initial hearing or rehearing, is regarded as an extraordinary procedure intended to address precedent-setting errors or a panel opinion that is allegedly in direct conflict with precedent of the Supreme Court or a prior panel opinion within the Eleventh Circuit Court of Appeals.

Federal Circuit

Inter-circuit conflict is not a ground for granting rehearing en banc. A suggestion for rehearing en banc alone is usually not referred to the original panel. The original panel has an opportunity to rehear an appeal only if a specific petition for rehearing before the panel is filed. At least 10 days before a precedential opinion is issued, it is circulated to all active and senior judges for comment and to the senior technical assistant for comment regarding any appearance of conflict between language in the opinion and that in precedent of the court or of the Supreme Court. Such comments are distributed to the author, panel or entire court and may in some instances lead to a modification of the opinion. If not, the circulated comments may stimulate en banc determination of the appeal. The court may use a footnote in the panel opinion stating that a certain issue has been reviewed by the entire court.

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

FROM: Carol Ann Mooney, Reporter

DATE: March 25, 1993

SUBJECT: Item 92-5, amendment of Rule 25 concerning the requirement that if a brief is filed by depositing it in the mail, the party must use "the most expeditious form of delivery by mail, excepting special delivery."
and
Item 92-6, a proposal to eliminate the mailbox rule.

Item 92-6

Last spring Mr. Greacen, the Clerk of the fourth circuit, asked Mr. Strubbe to recommend that the Advisory Committee consider eliminating the mailbox rule in Rule 25 for filing a brief or appendix. Mr. Greacen's letter was forwarded to us and the item was placed on the table of agenda items. A copy of Mr. Greacen's letter is attached to this memorandum.

The reason given by Mr. Greacen in support of his suggestion is that the mailbox rule creates uncertainty concerning due dates both as to a brief filed by mail and as to any subsequent brief. I do not understand that argument.

A brief filed by mail must be mailed no later than the last day for filing. It may be some days before the brief reaches the court but presumably the postmark allows the court to determine if the brief is timely.

Responsive briefs must be filed within a specified number of days after service of the preceeding brief. *See Rule 31.* A court should not have difficulty determining when a responsive brief is due. The court knows when service occurs because Rule 25(d) requires that a paper presented for filing be accompanied either by acknowledgement of service by the person served (which should state the date of service) or by proof of service which must state the date and manner of service. The proof of service accompanying a brief is all that is needed to determine the due date for the responsive brief. There is no uncertainty concerning the timing of service even if service is accomplished by mail. Rule 25(c) provides that service is complete on mailing. Although service is complete upon mailing, Rule 26(c) gives a party who must act within a certain number of days after service three extra days whenever he or she is served by mail. The proof of service establishes the date of service from which the court calculates the due date for any responsive brief and, if service was by mail, the court adds three days to the due date for the next brief.

This question has been discussed by the Advisory Committee at least once in the past several years. At that time the Committee decided to take no further action. Should the Committee react favorably to the suggestion at this time, the change can be accomplished simply

by deleting the language creating the special exception for briefs and appendices.

If the Committee decides once again to leave the mailbox rule in place, it should consider item 92-5.

Item 92-5

At the Advisory Committee's April 1992 meeting, the Committee prepared a GAP report for proposed amendments to a number of rules that had been published for comment. The Committee discussed the proposed amendments to Rule 25, and the comments thereon, which would extend the holding in Houston v. Lack to all papers filed by persons confined in institutions.

When reviewing Rule 25, one member of the Committee noted that in order to file a brief using the mailbox rule, the rule requires a party to use "the most expeditious form of delivery by mail, excepting special delivery." That member questioned whether a party must use overnight mail. The Committee decided to add review of the mailing requirements to the table of agenda items for consideration at a future meeting.

The committee note written in 1967 when the Appellate Rules were adopted says that "air mail delivery must be used whenever it is the most expeditious manner of delivery." Today, domestic first-class mail is routinely transported by air if the distance warrants it, that is if air transport is the most expeditious manner of delivery. The distinction between first class mail and air mail has disappeared for domestic mailing. Recently, however, the United States Postal Service added express mail service which is more expeditious than first class mail. It should be made clear whether Rule 25 requires use of express mail, the most expeditious service offered by the postal service.

I believe that the spirit of the rule, as adopted in 1967, would be satisfied by requiring a party to use first class mail. The rule has never required a party to use the costly the special delivery service. Similarly, requiring a party to use express mail could be burdensome in some instances.[1]

Supreme Court Rule 29.2 provides that a document is timely filed if it is "sent to the Clerk by first-class mail, postage prepaid, and bear[s] a postmark showing that the document

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[1] A two pound package shipped first class mail costs $2.90. A two pound package shipped express mail costs $13.95. Special delivery now costs $7.65 in addition to first class postage for a package not more than two pounds. Two pounds was chosen for purposes of comparison not only because it is the upper limit for the standard express mail package, but also because it is not unreasonable to expect that a package containing twenty-five copies of a brief could weigh two pounds or more.

was mailed on or before the last day for filing. . .."

If Rule 25(a) were amended to state that a brief is filed when it is deposited in the United States Mail with first-class postage prepaid, this would have no effect upon the time for filing a responsive brief. The mailbox rule deals with the time of filing and responsive briefs are due within a specified number of days after service of the opponents brief.

Rule 31(a) requires an appellee to file a brief within 30 days after service of the brief of the appellant and an appellant's reply brief must be filed within 14 days after service of the appellee's brief. Rule 25(c) provides that service may be by mail and is complete on mailing. Rule 26(c) gives a party three additional days to act whenever the time to act is computed with reference to the date of service and service is by mail. None of that would be changed by a change in mailbox provision of Rule 25(a).

Draft.
Only the changes at lines 5-8 are being proposed here. The other changes shown, have already been published but not yet finalized.

Rule 25. Filing and Service

(a) *Filing*.-- Papers required or permitted to be filed in a court of appeals ~~shall~~ must be filed with the clerk. Filing may be accomplished by mail addressed to the clerk, but filing ~~shall not be~~ is not timely unless ~~the papers are received by the clerk~~ the clerk receives the paper within the time fixed for filing, except that a briefs ~~and~~ or appendixees ~~shall be deemed filed on the day of mailing if the most expeditious form of delivery by mail, excepting special delivery, is utilized~~ is timely filed if it is mailed to the clerk by first-class mail, postage prepaid, and bears a postmark showing that the document was mailed on or before the last day for filing. 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 show 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. If a motion requests relief ~~which~~ that may be granted by a single judge, the judge

may permit the motion to be filed with the judge, in which event the judge ~~shall~~ must note thereon the date of filing and ~~shall~~ thereafter ~~transmit~~ give it to the clerk. 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.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
UNITED STATES COURTHOUSE
TENTH & MAIN STREETS
RICHMOND, VIRGINIA 23219

JOHN M. GREACEN
CLERK

TELEPHONE
(804)771-2213
FTS 925-2213

March 3, 1992

Thomas F. Strubbe
U.S. Court of Appeals
for the Seventh Circuit
219 South Dearborn Street
Chicago, Illinois 60604

Possible Change in Rule 25

Dear Tom:

I forgot to convey to you a request by our staff that you consider recommending to the Advisory Committee on FRAP a change in Rule 25 to eliminate the special treatment of briefs and appendices. All other filings are not timely unless they are received by the clerk within the time fixed for filing. Briefs and appendices, as you well know, are deemed filed on the day of mailing.

The mailbox filing rule creates uncertainty in the clerk's office concerning due dates--both for a brief filed by the mailbox rule, and for a subsequent brief, the due date for which is determined by the date of mailing and the three-day mail service principle of Rule 26(c).

We would be able to monitor our cases much more easily if there were no mailbox exception for briefs and appendices. We believe that the parties' interests could be preserved by extending the time allowed for filing--say from 40, 30 and 15 days to 43, 33 and 18 days. We would be glad to trade the additional time for the increased certainty of due dates.

Yours truly,

John M. Greacen

cc: Cathy Catterson

Rule 25. Filing and Service

(a) *Filing.*- Papers required or permitted to be filed in a court of appeals ~~shall~~ must be filed with the clerk. Filing may be accomplished by mail addressed to the

clerk, but filing ~~shall not be~~ is not timely unless ~~the papers are received by the clerk~~ the clerk receives the papers within the time fixed for filing, except that briefs and appendices ~~shall be deemed~~ are treated as filed on the day of mailing if the most expeditious form of delivery by mail, except~~ing~~ special delivery, is ~~utilized~~ used. 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 declaration (in compliance with 28 U.S.C. § 1746) setting forth the date of deposit and stating that first-class postage has been prepaid. If a motion requests relief ~~which~~ that may be granted by a single

judge, the judge may permit the motion to be filed with the judge, in which event the judge shall note thereon the date of filing and ~~shall~~ thereafter ~~transmit~~ give it to the clerk. A court of appeals may, by local rule, permit papers to be filed by facsimile or other electronic means, provided such means are authorized by and consistent with standards established by the Judicial Conference of the United States.

* * * * *

COMMITTEE NOTE

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

sentence under Fed. R. Crim. P. 35(c), nor does the filing of a motion under Fed. R. Crim. P. 35(c) affect the validity of a notice of appeal filed before entry of the order disposing of the motion.

(c) *Appeal by an Inmate Confined in an Institution.*- If an inmate confined in an institution files a notice of appeal in either a civil case or a criminal case, the notice of appeal is timely filed if it is deposited in the institution's internal mail system on or before the last day for filing. Timely filing may be shown by a notarized statement or by a declaration (in compliance with 28 U.S.C. § 1746) setting forth the date of deposit and stating that first-class postage has been prepaid. In a civil case in which the first notice of appeal is filed in the manner provided in this subdivision (c),

the 14-day period provided in paragraph (a)(3) of this Rule 4 for another party to file a notice of appeal runs from the date when the district court receives the first notice of appeal. In a criminal case in which a defendant files a notice of appeal in the manner provided in this subdivision (c), the 30-day period for the government to file its notice of appeal runs from the entry of the judgment or order appealed from or from the district court's receipt of the defendant's notice of appeal.

COMMITTEE NOTE

Note to Paragraph (a)(1). The amendment is intended to alert readers to the fact that paragraph (a)(4) extends the time for filing an appeal when certain posttrial motions are filed. The Committee hopes that awareness of the provisions of paragraph (a)(4) will prevent the filing of a notice of appeal when a posttrial tolling motion is pending.

Note to Paragraph (a)(2). The amendment treats a notice of appeal filed after the announcement of a decision or order, but before its formal entry, as if the notice had

been filed after entry. The amendment deletes the language that made paragraph (a)(2) inapplicable to a notice of appeal filed after announcement of the disposition of a posttrial motion enumerated in paragraph (a)(4) but before the entry of the order, see Acosta v. Louisiana Dep't of Health & Human Resources, 478 U.S. 251 (1986) (per curiam); Alerte v. McGinnis, 898 F.2d 69 (7th Cir. 1990). Because the amendment of paragraph (a)(4) recognizes all notices of appeal filed after announcement or entry of judgment-- even those that are filed while the posttrial motions enumerated in paragraph (a)(4) are pending-- the amendment of this paragraph is consistent with the amendment of paragraph (a)(4).

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

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

479 U.S. 930 (1986).

The amendment provides that a notice of appeal filed before the disposition of a specified posttrial motion will become effective upon disposition of the motion. A notice filed before the filing of one of the specified motions or after the filing of a motion but before disposition of the motion is, in effect, suspended until the motion is disposed of, whereupon, the previously filed notice effectively places jurisdiction in the court of appeals.

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

The amendment provides that a notice of appeal filed before the disposition of a posttrial tolling motion is sufficient to bring the underlying case, as well as any

orders specified in the original notice, to the court of appeals. If the judgment is altered upon disposition of a posttrial motion, however, and if a party wishes to appeal from the disposition of the motion, the party must amend the notice to so indicate. When a party files an amended notice, no additional fees are required because the notice is an amendment of the original and not a new notice of appeal.

Paragraph (a)(4) is also amended to include, among motions that extend the time for filing a notice of appeal, a Rule 60 motion that is served within 10 days after entry of judgment. This eliminates the difficulty of determining whether a posttrial motion made within 10 days after entry of a judgment is a Rule 59(e) motion, which tolls the time for filing an appeal, or a Rule 60 motion, which historically has not tolled the time. The amendment comports with the practice in several circuits of treating all motions to alter or amend judgments that are made within 10 days after entry of judgment as Rule 59(e) motions for purposes of Rule 4(a)(4). See, *e.g.*, Finch v. City of Vernon, 845 F.2d 256 (11th Cir. 1988); Rados v. Celotex Corp., 809 F.2d 170 (2d Cir. 1986); Skagerberg v. Oklahoma, 797 F.2d 881 (10th Cir. 1986). To conform to a recent Supreme Court decision, however--Budinich v. Becton Dickinson and Co., 486 U.S. 196 (1988)--the amendment excludes motions for attorney's fees from the class of motions that extend the filing time unless a district court, acting under Rule 58, enters an order extending the time for appeal. This amendment is to be read in conjunction with the amendment of Fed. R.

Civ. P. 58.

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

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

motion, or within 10 days after the entry of judgment, whichever is later. The amendment also changes the language in the third sentence providing that an appeal may be taken within 10 days after the entry of an order denying the motion; the amendment says instead that an appeal may be taken within 10 days after the entry of an order disposing of the last such motion outstanding. (Emphasis added) The change recognizes that there may be multiple posttrial motions filed and that, although one or more motions may be granted in whole or in part, a defendant may still wish to pursue an appeal.

The amendment also states that a notice of appeal filed before the disposition of any of the posttrial tolling motions becomes effective upon disposition of the motions. In most circuits this language simply restates the current practice. See United States v. Cortes, 895 F.2d 1245 (9th Cir.), cert. denied, 495 U.S. 939 (1990). Two circuits, however, have questioned that practice in light of the language of the rule, see United States v. Gargano, 826 F.2d 610 (7th Cir. 1987), and United States v. Jones, 669 F.2d 559 (8th Cir. 1982), and the Committee wishes to clarify the rule. The amendment is consistent with the proposed amendment of Rule 4(a)(4).

Subdivision (b) is further amended in light of new Fed. R. Crim. P. 35(c), which authorizes a sentencing court to correct any arithmetical, technical, or other clear errors in sentencing within 7 days after imposing the sentence. The Committee believes that a sentencing court should be able to act under

Criminal Rule 35(c) even if a notice of appeal has already been filed; and that a notice of appeal should not be affected by the filing of a Rule 35(c) motion or by correction of a sentence under Rule 35(c).

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

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

AGENDA III-H
Item 92-7
April 20-21, 1993

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

FROM: Carol Ann Mooney, Reporter

DATE: March 25, 1993

SUBJECT: Item 92-7, Amendment of Fed. R. App. P. 30 to require that a joint appendix include a copy of the notice of appeal.

Last spring Judge Jon O. Newman of the second circuit wrote and suggested that Rule 30 be amended to require that a joint appendix include a copy of the notice of appeal. He stated that the notice often needs to be examined to determine the timeliness and scope of the appeal.

Because Rule 28(a)(2) now requires a jurisdictional statement, a copy of the notice should not be needed to determine the timeliness of the appeal. Rule 28(a)(2) requires an appellant's brief to state the "relevant filing dates establishing the timeliness of the appeal or petition for review." An examination of the notice of appeal could, however, be necessary to determine the scope of the appeal.

Draft.

Rule 30. Appendix to ~~the briefs~~ a Brief

(a) Duty of Appellant to Prepare and File; Content of Appendix; Time for Filing; Number of Copies. The appellant ~~shall~~ must prepare and file an appendix to the briefs which ~~shall~~ must contain:

(1) the relevant docket entries in the proceeding below;

(2) any relevant portions of the pleadings, charge, findings or opinion;

(3) the judgment, order, or decision in question; ~~and~~

(4) the notice of appeal; and

(5) any other parts of the record to which the parties wish to direct the particular attention of the court.

~~Except where they have independent relevance, m~~ Memoranda of law in the district court should not be included in the appendix unless they have independent relevance. The fact that

parts of the record are not included in the appendix ~~shall~~ will not prevent the parties or the court from relying on such parts.

~~Unless filing is to be deferred pursuant to the provisions of subdivision (c) of this rule,~~ ~~t~~ The appellant ~~shall~~ must serve and file the appendix with the brief unless filing is deferred under subdivision (c) of this rule. Ten copies of the appendix must be filed with the clerk, and one copy must be served on counsel for each party separately represented, unless the court requires the filing or service of a different number by local rule or by order in a particular case.

* * *

Committee Note

Subdivision (a). Subdivision (a) is amended to require that an appendix include a copy of the notice of appeal. The court may wish to examine the notice of appeal in order to determine the scope of the appeal.

AGENDA III-I
Item 92-9
April 20-21, 1993

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

FROM: Carol Ann Mooney, Reporter CAM

DATE: March 25, 1993

SUBJECT: Item 92-9, Amendment of Rule 10(b)(1) to conform to recent amendments to Rule 4(a)(4)

When changing the Bankruptcy Rules to conform to the recently approved changes in Appellate Rule 4(a)(4), a member of the Bankruptcy Advisory Committee noted the need to make a conforming amendment to the rule requiring the preparation of the record on appeal. The Bankruptcy Committee currently has two rules out for public comment, Rule 8002 governing the time for filing a notice of appeal, and Rule 8006 governing the record on appeal.

We need to make parallel changes to Appellate Rule 10(b)(1). That Rule requires an appellant to order a transcript within ten days after filing a notice of appeal. If the notice of appeal is suspended because of the filing of a post trial motion, the appellant should not be required to order a transcript until after the disposition of the last post trial motion. The disposition of the motion may moot the appeal.

I have used the proposed Bankruptcy Rule as a model so that the two rules will be consistent in both form and substance. A copy of the proposed Bankruptcy Rule is attached.

Draft

Rule 10. The Record on Appeal

(a) *Composition of the Record on Appeal.* The record on appeal consists of the ~~The~~ original papers and exhibits filed in the district court, the transcript of proceedings, if any, and a certified copy of the docket entries prepared by the clerk of the district court. ~~shall constitute the record on appeal in all cases.~~

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

(1) Within 10 days after filing the notice of appeal or entry of an order disposing of the last timely motion outstanding of a type specified in Rule 4(a)(4), whichever is later, the

appellant ~~shall~~ must order from the reporter a transcript of such parts of the proceedings not already on file as the appellant deems necessary, subject to local rules of the courts of appeals. The order ~~shall~~ must be in writing and within the same period a copy ~~shall~~ must be filed with the clerk of the district court. If funding is to come from the United States under the Criminal Justice Act, the order ~~shall~~ must so state. If no such parts of the proceedings are to be ordered, within the same period the appellant shall file a certificate to that effect.

* * *

Committee Note

Paragraph (b)(1). This amendment conforms this rule to amendments being made in Rule 4(a)(4). The amendments to Rule 4(a)(4) provide, in essence, that certain specified postjudgment motions have the effect of suspending a filed notice of appeal until the disposition of the last of such motions. The purpose of this amendment is to suspend 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). The 10-day period set forth in the first sentence of this rule begins to run when the order disposing of the last of such postjudgment motions outstanding is entered.

Rule 8006. Record and Issues on Appeal

Within 10 days after filing the notice of appeal as provided in Rule 8001(a), or entry of an order granting leave to appeal, or entry of an order disposing of the last timely motion outstanding of a type specified in Rule 8002(b), whichever is later, the appellant shall file with the clerk and serve on the appellee a designation of the items to be included in the record on appeal and a statement of the issues to be presented. Within 10 days after the service of the statement of the appellant the appellee may file and serve on the appellant a designation of additional items to be included in the record on appeal and, if the appellee has filed a cross appeal, the appellee as cross appellant shall file and serve a statement of the issues to be presented on the cross appeal and a designation of additional items to be included in the record. A cross appellee may, within 10 days of service of the statement of the cross appellant, file and serve on the cross appellant a designation of additional items to be included in the record. The record on appeal shall include the items so designated by the parties, the notice of appeal, the judgment, order, or decree appealed from, and any opinion, findings of fact, and conclusions of law of the court. Any party filing a designation of the items to be included in the record shall provide to the clerk a copy of the items designated or, if the party fails to provide the copy, the clerk shall prepare the copy at the expense of the party. If the record designated by any party includes a transcript of any proceeding or a part thereof, the party shall immediately after filing the

designation deliver to the reporter and file with the clerk a written request for the transcript and make satisfactory arrangements for payment of its cost. All parties shall take any other action necessary to enable the clerk to assemble and trarsmit the record.

COMMITTEE NOTE

This amendment is made together with the amendment to Rule 8002(b) which provides, in essence, that certain specified postjudgment motions have the effect of suspending a filed notice of appeal until the disposition of the last of such motions. The purpose of this amendment is to suspend the 10-day period for filing and serving a designation of the record and statement of the issues if a timely postjudgment motion is made and a notice of appeal is suspended under Rule 8002(b). The 10-day period set forth in the first sentence of this rule begins to run when the order disposing of the last of such postjudgment motions outstanding is entered.

AGENDA IV-E
Item 92-11
April 20-21, 1993

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

FROM: Carol Ann Mooney, Reporter

DATE: April 9, 1993

SUBJECT: Item 92-11, consideration of local rules that do not exempt government attorneys from joining a court bar or from paying admission fees.

Last November, former Attorney General Barr wrote to the Chief Justice about the fact that a number of federal courts require attorneys who practice before them to join the local court bar and, in many instances, an admission fee is charged. Some courts exempt government attorneys from joining the bar or paying the admission fee; others do not. The Attorney General states that requiring an attorney representing the United States to join a federal court bar and to pay a fee is inconsistent with federal law. A copy of his letter is attached.

I asked my student assistant to review the local rules in all of the circuits. His research shows that seven circuits (D.C., 2nd, 3rd, 5th, 8th, 9th, and 10th) require admission to the court bar and do not have an exemption for government attorneys. Five circuits (1st, 6th, 7th, 11th, and Fed.) require admission but exempt government attorneys. A copy of his memorandum is attached.

This item will be discussed at the April 20 and 21 meeting.

Office of the Attorney General
Washington, D. C. 20530

November 24, 1992

The Honorable William H. Rehnquist
Chief Justice
Supreme Court of the United States
1 First St., N.E.
Washington, D.C. 20543

Dear Chief Justice Rehnquist:

I am writing to you in your capacity as the presiding officer of the Judicial Conference of the United States. I would like to call to your attention a problem caused by the local rules of a number of federal courts for attorneys representing the interests of the United States under the direction of the Attorney General. These rules are promulgated under the authority of 28 U.S.C. 2071(a). By statute, the Judicial Conference of the United States has the power to modify or abrogate rules of the federal courts of appeals if they are inconsistent with federal law. See 28 U.S.C. 331 and 2071(c)(2). Thus, the Judicial Conference is well-positioned to resolve our problem.

A number of federal courts require attorneys who practice before them to join their local bars, and many of these courts require the payment of admission fees. See, for example, D.C. Circuit Rule 6, Second Circuit Rule 46, Ninth Circuit Rule 46.1, and Tenth Circuit Rule 46.2. These rules do not, as far as we are aware, include any exception for government attorneys. Certain other circuits, however, exempt government attorneys from the requirement of paying the admission fee or joining the bar of the court. See First Circuit Rule 46.1, and Federal Circuit Rule 46(d).

We believe that those court rules that require attorneys appearing at the direction of the Attorney General solely in order to represent the interests of the United States to join federal court bars and to pay a fee to do so are not consistent with federal law. Several sections of Title 28 set out the authority of the Attorney General to assign attorneys to appear in court to represent the interests of the United States. Section 515(a) provides that "[t]he Attorney General or any other officer of the Department of Justice, or any attorney specially appointed by the Attorney General under law, may, when

specifically directed by the Attorney General, conduct any kind of legal proceeding * * * which United States attorneys are authorized by law to conduct * * *." (The powers of United States Attorneys are then broadly set out in 28 U.S.C. 547.) Further, Section 517 states that any officer of the Department of Justice "may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States * * *." Finally, Section 518(b) provides that "[w]hen the Attorney General considers it in the interests of the United States" he may "direct the Solicitor General or any officer of the Department of Justice" to "conduct and argue any case in a court of the United States in which the United States is interested * * *."

Thus, federal law clearly states that the Attorney General may direct any Department of Justice attorney to appear in federal court on behalf of the United States. The circuit rules mentioned above appear to conflict with these statutory provisions insofar as they actually require court bar membership and payment of fees by attorneys acting under the direction of the Attorney General.

Although district court rules on this point vary widely, a number of district courts also require payment of bar admission fees. I recognize that the Judicial Conference does not have direct supervision over district court rules (see 28 U.S.C. 331). However, these rules also must be in conformance with Acts of Congress (see 28 U.S.C. 2071(a)), and the judicial council in each circuit may modify or abrogate them if appropriate (see 28 U.S.C. 2071(c)(1)). Consequently, if the Judicial Conference requires the circuit rules to conform to federal law, I am confident that the district courts will either voluntarily make the necessary modifications, or that various circuit judicial councils will do so.

In sum, I respectfully request that the Judicial Conference of the United States consider our view that imposition of local bar admission fees on attorneys representing the United States is inconsistent with federal law, and modify any of the various circuit rules so that attorneys assigned by the Attorney General (or his legal designee) to represent the interests of the United States are not required to pay bar admission fees imposed by those rules.

Thank you for your attention to this matter. If you or members of the Judicial Conference would like to discuss it with me or my staff, please contact me.

Sincerely,

WILLIAM P. BARR
Attorney General

To: Professor Mooney
From: Bill Snyder
Date: February 11, 1993
Re: Circuit Court rules regarding admission to local bars, admission fees and exceptions for government employees.

1. D.C. Circuit: Rule 6 requires that each applicant for admission to the Bar of this Court file an application for admission and shall tender a fee for admission (which shall be set periodically by the Court) with the application.

2. First Circuit: Rule 46.1-Upon being admitted to practice, an attorney other than government counsel or court appointed counsel, shall pay a fee of $10.00 to the clerk. . . . Attorneys may be admitted in open court on motion or otherwise as the court shall determine.

3. Second Circuit: Rule 46(c)-Each applicant upon admission shall pay to the Clerk a fee which shall be set by the Court ($20.00). . . . (d) Counsel of record for all parties must be admitted to practice before this court. (For the requirements of admission, see sections (a) and (b)).

4. Third Circuit: Rule 9(1)(a)-Admission to the bar of this Court shall be governed by the provisions of F.R.A.P. 46, and such other requirements as the court may adopt from time to time. . . . The fee for admission shall be determined by order of the court and shall be payable to the Clerk as Trustee.

5. Fourth Circuit: No rule.

6. Fifth Circuit: Rule 46.1-Only attorneys admitted to the Bar of this Court may practice before the Court. Admission to the Bar of this Court is governed by FRAP 46. Each attorney shall pay to the Clerk an admission fee as may be fixed from time to time by Court order. . . .

7. Sixth Circuit: Rule 6

(a) Applicants for admission to the Bar of the Sixth Circuit shall pay a fee of $25.00. . . . An attorney who is appointed by the court to represent a party in forma pauperis and is qualified for admission, shall be admitted to practice in this court without payment for the admission of fees.

(b) In order to file pleadings or briefs on behalf of a party or participate in oral argument, attorney's must be admitted to the Bar of this court and file an appearance form. . . . Any attorney representing the United States or any officer or agency thereof in an appeal will be permitted to participate in that case without the necessity of being admitted to the Bar of this court.

IOP 4.2-Attorneys appointed by the court to represent clients in forma pauperis and who qualify under the standards of FRAP 46 and attorneys employed by a Federal Defender organization created pursuant to 18 USC § 3006A shall be admitted to practice in this court without payment of a fee, as shall an admittee presently employed by a United States court. . . .

8. Seventh Circuit: Rule 46.

(a) Admission. The lead attorney for all parties represented by counsel in this court must be admitted to practice in this court. . . . In addition, any attorney who orally argues an appeal must be admitted to practice in this court. An applicant for admission to the bar of this court shall file with the clerk an application on the form furnished by the clerk. . . .

(b) Admission Fees. The prescribed fee for admission is $115.00, except that attorneys who have been appointed by the district court or this court to represent a party on appeal in forma pauperis, law clerks to judges of this court or the district courts, and attorneys employed by the United States or any agency thereof need not pay the fee. . . .

(c) Government Attorneys. Attorneys for any federal, state or local government office or agency may appear before this court in connection with their official duties without being formally admitted to practice before the court.

9. Eighth Circuit: Rule 46A-The procedure for admitting, suspending, and disciplining attorneys is prescribed in FRAP 46.

Applicants for admission shall pay an admission fee of $30.00, for deposit in the Attorney Admission Fee Fund. An attorney who is appointed to represent a party proceeding in forma pauperis may appear in the case without being admitted to the bar of this court.

10. Ninth Circuit: Rule 46-1.

46-1.1. An attorney may be admitted upon written or oral motion of a member of the bar of the Court. Written motions shall be on the form approved by the Court and furnished by the clerk.

46-1.3. Each attorney shall pay to the clerk an admission fee. The amount of the admission fee may be periodically adjusted by the Court.

11. Tenth Circuit: Rule 46.2.2-Admission to the bar of this court shall be governed by the provisions of FRAP 46. The fee for admission shall be $15.00, payable to the clerk as trustee. . . .

12. Eleventh Circuit: Rule 46-1.

(a) Only attorneys admitted to the bar of this court may practice before the court. Admission is governed by FRAP 46 and this Eleventh

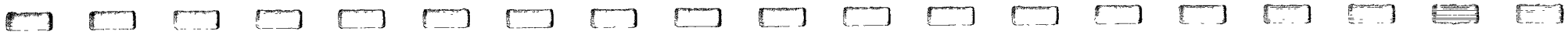
Circuit Rule. An attorney seeking admission shall file an application with the clerk on a form supplied by the clerk with an admission fee of $20.00. . . .

The following attorneys shall be admitted for the particular proceeding in which they are appearing without the necessity of formal application or payment of the admission fee: an attorney appearing on behalf of the United States, a federal public defender, an attorney appointed by a federal court under the Criminal Justice Act (CJA) or appointed to represent a party in forma pauperis. Attorneys in these categories who desire to receive an admission certificate from the Eleventh Circuit must pay the admission fee.

13. Federal Circuit: Rule 46

(c)-The prescribed fee for admission $25 payable to the clerk, for which the applicant shall receive a certificate of admission. . . .

(d) Attorneys for any Federal, State or local government office or agency may appear before this court in connection with their official duties without formal admission to the bar of the court.



U.S. Department of Justice
Office of the Solicitor General
Washington, D.C. 20530

AGENDA IV-F
Item 93-2
April 20-21, 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: New Proposal For Technical Amendment to FRAP 8(c)

Dear Judge Ripple:

One of our U.S. Attorneys recently brought to our attention a technical problem with Federal Rule of Appellate Procedure 8(c). Rule 8(c) states as follows:

> (c) **Stays in Criminal Cases.** Stays in criminal cases shall be had in accordance with the provisions of Rule 38(a) of the Federal Rules of Criminal Procedure.

When FRAP 8(c) was adopted, Fed. R. Crim. P. 38(a) addressed the rules for obtaining a stay when the sentence in question is death, imprisonment, a fine, or probation. See Federal Criminal Code and Rules, 1991 Rev. Ed., at 125-126 (reprinting rule) (copy attached). Rule 38 was later amended, however, to address those subjects in separate subsections (a) through (d). Subsection (a) covers the death penalty; subsection (b) imprisonment; subsection (c) fines; and subsection (d) probation.

When Rule 38 was amended as above, a conforming amendment to FRAP 8(c) was not made. As a result, FRAP 8(c) currently picks up only the part of criminal rule 38 that concerns stays of death sentences (Fed. R. Crim. P. 38(a)). This appears to have been an oversight, since there is no reason why the criminal rules should not also govern stays of sentences of imprisonment, fines, and probation.

This apparent oversight creates unnecessary confusion with respect to obtaining stays in criminal cases. This confusion can be eliminated by deleting the reference to subsection (a) of Fed. R. Crim. P. 38. As so amended, FRAP 8(c) would state as follows:

(c) Stays in Criminal Cases. Stays in criminal cases shall be had in accordance with the provisions of Rule 38 ~~(a)~~ of the Federal Rules of Criminal Procedure.

We propose that FRAP 8(c) be so amended.

Thank you for your consideration of this matter.

Sincerely,

William C. Bryson
Acting Solicitor General

cc: Carol Ann Mooney
Reporter, Appellate Rules Committee

Robert E. Kopp
Director, Appellate Staff
Civil Division

NOTES OF ADVISORY COMMITTEE ON RULES

1944 ADOPTION

This rule continues existing law. *Rupinski v. United States*, 4 F.2d 17, C.C.A.6th. The rule is similar to Rule 60(a) of the Federal Rules of Civil Procedure, 28 U.S.C., Appendix.

[VIII. APPEAL] (Abrogated Dec. 4, 1967, eff. July 1, 1968)

[Rule 37. Taking Appeal; and Petition for Writ of Certiorari.] (Abrogated Dec. 4, 1967, Eff. July 1, 1968)

NOTES OF ADVISORY COMMITTEE ON RULES

These are the criminal rules [Rules 37, 38(b), (c), 39] relating to appeals, the provisions of which are transferred to and covered by the Federal Rules of Appellate Procedure and (in the case of Rule 37(b) and (c), taking appeal to the Supreme Court and petition for review on writ of certiorari, respectively) by the Rules of the Supreme Court.

Rule 38. Stay of Execution

(a) Death. A sentence of death shall be stayed if an appeal is taken from the conviction or sentence.

(b) Imprisonment. A sentence of imprisonment shall be stayed if an appeal is taken from the conviction or sentence and the defendant is released pending disposition of appeal pursuant to Rule 9(b) of the Federal Rules of Appellate Procedure. If not stayed, the court may recommend to the Attorney General that the defendant be retained at, or transferred to, a place of confinement near the place of trial or the place where an appeal is to be heard, for a period reasonably necessary to permit the defendant to assist in the preparation of an appeal to the court of appeals.

(c) Fine. A sentence to pay a fine or a fine and costs, if an appeal is taken, may be stayed by the district court or by the court of appeals upon such terms as the court deems proper. The court may require the defendant pending appeal to deposit the whole or any part of the fine and costs in the registry of the district court, or to give bond for the payment thereof, or to submit to an examination of assets, and it may make any appropriate order to restrain the defendant from dissipating such defendant's assets.

(d) Probation. A sentence of probation may be stayed if an appeal from the conviction or sentence is taken. If the sentence is stayed, the court shall fix the terms of the stay.

(e) Criminal Forfeiture, Notice to Victims, and Restitution. A sanction imposed as part of the sentence pursuant to 18 U.S.C. 3554, 3555, or 3556 may, if an appeal of the conviction or sentence is taken, be stayed by the district court or by the court of appeals upon such terms as the court finds appropriate. The court may issue such orders as may be reasonably necessary to ensure compliance with the sanction upon disposition of the appeal, including the entering of a restraining order or an injunction or requiring a deposit in whole or in part of the monetary amount involved into the registry of the district court or execution of a performance bond.

(f) Disabilities. A civil or employment disability arising under a Federal statute by reason of the defendant's conviction or sentence, may, if an appeal is taken, be stayed by the district court or by the court of appeals upon such terms as the court finds appropriate. The court may enter a restraining order or an injunction, or take any other action that may be reasonably necessary to protect the interest represented by the disability pending disposition of the appeal.

(As amended Dec. 27, 1948, eff. Jan. 1, 1949; Feb. 28, 1966, eff. July 1, 1966; Dec. 4, 1967, eff. July 1, 1968; Apr. 24, 1972, eff. Oct. 1, 1972; Oct. 12, 1984, Pub.L. 98–473, Title II, § 215(c), 98 Stat. 2016; Mar. 9, 1987, eff. Aug. 1, 1987.)

Rule Applicable to Offenses Committed Prior to Nov. 1, 1987

This rule as in effect prior to amendment by Pub.L. 98–473 read as follows:

Rule 38. Stay of Execution, and Relief Pending Review

(a) Stay of Execution.

(1) Death. A sentence of death shall be stayed if an appeal is taken.

(2) Imprisonment. A sentence of imprisonment shall be stayed if an appeal is taken and the defendant is released pending disposition of appeal pursuant to Rule 9(b) of the Federal Rules of Appellate Procedure. If not stayed, the court may recommend to the Attorney General that the defendant be retained at, or transferred to, a place of confinement near the place of trial or the place where an appeal is to be heard, for a period reasonably necessary to permit the defendant to assist in the preparation of an appeal to the court of appeals.

(3) **Fine.** A sentence to pay a fine or a fine and costs, if an appeal is taken, may be stayed by the district court or by the court of appeals upon such terms as the court deems proper. The court may require the defendant pending appeal to deposit the whole or any part of the fine and costs in the registry of the district court, or to give bond for the payment thereof, or to submit to an examination of assets, and it may make any appropriate order to restrain the defendant from dissipating such defendant's assets.

(4) **Probation.** An order placing the defendant on probation may be stayed if an appeal is taken. If not stayed, the court shall specify when the term of probation shall commence. If the order is stayed the court shall fix the terms of the stay.

[(b) **Bail.**] (Abrogated Dec. 4, 1967, eff. July 1, 1968).

[(c) **Application for Relief Pending Review.**] (Abrogated Dec. 4, 1967, eff. July 1, 1968).

For applicability of sentencing provisions to offenses, see Effective Date and Savings Provisions, etc., note, section 235 of Pub.L. 98–473, as amended, set out under section 3551 of Title 18, Crimes and Criminal Procedure.

NOTES OF ADVISORY COMMITTEE ON RULES

1944 ADOPTION

This rule substantially continues existing law except that it provides that in case an appeal is taken from a judgment imposing a sentence of imprisonment, a stay shall be granted only if the defendant so elects, or is admitted to bail. Under the present rule the sentence is automatically stayed unless the defendant elects to commence service of the sentence pending appeal. The new rule merely changes the burden of making the election. See Rule V of the Criminal Appeals Rules, 1933, 292 U.S. 661 [18 U.S.C. formerly following § 688].

1966 AMENDMENT

A defendant sentenced to a term of imprisonment is committed to the custody of the Attorney General who is empowered by statute to designate the place of his confinement. 18 U.S.C. § 4082. The sentencing court has no authority to designate the place of imprisonment. See, e.g., *Hogue v. United States*, 287 F.2d 99 (5th Cir.1961), cert. den., 368 U.S. 932 (1961).

When the place of imprisonment has been designated, and notwithstanding the pendency of an appeal, the defendant is usually transferred from the place of his temporary detention within the district of his conviction unless he has elected "not to commence service of the sentence." This transfer can be avoided only if the defendant makes the election, a course sometimes advised by counsel who may deem it necessary to consult with the defendant from time to time before the appeal is finally perfected. However, the election deprives the defendant of a right to claim credit for the time spent in jail pending the disposition of the appeal because 18 U.S.C. § 3568 provides that the sentence of imprisonment commences, to run only from "the date on which such person is received at the penitentiary, reformatory, or jail for service of said sentence." See, e.g., *Shelton v. United States*, 234 F.2d 132 (5th Cir.1956).

The amendment eliminates the procedure for election not to commence service of sentence. In lieu thereof it is provided that the court may recommend to the Attorney General that the defendant be retained at or transferred to a place of confinement near the place of trial or the place where the appeal is to be heard for the period reasonably necessary to permit the defendant to assist in the preparation of his appeal to the court of appeals. Under this procedure the defendant would no longer be required to serve dead time in a local jail in order to assist in preparation of his appeal.

1968 AMENDMENT

Subdivisions (b) and (c) of this rule relate to appeals, the provisions of which are transferred to and covered by the Federal Rules of Appellate Procedure. See Advisory Committee Note under rule 37.

1972 AMENDMENT

Rule 38(a)(2) is amended to reflect rule 9(b), Federal Rules of Appellate Procedure. The criteria for the stay of a sentence of imprisonment pending disposition of an appeal are those specified in rule 9(c) which incorporates 18 U.S.C. § 3148 by reference.

The last sentence of subdivision (a)(2) is retained although easy access to the defendant has become less important with the passage of the Criminal Justice Act which provides for compensation to the attorney to travel to the place at which the defendant is confined. Whether the court will recommend confinement near the place of trial or place where the appeal is to be heard will depend upon a balancing of convenience against the possible advantage of confinement at a more remote correctional institution where facilities and program may be more adequate.

The amendment to subdivision (a)(4) gives the court discretion in deciding whether to stay the order placing the defendant on probation. It also makes mandatory the fixing of conditions for the stay if a stay is granted. The court cannot release the defendant pending appeal without either placing him on probation or fixing the conditions for the stay under the Bail Reform Act, 18 U.S.C. § 3148.

Former rule 38(a)(4) makes mandatory a stay of an order placing the defendant on probation whenever an appeal is noted. The court may or may not impose conditions upon the stay. See rule 46, Federal Rules of Criminal Procedure; and the Bail Reform Act, 18 U.S.C. § 3148.

Having the defendant on probation during the period of appeal may serve the objectives of both community protection and defendant rehabilitation. In current practice, the order of probation is sometimes stayed for an appeal period as long as two years. In a situation where the appeal is unsuccessful, the defendant must start under probation supervision after so long a time that the conditions of probation imposed at the time of initial sentencing may no longer appropriately relate either to the defendant's need for rehabilitation or to the community's need for protection. The purposes of probation are more likely to be served if the judge can exercise discretion, in appropriate cases, to require the defendant to be under