ADVISORY COMMITTEE
ON
APPELLATE RULES

Washington, D.C.

September 22-23, 1993

REVISED AGENDA
MEETING OF THE ADVISORY COMMITTEE ON APPELLATE RULES
September 22 & 23, 1993

I. ACTION ITEMS

A. Item 91-23, regarding the use of a single brief for each side in a consolidated appeal

B. Item 91-24, amendment of Rule 29 regarding amicus briefs

C. Item 91-25, regarding the contents of a suggestion for rehearing in banc

D. Item 91-28, updating Rule 27. A subcommittee consisting of Judge Williams, Mr. Froeb, and Mr. Munford was asked to examine the Department of Justice draft and report at the fall meeting. Judge Williams chairs the subcommittee.

E. Item 93-1, conflict between Fed. R. Civ. P. 9(h) and 28 U.S.C. § 1292(a)(3) re: interlocutory appeal of admiralty cases with non-admiralty claims

F. Item 93-3, amendment of Rule 41 re: expansion of the 7 day period for issuance of mandate
& Item 93-6, amendment of Rule 41 re: effective date of mandate

G. Item 93-4, amendment of Rule 41 re: length of time for stay of mandate

H. Item 93-5, amendment of Rule 26.1 re: use of the term affiliates

II. DISCUSSION ITEMS

A. Item 91-3, analysis of the responses regarding the new authority to define finality for purposes of appeal and to expand interlocutory appeals

B. Item 91-17, uniform plan for publication of opinions

III. REPORT ITEM

A. Item 86-23, re service on prisoners, review of initial responses from chief judges, staff attorneys, and Committee of Defenders
& introduction of item 93-7, the Houston v. Lack problem in the context of a petition for review of an agency decision.

Advisory Committee on the Federal Appellate Rules
Table of Agenda Items -- Revised August 1993

FRAP Item	Proposal	Source	Current Status
86-10	Amendment of Rule 4(a)(4) to give court of appeals discretion to waive requirement that new notice of appeal be filed after denial of motion to amend or alter judgment.	Hon. Francis D. Murnaghan, Jr.	Tabled indefinitely 12/83 Change adopted in substance; Reporter to work out language 4/85 Language to be circulated to circuits for comment 12/86 Further study requested 4/88 Approved in substance, Reporter to redraft 10/89 Further redrafting requested 10/90 Approved for submission to Standing Committee 4/91 Approved by Standing Committee for publication to bench and bar 7/91; published 8/91 Revised for resubmiission to Standing Committee 4/92 Approved by Standing Committee for submission to Judicial Conference 6/92 Approved by Judicial Conference 9/92 Supreme Court forwarded to Congress 4/93
86-19	Amendment of Rule 38 to afford appellant opportunity to respond to proposed award of damages or costs.	Standing Committee & Chicago Council of Lawyers	Drafts considered by Committee, Chair to contact Circuits re current practices and possible possible committee action 10/89 Further research requested 10/90 Approved for submission to Standing Committee 12/91 Approved by Standing Committee for publication 1/92 Approved for resubmission to Standing Committee 4/93 Approved for submission to Judicial Conference 6/93
86-23	Accommodation by rule the difficulty prisoners have in receiving notice of a magistrate's report in time to file their objection.	Hon. Dolores Sloviter (CA-3)	Under study by reporter Held over for further discussion 10/92 Draft to be sent to Chief Judges, Committee of Staff Attorneys, and Committee of Defenders 4/93

FRAP Item	Proposal	Source	Current Status
86-24	Rule to permit sanctioning of attorneys for bringing frivolous appeals.	Chief Justice Vincent McKusick (ME)	See notes under item 86-19 and 92-8 Subcommittee appointed to monitor; no need for action at this time 4/93
86-25	Amendment of Rule 28 to require statement of standard of review.	FRAP Committee	Reporter to work out language 12/86 Circuits' opinions to be solicited when jurisdictional statement rule is reviewed 4/88 Further consideration to be given 10/90 Approved for submission to Standing Committee 4/91 Approved by Standing Committee for publication to bench and bar 7/91; published 8/91 Revised for resubmission to Standing Committee 4/92 Approved by Standing Committee for submission to Judicial Conference 6/92 Approved by Judicial Conference 9/92 Supreme Court forwarded to Congress 4/93
86-26	Amendment of Rule 4(b) to clarify whether a notice of appeal filed after conviction but before sentencing ripens into an effective notice at the time judgment is entered.	Hon. Edward Becker (CA-3)	See notes under item 86-10 Approved for submission to Standing Committee 4/91 Approved by Standing Committee for publication to bench and bar 7/91; published 8/91 Revised for resubmission to Standing Committee 4/92 Approved by Standing Committee for submission to Judicial Conference 6/92 Approved by Judicial Conference 9/92 Supreme Court forwarded to Congress 4/93

FRAP Item	Proposal	Source	Current Status
88-10	Amend FRAP 34(c) by deleting requirement that the opening argument shall include a statement of the case.	Hon. Howard T. Markey (Fed. Cir.)	Committee opinion divided 6/89; approved in substance; reporter to redraft 10/89 Draft approved 10/90 Approved for submission to Standing Committee 4/91 Approved by Standing Committee for publication to bench and bar 7/91; published 8/91 Revised for resubmission to Standing Committee 4/92 Approved by Standing Committee for submission to Judicial Conference 6/92 Approved by Judicial Conference 9/92 Supreme Court forwarded to Congress 4/93
89-2	Amend filing rules to accommodate Houston v. Lack.	Hon. Joseph Weis, Jr. (CA-3)	Reporter asked to redraft to cover persons in mental institutions; Chair to contact prison officials re procedures 10/89 Additional information requested from reporter, clerks, and Justice Department 10/90 Approved in substance; redraft as 4(c), for submission to Standing Committee 4/91 Approved by Standing Committee for publication to bench and bar 7/91; published 8/91 Revised for resubmission to Standing Committee 4/92 Approved by Standing Committee for submission to Judicial Conference 6/92 Approved by Judicial Conference 9/92 Supreme Court forwarded to Congress 4/93

FRAP Item	Proposal	Source	Current Status
89-5	Amendment of FRAP 35(c).	Mr. Robert St. Vrain (CA-8)	Under study by reporter Discussion with Supreme Court Clerk to precede any further action 10/90 Additional drafts requested 12/91 Approved for submission to Standing Committee 4/92 Standing Committee requested that Advisory Committee reconsider 6/92 Draft approved for submission to Standing Committee 4/93. Check all other FRAP for cross-references to "suggestions" for rehearing in banc Approved by Standing Committee for publication to bench and bar 6/93
90-1	Amend FRAP 35(b) and (c) to change "suggestion" for an in banc to a "petition" for an in banc.	Hon. Jon Newman (CA-2) Mr. St. Vrain (CA-8)	Under study See notes under item 89-5
90-4	Amendment of Rule 3(c) in light of of Torres.	Hon. Gilbert S. Merritt (CA-6) and Public Citizen Litigation Group	Awaiting initial Committee discussion Approved for submission to Standing Committee 12/91 Approved for shortened publication period by Standing Committee 1/92; published 2/92 Revised for resubmission to Standing Committee 5/92 Approved by Standing Committee for submission to Judicial Conference 6/92 Approved by Judicial Conference 9/92 Supreme Court forwarded to Congress 4/93

FRAP Item	Proposal	Source	Current Status
90-5	Technical amendment to Rule 10(b)(3).	Mr. Greacen (CA-5)	Approved for submission to Standing Committee 4/91 Approved by Standing Committee for publication to bench and bar 7/91; published 8/91 Revised for resubmission to Standing Committee 4/92 Approved by Standing Committee for submission to Judicial Conference 6/92 Approved by Judicial Conference 6/92 Supreme Court forwarded to Congress 4/93
91-1	Change "Magistrate" to "Magistrate Judge" in all relevant rules.	Judicial Improvements Act of 1990	Approved for submission to Standing Committee 4/91 Approved by Standing Committee for publication 7/91; published 8/91 Revised for resubmission to Standing Committee 4/92 Approved by Standing Committee for submission to Judicial Conference 6/92 Approved by Judicial Conference 9/92 Supreme Court forwarded to Congress 4/93
91-2	Amend rules 40(a) and 41(a) to lengthen time for filing a petition for rehearing in civil cases involving the U.S.	Solicitor General, Kenneth Starr	Approved for submission to Standing Committee 12/91 Approved by Standing Committee for publication 1/92 Approved for resubmission to Standing Committee 4/93 Approved by Standing Committee for submission to the Judicial Conference 6/93
91-3	Final decision by rule/expanding interlocutory appeal by rule.	Federal Courts Study Committee Judicial Improvement Act of 1990, P.L. No. 101-650; and Federal Courts Administration Act of 1992, P.L. No. 102-572	Discussion on-going 4/91

FRAP Item	Proposal	Source	Current Status
91-4	Typeface, re: rule 32.	Mr. Greacen (CA-5)	Reporter asked to draft language 12/91 Approved for submission to Standing Committee 11/92 Approved by Standing Committee for publication to bench and bar 12/92 Advisory Committee approved new drafts for submission to Standing Committee for re-publication 5/93 Standing Committee approved new draft for re-publication 6/93
91-5	Use of special masters in courts of appeals.	Hon. Kenneth Ripple Hon. Gilbert Merritt Hon. Delores Sloviter	Reporter asked to draft language 12/91 Approved for submission to Standing Committee 10/92 Approved by Standing Committee for publication to bench and bar 12/92 Approved for resubmission to Standing Committee 4/93 Approved by Standing Committee for submission to the Judicial Conference 6/93
91-6	Amendment of Rule 39 to allocate word processing equipment costs between producing originals and producing "copies." Martin v. United States, 931 F.2d 453 (7th Cir. 1991).	Hon. Kenneth Ripple	Further discussion requested 12/91 Mr. Strubbe asked to collect information 10/92
91-8	Amendment of Rule 25 so that whenever service is accomplished by mailing, the proof of service shall include the addresses to which the papers were mailed.	Local Rules Project	Approved for submission to Standing Committee 12/91 Approved by Standing Committee for publication 1/92 Approved for resubmission to Standing Committee 4/93 Approved by Standing Committee for submission to Judicial Conference 6/93

FRAP Item	Proposal	Source	Current Status
91-9	Amendment of Rule 32(a) to require counsel to include their telephone numbers on the covers of briefs and appendices.	Local Rules Project	Approved for submission to Standing Committee 12/91 Approved by Standing Committee for publication 1/92 Approved for resubmission to Standing Committee 4/93 Approved by Standing Committee for submission to Judicial Conference 6/93
91-10	Amendment of FRAP 15 to require payment of the docketing fee.	Local Rules Project	Approved for submission to Standing Committee 12/91 Approved by Standing Committee for shortened publication period 1/92; published 2/92 Approved by Standing Committee for submission to Judicial Conference 6/92 Approved by Judicial Conference 9/92 Supreme Court forwarded to Congress 4/93
91-11	Amendment of Rule 42 re: authority of clerks to return or refuse documents that do not comply with federal or local rules.	Local Rules Project	Reporter asked to prepare draft 12/91 Approved for submission to Standing Committee 10/92 Approved by Standing Committee for publication to bench and bar 12/92 Approved for resubmission to Standing Committee 4/93 Approved by Standing Committee for submission to Judicial Conference 6/93

FRAP Item	Proposal	Source	Current Status
91-12	Amendment of Rule 33.	Local Rules Project	Judge Hall, Judge Logan, Mr. Kopp, & Reporter asked to develop drafts 12/91 Approved for submission to Standing Committee 10/92 Approved by Standing Committee for publication to bench and bar 12/92 Approved for resubmission to Standing Committee 4/93 Approved by Standing Committee for submission to Judicial Conference 6/93
91-13	Amendment of Rule 41 to provide a uniform standard for granting a stay of a mandate.	Local Rules Project	Reporter asked to draft language 12/91 Approved for submission to Standing Committee 10/92 Approved by Standing Committee for publication to bench and bar 12/92 Approved for resubmission to Standing Committee 4/93 Approved by Standing Committee for submission to Judicial Conference 6/93
91-14	Amendment of Rule 21 so that a petition for mandamus does not bear the name of the district judge and the judge is represented pro forma by counsel for the party opposing the relief unless the judge requests an order permitting the judge to appear.	Local Rules Project	Reporter asked to draft language 12/91 Approved for submission to Standing Committee 10/92 Standing Committee referred the proposal back to to Advisory Committee for further consideration 12/92 New draft approved for submission to Standing Committee 4/93 Approved by Standing Committee for publication to bench and bar 6/93
91-15	Uniform effective date for local rules.	Local Rules Project	Further study recommended 12/91

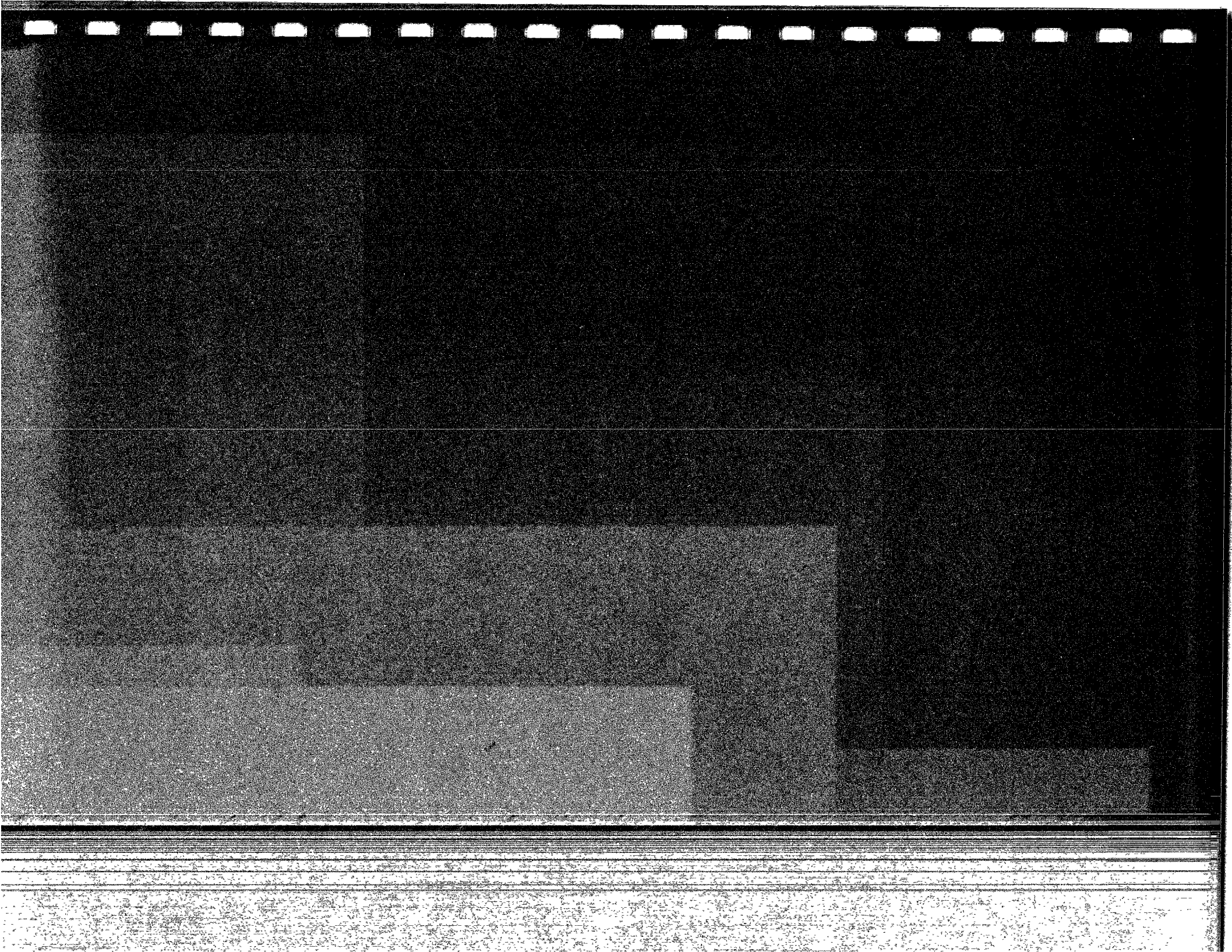
FRAP Item	Proposal	Source	Current Status
91-17	Uniform plan for publication of opinions.	Local Rules Project & Federal Courts Study Committee	Further study recommended 12/91
91-18	Amendment of Rule 5.1 to require additional information or to authorize courts of appeals to require additional information by rule or order.	Local Rules Project	For future discussion 12/91 No further action deemed appropriate 4/93
91-19	Uniform format and filing time for docketing statements.	Local Rules Project	For future discussion 12/91 No further action deemed appropriate 4/93
91-20	Expand requirements of Rule 26.1 or limit local rulemaking in area.	Local Rules Project	For future discussion 12/91 No further action deemed appropriate 4/93
91-21	Uniform appendix	Local Rules Project	For future discussion 12/91 No further action deemed appropriate 4/93
91-22	Amend Rule 9(a) or (b) to specify the type of information that should be presented to a court in bail matters.	CA-5 in response to Local Rules Project	Adopted in substance, Reporter asked to draft language 12/91 Approved for submission to Standing Committee 10/92 Approved by Standing Committee for publication to bench and bar 12/92 Approved for resubmission to Standing Committee 4/93 Approved by Standing Committee for submission to Judicial Conference 6/93
91-23	Single brief for each side in consolidated or multi-party appeals.	CA-4 in response to Local Rules Project	For future discussion 12/91

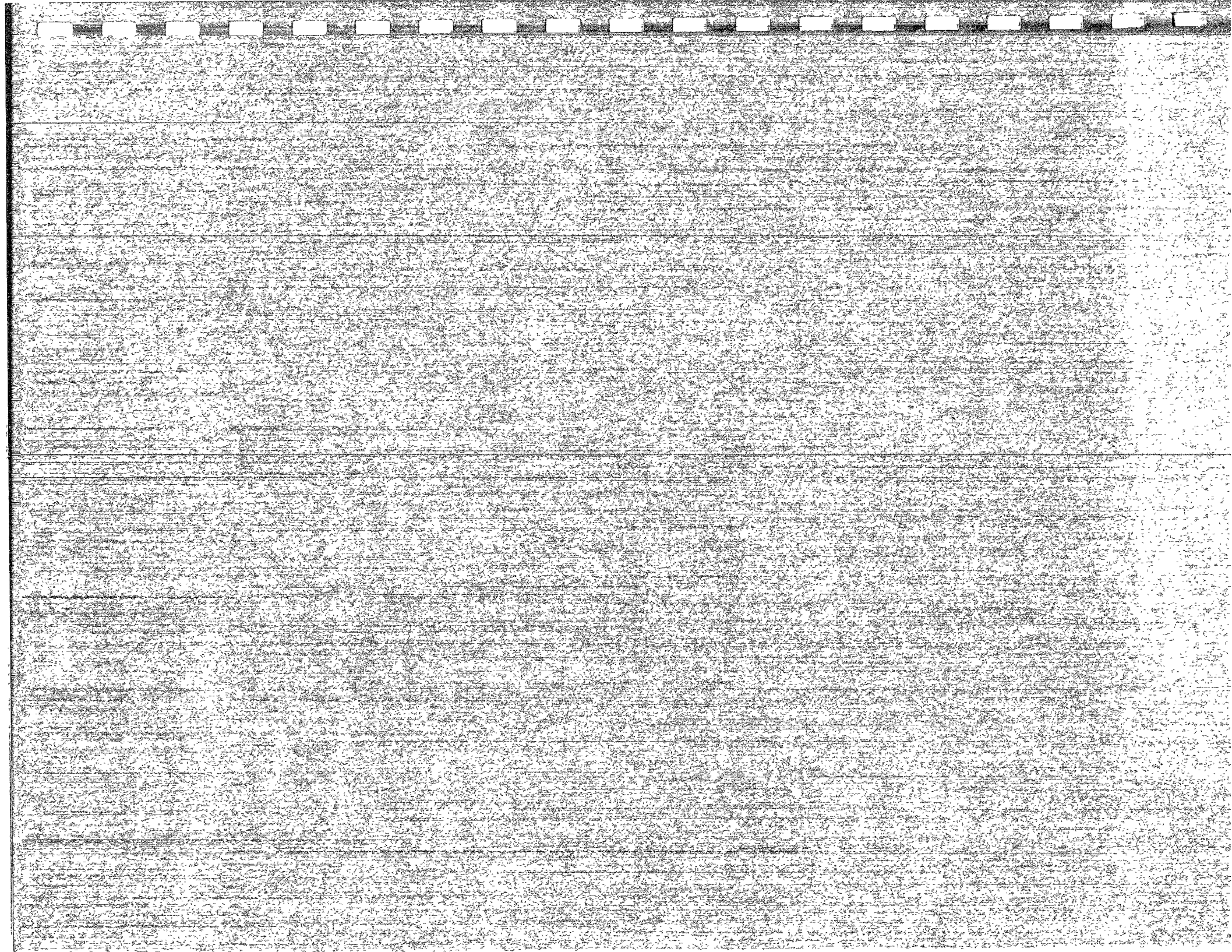
FRAP Item	Proposal	Source	Current Status
91-24	Page limits for and contents of amicus briefs.	CA-5 in response to Local Rules Project	For future discussion 12/91
91-25	Amendment of Rule 35 to specify contents of suggestions for rehearing in banc.	CA-5 in response to Local Rules Project	For future discussion 12/91
91-26	Amendment of Rule 28 to require a summary of argument, any claim for attorney's fees with statutory basis & amendment of Rule 32	Advisory Committee in response to Local Rules Project	For future discussion 12/91 Mr. Kopp and Mr. Strubbe asked to assist reporter 12/91 Summary of argument -- approved for submission to Standing Committee 10/92 Attorney fees -- no further action deemed appropriate 10/92 Summary of argument -- approved by Standing Committee for publication 12/92 Approved for resubmission to Standing Committee 4/93 Summary of argument amendment -- approved by Standing Committee for submission to Judicial Conference 6/93
91-27	Number of copies.	Local Rules Project	Reporter asked to draft language 12/91 Mr. Kopp, Mr. Strubbe, & Mr. Spaniol asked to study chart question 12/91 Approved for submission to Standing Committee 10/92 Approved by Standing Committee for publication to bench and bar 12/92 Approved for resubmission to Standing Committee 4/93 Approved by Standing Committee for submission to Judicial Conference 6/93
91-28	Updating Rule 27	Advisory Committee	Mr. Kopp asked to prepare memo 12/91 Held over 10/92 Subcommittee appointed 4/93

FRAP Item	Proposal	Source	Current Status
92-1	Amendment of Rule 47 to require that local rules follow uniform numbering system and delete repetitious language.	Standing Committee	Draft requested 1/92 Approved for submission to Standing Committee 4/92 Standing Committee referred to Committee of Reporters 6/92 New draft approved 10/92 Uniform language developed by Standing Committee--referred to Advisory Committee for incorporation 12/92 Approved by Advisory Committee for submission to Standing Committee 4/93 Approved by Standing Committee for publication to bench and bar 4/93
92-2	Amendment permitting technical amendments without full procedures.	Standing Committee	Draft requested 1/92 Draft discussed 4/92; discussion ongoing New draft approved 10/92 Uniform language developed by Standing Committee--referred to Advisory Committee for incorporation 12/92 Approved by Advisory Committee for submission to Standing Committee 4/93 Approved by Standing Committee for publication to bench and bar 4/93
92-3	Study Rule 4(b) in light of § 3731.	Advisory Committee	For future discussion; Mr. Kopp asked to consult with the Solicitor General 4/92 Held over 10/92 No further action deemed appropriate 4/93
92-4	Amendment of Rule 35 to include intercircuit conflict as ground for seeking in banc.	Solicitor General Starr	Subcommittee consisting of Judges Logan and Williams and Mr. Kopp to consult with Reporter Report from FJC pending 1/93 On hold pending views of Solicitor General 4/93

FRAP Item	Proposal	Source	Current Status
92-5	Amendment of Rule 25 re "most expeditious form . . . except special delivery".	Advisory Committee	Approved for submission to Standing Committee 4/93 Approved by Standing Committee for publication to bench and bar 6/93
92-6	Amendment of Rule 25 to eliminate the mailbox rule for briefs and appendices.	Mr. Greacen	No further action deemed appropriate 4/93
92-7	Amendment of Rule 30(a)(3) to require a copy of the notice of appeal.	Hon. Jon Newman (CA-2)	No further action deemed appropriate 4/93
92-8	Amendment of Rule 38 re: 1) defining "frivolous"; 2) whether responsibility falls on the client or the attorney; 3) requiring a court to state reasons.	Alan B. Morrison, Esq.	Subcommittee appointed to monitor; no need for action at this time 4/93
92-9	Amendment of Rule 10(b)(1) to conform to 4(a)(4).	Advisory Committee on Bankruptcy Rules	Approved for submission to Standing Committee 4/93 Approved by Standing Committee for publication to bench and bar 6/93
92-10	Reconsideration of some of the language of amended Rule 4(a)(4).	Standing Committee	Approved for submission to Standing Committee 4/93 Approved by Standing Committee for publication to bench and bar 6/93
92-11	Consideration of local rules that do not exempt government attorneys from being required to join court bar or from paying admission fees.	Attorney General Barr and Standing Committee	On hold pending views of Solicitor General 4/93

FRAP Item	Proposal	Source	Current Status
93-1	Conflict between Civil Rule 9(h) & 28 U.S.C. § 1292(a)(3) re: interlocutory appeal of admiralty cases with non-admiralty claims.	Hon. Edward Becker (CA-3)	Awaiting initial Committee discussion
93-2	Amend Rule 8(c) re: cross-reference to Crim. R. 38.	Department of Justice	Approved for submission to Standing Committee 4/93 Approved by Standing Committee for publication 6/93
93-3	Amend Rule 41 re: 7-day period for issuance of mandate.	Advisory Committee	Awaiting initial Committee discussion
93-4	Amend Rule 40 re: length of time for stay of mandate.	Advisory Committee	Awaiting initial Committee decision
93-5	Amend Rule 26.1 to delete use of term "affiliate."	Mr. Joseph Spaniol	Awaiting initial Committee decision
93-6	Amend Rule 41 re: effective date of mandate	Solicitor General Days	Awaiting initial Committee decision
93-7	The Houston v. Lack problem in the context of a petition for review of an agency decision	Mr. Munford	Awaiting initial Committee decision





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

Judge Kenneth F. Ripple called the meeting to order in the fourth floor conference room of the Federal Judiciary Building in Washington, D.C. In addition to Judge Ripple, the Committee Chair, the following Committee members were present: Judge Danny Boggs, Mr. Donald Froeb, Judge Grady Jolly, Judge James Logan, Mr. Luther Munford, and Judge Stephen Williams. Mr. Robert Kopp attended on behalf of the Acting Solicitor General. Judge Robert Keeton, Chair of the Standing Committee was present. Mr. Strubbe, the Clerk of the Seventh Circuit, attended on behalf of the clerks. Professor Mooney, the Reporter, was present. Mr. Peter McCabe - the Secretary, Mr. John Rabiej - Chief of the Rules Support Office, Mr. Paul Zingg - Mr. McCabe's assistant, and Mr. Joseph Spaniol were present along with Mr. Joseph Cecil of the Federal Judicial Center.

Judge Ripple began the meeting by greeting and introducing Mr. Munford, the newest member of the Committee.

Judge Ripple then turned the Committee's attention to the first item on the agenda a review and assessment of the comments submitted concerning the proposed amendments published in January 1993.

I. GAP Report

General Comments

The Reporter noted that in addition to the comments concerning specific rules, two comments were received that were general in nature.

First, one commentator opposed the change from "shall" to "must." He pointed out that unless Congress also makes the same changes, the rules and statutes will use different terminology to refer to the same thing. Professor Mooney stated that the change from shall to must is supported by the Style Subcommittee of the Standing Committee. Indeed the Style Subcommittee has decided to use "must" with both active and passive voice. Because some of the published rules were drafted when the Style Subcommittee continued to use "shall" with the active voice, the Reporter changed every remaining "shall" in the published rules to "must" except in those instances where it is used to indicate the future tense. The Committee agreed that the change is appropriate.

Second, Mr. Munford had written asking whether it would be preferable to omit citations to specific circuit rules in the Committee Note accompanying a rule amendment. He pointed out that local rules change frequently and that in some instances the purpose of an amendment is to supplant a local rule. He suggested that it might be better to simply refer to "local rules of the X & Y Circuits" rather than to cite to specific rules. Mr. Munford further pointed out that citation to specific local rules has not been consistent in the past.

Judge Ripple noted that one reason for citing the local rules is that a significant portion of the amendments originate with local rules, and citation to the local rules becomes a part of the legislative history. He added further that if the Committee thought it would avoid confusion, the Committee Notes could state that citations are to local rules effective as of a certain date. Judge Jolly remarked that the exact citation facilitates historical research. Judge Ripple suggested that we should be conscious of the problem and be careful in writing notes that readers are not mislead, but that we should also try to provide an accurate and complete legislative history. The Committee concurred.

The Committee then turned its attention to the specific comments submitted concerning the proposed amendments.

Item 86-10

The proposed amendment to Rule 38 requires a court to give an appellant notice and opportunity to respond before damages or costs are assessed for filing a frivolous appeal. The published rule states:

> 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.

Two comments were received. The National Association of Criminal Defense Lawyers supports the proposal. The NLRB suggests deleting the requirement that the notice come "from the court."

Mr. Froeb asked whether a statement by a court in its order that the court intends to sanction is sufficient? Judge Logan responded that he believes a show cause order should be entered.

Judge Jolly noted that the rule allows the court to award single or double costs. He asked whether notice must be given before a court may award single costs. The consensus was that Rule 38 applies only to "frivolous appeals" and that single costs may always be awarded under Rule 39 without notice. To omit single costs from Rule 38 might imply that only double costs could be awarded. The Reporter stated that the Committee had long discussed more radical amendments of Rule 38 but had finally decided to leave the rule basically unchanged but to add the notice requirement. Mr. Froeb suggested leaving the wording of the underlying rule unchanged. Rule 11 is currently undergoing changes and he believes that there will be evolutionary changes in Rule 38.

Mr. Munford questioned whether the new language requiring the court to give notice and opportunity to respond should be moved after "court of appeals" in the first line of the rule. The consensus was that the new language was properly placed. A court may decide whether an appeal is frivolous first, but it must give notice and opportunity to respond before

imposing sanctions.

Mr. Munford asked whether the last sentence should be retained in the Committee Note. The last sentence reads: "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." Mr. Munford was concerned that retention of that language might be read as condoning such conduct. Judge Ripple pointed out that the sentence accurately reflects a fundamental concern that motivated the Committee's decision to require notice from the court. He further stated that after the Advisory Committee completes its work, the amendment will be carefully scrutinized by both the Standing Committee and the Judicial Conference. Deletion of the sentence would in effect remove supporting documentation from the papers.

Judge Boggs moved approval of Rule 38 as published. Judge Williams seconded the motion; it passed unanimously.

Item 91-2

The proposed amendments to Rules 40 and 41 lengthen the time for filing a petition for rehearing in civil cases involving the United States.

Two public comments were submitted. Judge Newman, the immediate past Chair of the Advisory Committee, states that the additional time for requesting a rehearing under Rule 40 should be extended only to the United States and not to other parties in a civil appeal involving the United States. Judge Newman also states that he sees no need for Rule 41 to delay the issuance of the mandate until 7 days after the time for seeking rehearing has expired. He suggests that the court should be able to issue the mandate "within 7 days." The NLRB opposes the amendment because it may delay the effectiveness of enforcement orders. Although the law is not clear, the NLRB believes that an enforcement order becomes effective only upon issuance of the mandate and that the amendment would delay the effectiveness of enforcement orders.

Judge Boggs expressed disagreement with both Judge Newman and the NLRB concerning the time for issuing the mandate. He noted that when it is appropriate there are procedures authorizing the issuance of the mandate forthwith. Mr. Kopp agreed that when necessary the court can direct that the mandate issue forthwith. Mr. Kopp stated a preference for a day certain for issuance of the mandate and, therefore, he opposed, the "within 7 days" formulation.

With regard to whether the extension of time should be given only to the government, Mr. Munford pointed out that it would doubtlessly be easier for the clerk's office to administer an even handed rule. A rule giving an extension only to the government would leave the clerk's office in the position of trying to guess whether the government might want to petition for rehearing or whether the mandate should issue. Mr. Kopp pointed out that the

published draft was based on D.C. Cir. R. 15 and 10th Cir. R. 40, both of which extend the time for all parties, not just the United States. While the government would probably not oppose an amendment that extended the time only for the government, he stated that it had never occurred to the Solicitor's Office to suggest that the government operate by one time frame while opposing parties use different time limits.

Judge Logan expressed agreement with Mr. Munford that an unbalanced rule would make it difficult for the clerk's office to know whether to issue the mandate before the government's time expired. He stated his preference for an evenhanded rule and one that fixed a day certain for issuance of the mandate.

Mr. Munford also favored a fixed time period but questioned whether 7 days is the right amount of time. He noted that 7 days is the time period currently provided but that amendments of Rule 41(b) under Item 91-13 will change what a party must show in order to obtain a stay of the mandate. Judge Logan responded that a party has the period for filing the petition for rehearing to consider the reasons why a stay should be entered if rehearing is not granted. In fact, he pointed out, that the same reasons are often part of the petition for rehearing.

Judge Williams expressed his opposition to Judge Newman's suggestions that time be extended only for the government and that the court could issue the mandate within 7 days. Judge Williams said, however, that changing the time in Rule 41 for issuing the mandate from 7 to 14 days might be useful.

Mr. Kopp stated that he thinks 7 days is not a problem or that it is a separate problem from the one under consideration. He noted that as a practical matter ordinarily there is no problem because if a mandate issues and a stay is subsequently granted, the court recalls the mandate. He suggested that if there is a problem, a better approach would be to provide that if an application for a stay is filed, the mandate should not issue until the court acts on the application for stay.

Judge Ripple agreed that the question of whether a mandate should issue within 7 days after the expiration of the time for petitioning for rehearing, or after denial of such a petition is a separate question. The issue under consideration is the amendment extending the time for petitioning when the United States is a party. He suggested that the 7 day time period be treated as a separate suggestion and be placed on the table of agenda items as Item 93-3. The committee concurred and Judge Ripple stated that he would form a subcommittee including Mr. Strubbe, practitioners, and judges.

Judge Logan moved adoption of Rules 40 and 41 as published except that the word "shall" should be changed to "must" and the word "application" to "petition" for certiorari. Mr. Kopp seconded the motion and it was approved unanimously.

Item 91-4

Several amendments to Rule 32, governing the form of documents, were published. Four public comments were received. The Reporter summarized the comments.

One commentator, Judge Newman, supports the effort to standardize type styles but disagrees with the approach taken in the draft. He suggests that the committee consult the new Second Circuit rule. He also disagrees with the suggestion that footnotes be double spaced. Judge Newman also opposes the binding requirement.

One commentator favors the binding requirement but suggests that the use of spiral binding should be specifically mandated.

Two other commentators also oppose double spaced footnotes and made miscellaneous minor objections.

After the Reporter summarized the comments, Judge Ripple suggested considering them one at a time. The Committee began with the type style question. The published rule said that unless a brief is commercially printed, it must be prepared with no more than "11 characters per inch." Mr. Strubbe reported that the clerks' committee had discussed the proposal and thought that 65 characters per line would be preferable because such a standard would permit proportional type.

Mr. Kopp suggested that a better way to permit proportional type would be to require a typeface of 12 point or larger. It was pointed out that with 12 point type it would be necessary to prohibit compaction or compressed type. Mr. Strubbe noted that if the rule sets a limit of 65 characters per line, compacted type would simply result in shorter lines.

Judge Logan stated that he likes printed briefs and would like the rule to permit production of similar briefs on computers. He pointed out that a 65 characters per line standard allows proportional fonts and may improve readability. He noted that the Committee's basic aim has been to prevent people from cheating on the page limits.

Mr. Munford expressed concern about a standard that will not make it clear to a practitioner which button should be pressed on a computer to achieve compliance.

Judge Keeton stated that changing the standard from a number of characters per inch to a number of characters per line simply eliminates the notion that looking at any one inch will determine whether a brief is in compliance. Beyond the fact that such a change would force one to look at a larger unit, he thought that there would be no real difference between the two.

Judge Ripple suggested a straw vote. Four members voted to retain the 11 characters per inch standard. Three members voted to change to 65 characters per line; and no one

voted to send the rule back for further study.

After a short break Judge Ripple resumed the discussion by noting that Supreme Court Rule 33.1(b) prohibits any ". . . attempt to reduce or condense typeface." He inquired whether using similar language either in the text of the rule or in the Committee Note would be useful.

Judge Jolly suggested leaving the rule as published. Judge Logan expressed preference for a standard that would allow use of proportional type. The Committee members discussed the possibility of changing to a number of characters per page or per brief.

Judge Ripple appointed a subgroup, chaired by Judge Jolly, to continue the discussion and return to the Committee with a suggestion. Judge Ripple then asked the Committee to discuss the other comments.

The Committee discussed the issue of double spaced footnotes. Judge Logan moved that the rule be amended to permit single spaced footnotes. Judge Williams seconded the motion. After a brief discussion the motion was amended to add the Supreme Court's language concerning compressed type at the end of line 16 and to add a reference therein to footnotes. The motion passed unanimously.

The Committee then discussed the proposal that a brief or appendix be bound to permit it to lie flat when open. Judge Jolly moved that the provision remain unchanged; the motion was seconded by Mr. Munford. The motion was approved unanimously. The requirement that the case number appear at the top center of the cover and that the attorney's phone number be placed on the front cover were also unanimously approved.

The published proposal stated that the title of the document should "includ[e] the name of the party or parties for whom the document is filed (e.g., Brief for Appellant, J.Doe)." Judge Logan asked whether naming the parties is necessary when a brief is filed for all appellants or all appellees. Mr. Munford suggested that the rule could refer to Civil Rule 10(c). Judge Logan moved that the provision be amended by deleting the words "including the name of" and substituting the word "identifying;" he also suggested deleting all examples. Judge Williams seconded the motion and it was approved by a vote of six in favor and one opposed.

Mr. Spaniol had written prior to the meeting and asked whether the rule should continue to refer to carbon paper. The Committee had discussed that issue at the October meeting and decided to make no changes. Mr. Spaniol had also noted that the rule refers to "parties" proceeding in forma pauperis whereas the statute refers to "persons" proceeding in formal pauperis. Judge Logan and Judge Boggs moved that all such references to parties should be changed to persons. The change was approved unanimously.

One of the commentators noted that the proposed amendment requires a petition for rehearing, a suggestion for rehearing in banc, and any response to such petition or suggestion to be produced in the same manner as a brief, but that the rule did not prescribe the cover color. Judge Ripple moved, and Judge Boggs seconded the motion, that line 58 be amended by inserting the words: "with a cover the same color as the party's principal brief." The motion was approved unanimously.

Judge Ripple noted that the Committee Note makes specific reference to local rules but unless someone objected to the references they would be retained. There were no objections.

That concluded the discussion of Item 91-4 except that the Committee would return later to the discussion of type style.

Item 91-5

Proposed Rule 49 authorizes the use of special masters in the court of appeals. One comment was submitted; the NLRB expresses support for the proposal.

Mr. Munford questioned the numbering of the rule. He asked whether it should come at the end of the rules (and thus after Rule 48, the "Title" rule) or whether it should follow Rule 33. He suggested placement after Rule 33 because in both rules someone other than a judge presides. Judge Ripple thought that placement after Rule 33 would be inappropriate because he would like to avoid any suggestion that the rule on special masters is connected to the rule on appeal conferences. Because the use of appeal conferences for settlement purposes is new and the amended Rule 33 is trying to promote a level of informality, he would like to keep the two concepts separate.

Judge Williams suggested moving Rule 48 to Rule 1(c). Judge Keeton questioned whether such a change could be treated as a technical change and decided that it probably could be so characterized. Mr. McCabe noted that Bankruptcy Rule 1 combines the topics currently covered by Fed. R. App. P. 1 and 48.

Judge Ripple moved the approval in substance of the special master rule. Judge Williams seconded the motion; it was approved unanimously.

Judge Boggs moved that Rule 48 be moved to Rule 1 and made subpart (c) and captioned "Title." Mr. Munford seconded the motion. It was approved unanimously.

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 have been mailed. No public comments were submitted.

Prior to the meeting, Mr. Munford wrote and inquired why an address is required only when service is accomplished by mail. He noted that when a document is hand delivered, the document is usually delivered to office personnel rather than to the party or the party's counsel personally. Therefore, questions about service can arise even when a document has been hand delivered. In light of that comment, the Reporter had amended the draft to require that a certificate of service include not only the addresses to which papers have been mailed, but also the addresses at which papers have been delivered.

The Committee unanimously approved the change and the Committee consensus was that it was not a "substantial" change and that republication would not be necessary.

Mr. Munford noted that in cases involving many parties inclusion of all the addresses could result in a lengthy certificate of service and that the certificate of service should not count against the page limit for a brief. He suggested that Rule 28(g) should be amended to so provide. He made a motion that the words "proof of service" be inserted in Rule 28(g) following "table of citations." Judge Logan seconded the motion and it was approved unanimously. It was decided that the change could be treated as a technical and conforming amendment.

At 12:00 noon the Committee broke for lunch.

The meeting resumed at 1:00 p.m.

Judge Ripple suggested that the Committee pass a resolution thanking Mr. James Macklin, Jr., the Deputy Director of the Administrative Office who served as the Secretary to the Rules Committees for several years. Mr. Macklin will soon retire and it would be appropriate to thank him for his many years of dedicated service and assistance to the Committee. A motion was made and seconded and unanimously approved.

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 submitted but the clerks through Mr. Strubbe registered their opposition to the rule.

Mr. Munford questioned whether the proposed amendment to Rule 25 is consistent with amended Rule 32 which provides that carbon copies may not be filed except by persons proceeding in forma pauperis.

Judge Keeton suggested changing the word "submitted" to "used" at line 7 of the amended draft of Rule 32. Judge Boggs suggested using the word "submitted" rather than "filed" at line 64 of the amended draft of Rule 32. Those changes were approved unanimously.

Judge Boggs then moved approval of Rule 25(a) as published. Judge Jolly seconded the motion and it passed unanimously.

Item 91-12

The proposed Rule 33, published in January, differs substantially from the existing Rule 33. The Reporter summarized the two comments received. Judge Newman suggests that the language of the rule be amended to make it clear that the choice of an in-person or telephone conference is the court's and not the parties'. The Solicitor General's office suggests amending the third paragraph of the Committee Note to make it clear that suits against government officials should be treated like suits against government agencies and to state that attendance of an employee with authority "regarding" the matter at issue is sufficient.

In response to Judge Newman's suggestion the Reporter had inserted the words "as the court directs" at line 19 of the amended draft. Judge Ripple expressed his disapproval of that change. He noted that the rule serves dual purposes. It governs the usual prehearing conference that delineates issues, etc. but it also governs settlement conferences. Those circuits that currently use settlement conferences have adopted measures aimed at keeping the judges distanced from the conference. The language "as the court directs" could give the impression that judges are involved in the process. Judge Logan moved approval of line 19 as published (*i.e.*, without the new language). Mr. Froeb seconded the motion. It was approved unanimously.

With regard to the amendment of the third paragraph of the Committee Note, Mr. Kopp stated that many suits against government agencies also name government officials individually. As published, the Committee Note could give rise to an inference that suits against government officials should be treated differently than suits against agencies. The redrafting was intended to make it clear that a government official may also be represented at an appeal conference by an employee. Second, the Committee Note was changed to provide that when a party is required to attend the conference the court may determine that an employee with authority "regarding" the issue is sufficient rather than requiring attendance of an employee with authority "over" the matter.

The changes to the Committee Notes were moved by Judges Boggs and Logan and approved unanimously.

Item 91-13

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

A comment was submitted by the National Association of Criminal Defense Lawyers.

The Association argues that the 30 day period for a stay is anachronistic because the period for filing a petition for certiorari is now 90 days in both civil and criminal suits.

Judge Boggs and Ripple both stated that in their circuits the practice is to grant 90 day stays and that even if the rule were changed to permit a 90 day stay, it would not be necessary to grant a stay for the full period.

Mr. Munford focused the Committee's attention on lines 21 & 22 which require a motion for a stay to show that the petition for certiorari would present a substantial question and that there is good cause for a stay. He stated that those standards are stricter than they need to be. In many circuits the standard is that the petition would not be frivolous. He pointed out that Fed. R. Civ. P. 62(d) & (e) provide for an automatic stay upon posting a supersedeas bond. He said that he would except stays under Rule 62(d) & (e) from the showing required in the proposed amendment. Judge Ripple responded that a stay pending appeal to the court of appeals (the first appeal and an appeal as of right) is different than a stay after judgment by the court of appeals pending petition for certiorari to the Supreme Court.

Judge Logan questioned whether the standard should be substantial question and good cause (as published) or whether it should be substantial question or good cause. Judge Williams stated that "cause shown" has long been interpreted as involving a balancing of the equities. The greater the irreparable injury, the less substantial the question must be in order for a stay to be appropriate.

Mr. Kopp noted that at the Committee's meeting in October 1992, the consensus was that the proposed amendments did not create a substantive standard that the circuits are bound to follow, rather the intent of the proposed amendments was simply to put counsel on notice regarding the issues that a petition should address. Judge Ripple suggested removing the "see, e.g.," citation from the Committee Note in an effort to make it clear that the rule does not establish a substantive standard. The Committee voted to eliminate the Barnes citation in the Note.

With regard to the suggested change from 30 to 90 days, Mr. Kopp suggested that such a change would need to be published for comment. It was agreed to make that suggestion Item Number 93-4 on the table of agenda items.

Judge Logan moved adoption of the text of Rule 41 as drafted. Mr. Froeb seconded the motion; it passed by a vote of six in favor and one opposed. Mr. Munford stated that his opposition was based upon his belief that the "and" should be changed to "or."

91-22

Rule 9 governing review of a release decision in a criminal case was completely rewritten and published for comment. Two public comments were received. A United

States District Judge suggests that subdivision (c) should refer to 18 U.S.C. § 3145(c) in addition to the sections already cited. The National Association of Criminal Defense Lawyers (NACDL) made several suggestions. First, it suggests that the captions of subdivisions (a) and (b) should be coordinated to clarify whether (a) or (b) applies after a finding of guilt but before sentencing. Second, it suggests that the rule should be amended to make it clear whether a motion for release must be filed first in the district court even after filing a notice of appeal. Third, it suggests omitting the statutory references in subdivision (c) and, if necessary, moving them to the Committee Note. Fourth, it suggests amending the rule to allow a party to supplement the district court's bail record with evidentiary material.

In light of NACDL's first comment the Committee approved several changes:

1. it amended the caption of subdivision (a) to read: "Appeal from an Order Regarding Release Before Judgment of Conviction";
2. on line 24 of the draft prepared for the meeting, the Committee inserted a period after the word "conviction" and deleted the words "or the terms of the sentence";
3. it amended the first paragraph of the Committee Note; in line three after the word "before" the Committee inserted "the judgment of conviction is entered at the time of";
4. following the first sentence of the second paragraph of the Committee Note, the Committee added citations to Fed. R. Crim. P. 32(b); and
5. in the second paragraph of the Committee Note accompanying subdivision (b), the Committee inserted a period at line 4 after the word conviction and deleted the words "or from the terms of the sentence".

In response to NACDL's second suggestion the Committee decided to omit the second sentence (beginning with the word "implicit") of the Committee Note accompanying subdivision (b). The intent of that deletion was to remove any inference that a motion for release must in all instances be made first in the district court. The rule deals only with review of a release decision made by a district court and not with release decisions that may be sought initially in a court of appeals. Therefore, the Committee decided that it would be inappropriate to include any language stating categorically either that a motion must be made, or need not be made, in the district court after the filing of a notice of appeal.

Because the statutory references in subdivision (c) had been added by Congress, the Committee decided that it should not delete them but should add the reference to § 3145(c).

The Committee decided that it would ordinarily be inappropriate to allow a party to supplement the bail record in the court of appeals.

Judge Boggs moved the approval of the published rule with the amendments to the text and notes described above. The motion was seconded by Judge Williams and passed unanimously.

Following a short break, Ms. Sharon Marsh, a printing expert from the Administrative Office joined the Committee briefly to discuss the Rule 32 typeface issues. She suggested that the rule should specify the size of type, amount of spacing, size of paper, and the size of margins.

Item 91-13

The discussion then returned briefly to Item 91-13. The Committee had discussed deleting the citation to Justice Scalia's chambers opinion in the Barnes case. That change was intended to remove the inference that the rule establishes the substantive standard for granting a stay pending the filing of a petition for certiorari to the Supreme Court. Judge Ripple suggested that rather than simply delete the citation, it be replaced with a reference to § 17.19 of Stern & Gressman's treatise on Supreme Court Practice. Judge Williams asked whether it is clear that the standards for the courts of appeals are the same as those used by the Supreme Court. Judge Ripple replied that Stern & Gressman, at page 690, suggests that they are. Judge Logan moved to substitute the cite to Stern and Gressman for the Barnes citation. Mr. Kopp seconded the motion. It passed unanimously.

Item 91-26

The proposed amendment to Rule 28 requires a brief to contain a summary of argument. Three comments were received. One person suggests that the decision should be left to each court and, in those courts that decide not to require a summary, to the parties. Another person suggests that the choice be left to the judgment of individual lawyers. The third commentator suggests that a summary is needed only when a brief exceeds 25 pages.

Judge Logan stated that he did not feel strongly about the issue either way. Judge Boggs expressed his support of the requirement. He pointed out that Supreme Court Rule 24.1(h) requires a summary and he stated that he thinks it would be useful for judges. Mr. Kopp observed that the Committee has been trying to minimize the need for a pressure to have local rules. Because several circuits have local rules requiring a summary of argument, Mr. Kopp favors including the requirement in the national rule. Judge Jolly agreed with Mr. Kopp and additionally stated that a summary is helpful in deciding whether to grant oral argument. Judge Ripple stated that he uses a summary in a variety of ways and finds it very helpful.

Judges Logan and Williams moved adoption of the rule as published. The motion was approved unanimously.

Item 91-27

This item involves amendment of all appellate rules requiring the filing of copies of documents with a court of appeals. The amendments make it clear that a court may require a different number of copies than the number specified in the national rule either by local

rule or by order in an individual case. No comments were submitted and the Committee approved the drafts as published.

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 noted that the Supreme Court dropped "affiliates" from its list because no one understood what it meant. The Committee briefly discussed the possible meanings of the term "affiliates." Judge Boggs asked whether that change would mean that a litigant would not need to disclose "full brothers or full sisters" by which he means companies that are wholly owned, or virtually wholly owned, by the same parent? Judge Williams noted that the term "affiliate" is used in virtually every antitrust consent decree. Judge Ripple stated that a memorandum would be circulated concerning that subject after the meeting.

Discussion of Item 91-27 concluded the reconsideration of the materials published for comment.

Chief Judge Sloviter, the liaison member from the Standing Committee, joined the Committee during the last discussion. The meeting adjourned for the day at 4:50 p.m. to allow time for the subcommittee on Rule 32 to meet.

The meeting reconvened at 8:30 a.m. on April 21.

II. Items Remanded by the Standing Committee

The Standing Committee had requested that the Advisory Committee reconsider a number of items.

Items 89-5 and 90-1

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. That draft made no substantive changes in Rule 35. It simply included within the text of the rule a warning that the pendency of a suggestion for rehearing in banc does not extend the time for filing a petition for certiorari.

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 short, the proposal had been remanded because it only made the trap obvious rather than eliminating it.

The Reporter reviewed the earlier drafts. A December 1991 draft had taken the approach favored by the Standing Committee. That draft did not win Advisory Committee approval. 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 prevailing practice, 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. The Committee had concluded that requiring any sort of action within a time certain (whether it be 30, 60, or 90 days) was undesirable.

After the Reporter concluded her summary of past discussions, Judge Williams asked whether it really would be necessary to require action on a suggestion within a time certain. There is no time limit in the rules within which a court must act on a petition for panel rehearing. A court knows that a petition for panel rehearing must be acted upon and does so in due course. Judge Williams thought that the same approach would work with suggestions for rehearing in banc. Judges Sloviter, Boggs, and Logan all indicated that suggestions for rehearing in banc are decided by their courts as routine matters. A consensus developed that if a change were made so that the pendency of a suggestion for rehearing in banc stayed the mandate and tolled the time for filing a petition for certiorari, the courts would develop a mechanism for disposing of the suggestions.

At that point the December 1991 draft became the focus of discussion. Judge Logan moved that lines 13 through 16 of the draft be omitted. The effect of that deletion would be to allow the circuits to determine how they would handle the internal voting procedures. The motion was seconded by Judge Williams and approved unanimously.

The Committee then discussed lines 24 through 26 and whether a petition for rehearing in banc should be included with a petition for panel rehearing. The existing rule states that a suggestion for rehearing in banc may be combined with a petition for panel rehearing. The draft would have required the two to be combined if both are filed. Judge Logan made a motion to excise that requirement. Judge Jolly seconded the motion and expressed his preference for separate documents. Mr. Munford noted that in the Fifth Circuit, a suggestion for rehearing in banc may be treated as a petition for panel rehearing. Judge Sloviter responded that the suggested change would not preclude that; the change simply means that the rule does not require that the two petitions be combined. The motion carried by a vote of five to three. Judge Williams made a motion that was seconded by Judge Logan to amend the Committee Note to state that a circuit has the option of requiring a separate document. The motion passed unanimously.

Judge Logan then moved approval of the drafts of Rule 35(b) & (c) and Rule 41 as amended by the preceding motions. Judge Williams seconded the motion. Judge Jolly stated that he believes the term "suggestion for rehearing in banc" should be retained to distinguish it from a petition for panel rehearing. Judge Logan responded that calling it a "petition for

rehearing in banc" makes it clear that a response is required from the court. Judge Keeton noted that with the omission of lines 13 through 16, there is no certainty as to what may happen, the petition may languish and the mandate is stayed until disposition of the petition. Judge Jolly pointed out that the problem is more theoretical than actual because whenever a judge is seriously considering voting in favor of rehearing in banc, the judge stays the mandate. Mr. Kopp suggested that the Committee Note point out that Rule 41 provides that the filing of a petition for rehearing in banc stays the mandate and that the court of appeals will need to take final action on the petition but the procedure for doing so is left to local practice. The motion passed by a vote of six to two.

Mr. Munford pointed out that Rule 32(b) uses the term "suggestion for rehearing in banc." Because the amendments just approved changes that term to "petition for rehearing in banc" that reference plus all other cross-references in the rules to "suggestions" for rehearing in banc must be amended.

Item 91-14

This item arose from a Local Rules Project suggestion to amend 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. 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 was concerned about two issues. First, some members of the Committee felt strongly that a trial judge should have the option to appear to oppose the relief sought in a petition for mandamus. Second, in many instances a mandamus action is actually adversarial in nature and further changes in the rule might be desirable to emphasize the similarity of mandamus to an interlocutory appeal.

The Reporter summarized the three drafts that were prepared for the meeting. The first draft differed from the one submitted to the Standing Committee in that it would permit the trial judge to respond whenever the court of appeals requires a response. The second draft amends the rule so that the trial judge is not treated as a party but it allows the trial judge to respond and authorizes the court of appeals to order the judge to respond. The third draft was prepared by Judge Easterbrook. The third draft also amends the rule so that the trial judge is not treated as a party but unlike the second draft it permits the trial court judge to participate only if ordered to do so by the court of appeals. The third draft also authorizes a court of appeals to invite an amicus curiae to defend the order in question.

Judge Ripple invited Judge Keeton to add any comments about the Standing Committee discussion. Judge Keeton reported that there are deep divisions of thought on the issue of a trial court judge's appearing before a court of appeals and arguing. But there are also instances in which neither party may want the order to stand and that the position of the court may go unrepresented.

Judge Logan stated that in most instances one party supports the judges action but there are instances in which that is not true. For example, if a district judge refuses to act on a remand from a court of appeals, it is not likely that either party would support the judge's position. In some cases the judge is the proper person to respond to a petition for mandamus and the judge wants to respond.

Judge Williams expressed support for Judge Easterbrook's position in which a judge participates only upon court order. If a judge does not have the option to participate, the judge has a greater incentive to give a written explanation for the judge's conduct at the time he or she acts.

Judge Boggs noted that mandamus cases are of two different types. In some instances the issue is fundamentally substantive and in such instances there is no greater need for the judge's participation than in an appeal. In other instances, the issue involves a question of delay, of the judge's conduct, or of control of the court. In such instances the judge often wants to provide an explanation. The trouble with the judge's participation is that it calls into question the judge's impartial position.

Mr. Froeb favored allowing a judge to appear whenever the judge wishes to do so. He states that sometimes the outcome of a mandamus petition can have a serious effects on the administration of justice. When he served as the chief judge of a trial court, he had occasion to present the trial court's position in writing to a court of appeals. He did not agree that an amicus curiae would be able to adequately represent the court in all instances, and may not be willing to do so for little or no compensation.

Chief Judge Sloviter agreed that are cases where the parties do not have any interest in the outcome of the mandamus. For example, there was a case in her circuit in which the district judge assessed the cost of empaneling jury against the lawyer who failed to give notice that the case had been settled. Because the case had been settled, there was no appeal. But the question of the judge's authority to so assess the cost of the jury was called into question on mandamus. In that case, she asked a law professor to represent the judge's position as an amicus. She observed that the fundamental question is whether the district judge has a right to be a party to the action.

Mr. Munford stated that in his opinion it is unseemly for a judge to be a party in a case. Typically a court will not grant mandamus unless the party has asked for relief in the trial court. At the time that the trial court judge responds to that request, the judge has the opportunity to give reasons for the response. Mr. Munford stated that he thinks that participation by the trial court judge is proper only upon invitation of the appellate court.

Judge Ripple pointed out that if the parties have mutual self-interest, it is possible for them to frame the petition for mandamus so that the court of appeals is not aware of the real issue. It may be important to leave open the possibility of the district judge appearing to clarify the situation.

Judge Williams agreed that a case may be framed before a court of appeals so that a certain angle is obscured but that can happen on appeal as well as on mandamus. Therefore, he said that he does not see anything distinctive about the problem in mandamus cases.

Judge Ripple agreed that in mandamus cases involving substantive matters there is little or no distinction. But when a mandamus case involves case management or procedural issues, only the district court has a global viewpoint and the ability to explain certain actions to the court of appeals.

Chief Judge Sloviter suggested that after the filing of a mandamus petition, it might be appropriate to allow a district court to enter a supplementary opinion explaining its conduct. Allowing the court to file such an opinion would not constitute participation as a litigant.

Judges Jolly and Ripple both expressed the opinion that mandamus is an unusual writ and is not to be considered a substitute for an appeal. It is an action against the judge or against the judge's ruling. It is important that the judge have the opportunity to defend himself or herself.

Mr. Kopp observed that the problem is that mandamus occurs in many different contexts and the context determines the appropriateness of a judge's participation. As a general practice one does not want to encourage a judge to act as a litigant. The difficulty in drafting a rule, is that it cannot cover all the various situations.

Judge Logan expressed a preference for draft two because it neither names nor blames the trial court judge but gives the court the option of responding to the petition for mandamus.

Judge Ripple outlined the various options before the committee and asked for a straw vote. First, the Committee could take no action; Judge Jolly favored that approach. Second, the Committee could work with draft one; no member voted in favor of that approach but Judge Jolly indicated that it would be his second preference. Third, the Committee could work with draft two; five members voted to do so. Fourth, the Committee could work with draft three, the Easterbrook draft; two members voted to do so.

Following the straw vote, the Committee focused upon draft two found at pages 6 and 7 of the memorandum.

With regard to lines 18 through 20 of the draft, it was suggested that the two sentences could be made one by deleting the words "[o]therwise, it must" and substituting the word "or." Upon reflection, however, the Committee concluded that the change would alter the rule substantively. As written, unless the court denies a petition, it must order respondents to answer. If rewritten as suggested, the rule would say, "[t]he court may deny the petition without an answer or order that the respondents answer . . .." That formulation

omits the idea that the court must order a response unless it denies the petition. It was decided to leave the sentences as written.

Judge Jolly noted that lines 15 and 16 require the clerk of the court of appeals to send a copy of a petition for mandamus to the clerk of the trial court. He suggested moving that idea to line 6 and requiring the petitioner to serve the clerk of the district court. Judge Ripple noted that such a change might reintroduce the idea that the judge is a party. But he further, noted that the document would come to the trial court's attention earlier if it were sent to the trial court by the party at the time of filing rather than being sent by the court of appeals after filing. Judge Logan responded that mandamus cannot be granted without ordering a response, so delay is inevitable and the delay involved under the latter approach should not be problematic.

As an alternative, Judge Ripple suggested that a new sentence be inserted in line 7 following the word "court." He suggested that it state: "The party shall also transmit a copy to the clerk of the trial court for the information of the trial judge and certify to the court of appeals that such transmission has been made." A motion was made to delete the underlined language at line 16 and 17 and to add Judge Ripple's sentence at line 7. The motion was seconded and passed unanimously.

Two minor amendments were also approved unanimously. At line 5 the word "therefor" was deleted. At line 19 the word "respondents" was changed to singular.

Finally, the Committee unanimously approved the entire rule as amended with a request that the Standing Committee publish it for comment. Two members of the committee, however, wanted it recorded that they preferred the Easterbrook draft.

Item 91-4

The Committee returned once more to the discussion of the typeface problem in Rule 32. The Committee began by considering a draft prepared by Judge Jolly and his subcommittee. That draft read as follows:

> A brief or appendix produced by the standard typographic process must be printed in 11 point or larger type; ~~those~~ briefs produced by any other process must ~~be printed with~~ not exceed ~~more than~~ an average of 2000 ~~11~~ characters per ~~inch~~ page 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. At the end of the non standard typographic brief, there must be an attorney's certification of the number of characters produced in the total brief (excluding the table of contents and the lists of cases and authorities).

Judge Jolly also provided a suggested Committee Note.

> Further, it is important that all briefs contain approximately the same average content per page so that no brief achieves an advantage in content based on the method or style of production. At the same time the rule seeks to allow a broad range of easily readable type, including proportional and non proportional fonts. To achieve this end the Committee concluded that a per page character average, including quotes and footnotes, was the most appropriate measurement to apply. Thus, following the close of the brief an attorney will certify the total number of characters produced (excluding the table of contents and the lists of cases and authorities). The Committee wishes to make plain that any typeface used must be easily readable and that no attempt should be made to reduce or condense the typeface in a manner that would increase the content of the document.

The Committee discussion focused upon whether computer programs can provide character counts and how a person using a typewriter rather than a computer would be able to certify the number of characters per page. The Committee also realized that further study would be needed to determine whether 2000 characters per page is the correct number. To easily accommodate the person using a typewriter, the Committee considered using the 11 character per inch standard as an alternative to the number of characters per page.

Judge Keeton indicated that he had been working on an alternative draft. He read his draft, which provided that a brief produced by any means other than standard typographic printing must not exceed on average the same content per page and must include a certification of compliance with this requirement. He suggested that the Committee Note could explain the standard and give examples from different software programs. His intent to avoid the need to change the text of the rule as technology changes.

Judge Keeton agreed to have his proposal typed for consideration by the Committee after the lunch break.

At 12:10 p.m. the Committee broke for lunch.

The meeting resumed at 12:55 p.m.

Item 92-10

At the December 1992 meeting of the Standing Committee, the Advisory Committee on Bankruptcy Rules submitted 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 in both 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 Advisory Committee was asked whether, at line 87 of Rule 4(a)(4), the rule should require a party to file "a notice, or amended notice, of appeal" rather than simply an "amended notice of appeal." Judge Logan moved approval of the change; the motion was seconded by Judge Ripple. It was approved unanimously.

Item 91-4

The discussion returned to Judge Keeton's draft of Rule 32. The draft read as follows:

(a) Form of a Briefs and ~~the~~ an Appendix.

(1) 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.

(2) A brief produced by the standard typographic process must be in 11-point or larger type. Quotations and footnotes must be in the same size type as the text.

(3) A brief produced by any other process must not exceed on the average the same content per page and must include a certification of compliance with this requirement. Lines of text must be separated by double spacing. Quotations more than two lines long may be indented and single spaced. Headings and footnotes may be single spaced. Quotations and footnotes must be in the same size type as the text.

(4) All printed matter must ~~appear in at least 11 point type~~ ....

The Committee decided that it would be clearer if the word "process" on line 10 of the draft were changed to the word "printing."

Mr. Munford suggested moving all the requirements for a brief produced by standard typographic printing into paragraph 2, which would mean including page and margin sizes for a printed brief in that paragraph. The Committee agreed and suggested that after the meeting the reporter reorganize the material in subdivision (a).

Judge Sloviter asked whether line 14 is clear enough; specifically, she wondered whether it is clear that one must count footnotes and block quotes in the content per page. Judge Williams suggested that the rule be amended to state that a brief must not exceed on average the same content per page "(including footnotes and quotations)" and the Committee agreed.

Judge Ripple commented that substantively, subpart (a)(3) is still ambiguous. The person preparing a non-printed brief is given a broad standard but does not have detailed instructions. Judge Jolly stated that a practitioner would need to obtain a printed brief and use it for comparison. Judge Keeton stated that he had hoped that the notes would be able to provide concrete illustrations. Judge Ripple continued to believe that the standard in the draft is so broad that the circuits would inevitably adopt local rules to provide guidance to practitioners and, therefore, there is a great risk that there would not be uniform application of the rule.

In light of the difficulty the Committee had during the meeting with the technical aspects of the rule, Judge Ripple asked the Committee to reconsider the approach considered some time ago under which the Administrative Office would publish a list of acceptable typefaces. There was discussion about whether that approach would violate the Rules Enabling Act as well as the question of accessibility to such a list.

Judge Logan made a motion to approve the draft as amended with the understanding that the Reporter would reorganize some of the material. The motion was seconded by Judge Ripple. Judge Jolly asked if the vote could be taken subject to the understanding that if it is possible to count characters per page, that a standard based upon characters per page would be used. With those understandings, the Committee voted unanimously to approve the draft. The Committee believed that the rule should be republished for a period of comment.

Item 92-2

At the Advisory Committee's October 1992 meeting it approved a draft rule that would permit technical amendment of the rules without the need for Supreme Court and Congressional review. At the Standing Committee's December meeting, the chairs and reporters of all of the advisory committees met, compared their various drafts, and agreed upon uniform language. The Reporter for the Standing Committee prepared uniform committee notes.

The Reporter reminded the Committee that the uniform draft is very similar to the October draft and that when the new draft was circulated to the Committee for a mail vote, it was approved unanimously. For informational purposes, the Reporter related that the Advisory Committee on Bankruptcy Rules met recently and failed to approve the technical amendments rule.

In light of the fact that the mail vote unanimously approved the new draft, Judge Ripple stated that unless some member of the Committee called for reconsideration in light of the Bankruptcy Committee's action, there was nothing further for the Committee to do. No member called for reconsideration so the rule was approved.

Because the Committee was awaiting photocopies of the materials for Item 92-1,

Judge Ripple proceeded to consider the next portion of the agenda with a promise to return to Item 92-1 when possible.

III. ACTION ITEMS

Item 92-4

In spring 1992, then Solicitor General Starr requested that the Committee consider amending Rule 35 to make the existence of an intercircuit conflict a ground for seeking a rehearing in banc. Acting Solicitor Bryson wrote to Judge Ripple shortly before this meeting and requested that the Committee take no final action on the suggestion until the new Solicitor General has an opportunity to consider the proposal.

Judge Ripple, however, had invited Mr. Cecil of the Federal Judicial Center to report on the Center's findings from its recent survey. Mr. Cecil reported that the survey of appellate judges revealed that intercircuit conflicts are not at the forefront of the judges' concerns. He further reported that four circuits have local rules that permit the courts to consider inter-circuit conflict as a basis for granting a rehearing in banc. The Ninth is one of those circuits but Professor Hellman's empirical research on the Ninth Circuit indicates that intercircuit conflict is not a prominent factor in granting a rehearing in banc in that circuit. Concerning alternatives to a full in banc that provide some check on the proliferation of intercircuit conflicts, nine circuits circulate opinions to all the judges of the circuit for their comment prior to publication. Some of those circuits require the circulating judge to note intercircuit conflicts so that the existence of the conflict is brought to the attention of the other judges.

Judge Ripple thanked Mr. Cecil and the other researchers at the FJC for their assistance. Judge Ripple also indicated that this item would be considered at the Committee's next meeting.

Item 92-1

This draft, like Item 92-2 dealing with technical amendments, is a uniform draft resulting from the December meeting of chairs and reporters. This draft deals with local rules.

When the draft was circulated by mail for a vote prior to the meeting, one member of the Committee did not approve the draft. Mr. Munford objected to that portion of the new draft that would allow a court to impose sanctions for non-compliance with a directive not found in either a national or local rule, but concerning which the person sanctioned had actual notice. Mr. Munford stated that if a matter is important enough to be sanctionable, it should be placed in a local rule.

Mr. Munford stated that he would prefer to end the rule on line 25 with the words

"local circuit rules." His suggestion would mean that sanctions could only be imposed for noncompliance with a federal statute or rule, or a local circuit rule. In contrast, the draft would permit sanctions for violation of other requirements so long as the violator had actual notice of the requirements.

Judge Ripple noted that the uniform draft does not deal with internal operating procedures. The Advisory Committee's earlier draft stated that any provision regulating practice before a circuit should be placed in a local rule rather than in an internal operating procedure. Internal operating procedures are abused in that way in some circuits. Judge Ripple suggested that the real issue is whether uniformity is sufficiently important to forego tailoring a rule to the particular differences between a court of first instance and an appellate court.

Judge Ripple invited Judge Keeton to speak about the uniformity issue. Judge Keeton stated that from the perspective of both the courts and the bar when the rules committees address the same problem, it is desirable that they use the same language. If the committees intend different things, they should use different language only when they mean to be different. He stated, however, that the Committee should feel free to make whatever recommendation it sees fit.

Judge Logan expressed support for the draft with the possible exception of making the two word changes made by the Bankruptcy Committee so that the two rules would be identical. He noted, however, that internal operating procedures are problematic in many circuits. Several circuits use i.o.p.'s like local rules but are not required to publish or circulate them like local rules.

Mr. Munford expressed disapproval of the final sentence of the Committee Note, lines 38-42. That sentence states: "Furnishing litigants with a copy outlining the court's practices -- or attaching instructions to a notice setting a case for conference or oral argument -- would suffice to give actual notice, as would an order in a case specifically adopting by reference a court's standing order and indicating how copies can be obtained." He pointed out that the last phrase would force a lawyer to somehow obtain a copy of the cross referenced standing orders. The last phrase, in fact, treats what is normally considered constructive notice as actual notice. Judge Jolly and Mr. Kopp moved that the entire sentence be deleted. The motion was approved unanimously.

Because the mail vote approved the draft and no member called for reconsideration of that vote, the draft was approved.

Item 86-23

The Committee was asked to address the problem a prisoner may have in filing timely objections to a magistrate judge's report. The problem is the converse of the one addressed

by the Committee in response to Houston v. Lack. Houston addressed the problem that a *pro se* prisoner has in timely filing documents because a prisoner has no control over when prison officials place the prisoner's mail in the United States mail -- a problem with outgoing mail. The focus of this item is that an incarcerated person also does not have control over when mail is delivered to him or her -- a problem with incoming mail.

The drafts prepared for this meeting provide that service upon institutionalized persons is complete only upon receipt of the document by the inmate.

Following a brief discussion about whether there is any need for such a change, Judge Ripple suggested that the drafts be circulated to the Chief Judges of the circuits and to the Committee of Staff Attorneys, who deal with motions for leave to file out of time, to get their reactions. It was further suggested that the Advisory Committee of Defenders be consulted. The Committee concurred.

Items 86-24 and 92-8

A suggestion was submitted to the Committee that it reexamine the operation of Rule 38 just as the Civil Rules Committee had reexamined Rule 11. Judge Ripple had appointed a subcommittee consisting of Judge Boggs, Mr. Froeb, Judge Hall, and Mr. Munford to consider the suggestion and to lead the discussion.

Judge Boggs reported that subcommittee concluded that further consideration of the topic would not be fruitful at this time. He did state, however, that the subcommittee believed that the area does bear watching and may need to be revisited in the future.

Judge Ripple stated that he would keep the subcommittee in place and ask it to monitor, with the help of the Reporter, the developments in the area of sanctions. That subcommittee would be charged with informing the Committee when, and if, it should address the topic in a more formal way. Judge Boggs agreed to continue to serve as subcommittee chair.

Item 91-28

At the December 1991 meeting Mr. Kopp suggested that Rule 27, which governs motions, needed updating. Mr. Kopp prepared a proposal and supporting memorandum. Because of the complexity of the topic and the lateness of the hour, Judge Ripple suggested that the Committee was not in a position to take up the topic during the meeting. But Judge Ripple appointed a subcommittee to examine the proposal. He asked Judge Williams to chair the subcommittee and Mr. Froeb and Mr. Munford to serve on it; they all agreed. He further requested that the subcommittee circulate the draft to the Chief Judges of the circuits, if the subcommittee thought that was appropriate.

Item 92-3

This item concerns the possible conflict between Rule 4(b) and 18 U.S.C. § 3731. The matter was brought to the attention of the Committee by Judge Logan. The former Solicitor General wrote to the Committee suggesting that the Committee take no further action and allow case law to resolve any remaining problems.

Judge Ripple noted that Rule 4(b) was amended by Congress. The conflicting provision was not a product of the committee process but a direct expression of Congressional intent. Therefore, Judge Ripple stated one could argue that because 4(b) was enacted after § 3731, 4(b) is the most recent expression of Congressional intent and the conflict is more apparent than real.

Mr. Munford observed that the only party that could be injured by the conflict is the government and the government does not want the Committee to act.

Judges Jolly and Boggs moved that the Committee take no further action. The motion was approved unanimously.

Item 92-5

At the Advisory Committee's April 1992 meeting, the Committee reviewed proposed amendments to Rule 25 drafted in response to the Houston v. Lack case. At that time one member of the Committee noted that in order to file a brief using the mailbox rule, Rule 25 requires a party to use "the most expeditious form of delivery by mail, excepting special delivery." Now that the postal service offers overnight mail service, the Committee questioned whether the rule requires the use of that service.

The Reporter prepared a draft amendment to Rule 25 requiring the use of first class mail, which is what the current Supreme Court Rule requires. Mr. Froeb and Mr. Kopp moved that the Committee approve the draft; it was approved unanimously.

Item 92-6

Mr. Greacen, the Clerk of the Fourth Circuit, asked that the Advisory Committee consider eliminating the mailbox rule in Rule 25 for filing a brief or appendix. Following the Reporter's review of the issue, no motion was made; therefore, Judge Ripple stated that the item would be treated as one for which no further action is deemed appropriate.

Item 92-7

Judge 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. Judge Newman's letter stated that the notice often needs to be examined to determine the timeliness and scope of the appeal.

Mr. Munford observed that those circuits that want a copy of the notice require it by local rule. The issue, therefore, is whether the requirement should be national.

No member making a motion to adopt the suggestion, Judge Ripple stated that the item would be treated as one for which no further action is deemed appropriate.

Item 92-9

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 has published such an amendment. The Reporter prepared draft amendments to Fed. R. App. P. 10(b)(1) using the Bankruptcy Rule as a model. The draft provides that if a notice of appeal is suspended because of the filing of a post trial motion, the appellant is not required to order a transcript until after disposition of the last post trial motion.

Mr. Froeb made a motion to approve the draft. The motion was seconded by Judge Williams and approved unanimously.

Item 93-2

The Acting Solicitor General wrote to Judge Ripple noting a technical problem with Rule 8(c). Rule 8(c) provides that a stay in a criminal case shall be had in accordance with the provisions of Rule 38(a) of the Federal Rules of Criminal Procedure. When Rule 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, fine, or probation. Criminal Rule 38 was later amended to address those subjects in separate subsections. Subsection (a) now only covers the death penalty; subsection (b) imprisonment; subsection (c) fines; and subsection (d) probation. Mr. Bryson suggested that the specific cross reference to subdivision (a) be dropped and that Rule 8(c) refer simply to Criminal Rule 38.

Judge Williams made a motion to approve the suggestion; the motion was seconded by Mr. Kopp. The motion was approved unanimously.

Miscellaneous

Judge Ripple reminded the Committee that in late January he had circulated a list of agenda items to determine whether there was any continuing interest in the topics. In response to that memorandum, none of the Committee members wanted to take any further action with regard to Items 91-18 (content of a petition to review a magistrate judge's judgment); 91-19 (uniform docketing statement); 91-20 (amendment of FRAP 26.1); and 91-21 (uniform appendix). However, two members requested further action with regard to Items 91-23 (consolidated brief for each side); 91-24 (page limits or other changes re: amicus

briefs); and 91-25 (contents of a suggestion for rehearing in banc). Judge Ripple stated that the last three items will be placed on the agenda for the Advisory Committee's fall meeting. The first four items will be listed as "no further action deemed appropriate."

IV. DISCUSSION ITEMS

Item 91-3 deals with implementing the authority to define a final decision by rule and to expand by rule the instances in which an interlocutory decision may be appealed. Judge Ripple informed the Committee that he had written to the Chief Judges of the Courts of Appeals asking their advice and that responses from them have begun to arrive. He also had written to the chairs of the AALS Sections on Federal Courts and Civil Procedure asking their advice and requesting that through their newsletters they make their members aware of the Committee's interest in hearing from the academic bar. Judge Ripple also reminded the Committee that the former Solicitor General had conveyed his hope that the Committee would not take an activist role simply because the authority had been granted.

With regard to Items 91-6, concerning the allocation of word processing equipment costs between producing originals and producing copies, and 91-15, concerning a uniform effective date for local rules, Judge Ripple informed the Committee that he would write to the Committee to ascertain if the members wish to keep those items on the docket.

Item 91-17, involving unpublished opinions, will be discussed at the fall meeting to determine whether the Committee wishes to pursue the topic.

Item 92-11 originated with a request from the Solicitor General to examine those local rules that do not exempt government attorneys from joining a court bar or from paying admission fees. Judge Ripple informed the Committee that the Acting Solicitor General has asked that the Committee defer acting on the item until the new Solicitor General has an opportunity to address the issue.

Judge Ripple suggested that the Committee try to meet next September before the Chair of the Committee changes. Such a meeting would give the Committee the opportunity to try to clear a number of remaining items off the docket before the new Chair assumes his or her duties.

The meeting adjourned at 3:00 p.m.

Respectfully submitted,

Carol Ann Mooney /tw

Carol Ann Mooney
Reporter

AGENDA I-A
Item 91-23
Washington, D.C.
September 22-23, 1993

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

FROM: Carol Ann Mooney

DATE: August 27, 1993

SUBJECT: Item 91-23, suggestion that each side file a single brief in consolidated or multi-party appeals

Background

Fed. R. App. P. 28(i) presumes that parties on the same side of a case will file separate briefs but grants parties permission to join in a single brief or adopt by reference part of another's brief. It provides:

> (i) *Briefs in cases involving multiple appellants or appellees.* -- In cases involving more than one appellant or appellee, including cases consolidated for purposes of the appeal, any number of either may join in a single brief, and any appellant or appellee may adopt by reference any part of the brief of another. Parties may similarly join in reply briefs.

When responding to the Report of the Local Rules Project, the Fourth Circuit recommended that the Advisory Committee consider incorporating Fourth Circuit Rule 28(a) into the Federal Rules. Fourth Circuit Rule 28(a) provides that a single brief will be filed for each side in a consolidated or multi-party case. (The text of 4th Cir. R. 28(a) is attached to this memorandum along with local rules and internal operating procedures from other circuits.)

John Greacen, the Clerk of the Fourth Circuit, prepared the circuit's response to the Local Rules Project. Mr. Greacen stated:

> Our experience with that rule has been very positive. In most cases the parties are able to present a concise and consistent point of view within a single brief per side. Having combined briefs simplifies appeals, avoids confusion, and saves considerable time and expense for the bench and the bar. When parties on the same side of a controversy prepare separate briefs they often appear to espouse inconsistent positions just because of the way they write their briefs. Our rule eliminates that problem, encouraging the attorneys to reach agreement on the way to present their common position to the court. The rule also saves the judges from reading multiple, repetitive arguments of the same issues. In criminal appeals involving multiple appellants, court appointed counsel are understandably reluctant to risk claims of inadequate representation by voluntarily joining in a common brief. Our rule relieves them of the onus of making that choice. Requiring joint briefs produces savings on Criminal Justice Act claims in many

such cases as well.

> The court recognizes that there will be instances in which the interests of parties on the same side of a controversy are sufficiently adverse or separate that they should be allowed to proceed separately. In those instances, the court will either authorize additional pages so that separate parties can have separate sections of a combined brief (see Internal Operating Procedure 28.2), or allow the filing of separate briefs. Fourth Circuit Local Rule 28(a) presumes that the resolution of consolidated appeals will ordinarily be furthered by joint, rather than separate, briefs. The language of FRAP 28(i) carries the opposite presumption. This court believes that our presumption is the more reasonable one, and urges the Advisory Committee to revisit this issue.
>
> Six or seven years ago an unhappy appellant complained of Fourth Circuit Local Rule 28(a) in a petition for certiorari to the Supreme Court. After careful review, including a conference with me and then-Chair of our Advisory Committee, Professor Eugene Gressman, the Solicitor General's Office concluded that our rule, as applied, was not inconsistent with FRAP 28(i) nor with constitutional due process or fundamental fairness.

The Advisory Committee first discussed this suggestion at its December 1991 meeting. The discussion was brief. The committee generally favored creating a presumption that only a single brief would be allowed but making it clear that the presumption could be overcome. The committee discussed the difficulties that limitation to a single brief creates because lawyers representing different parties inevitably have varying levels of skill. Mr. Kopp also noted that generally it would be inappropriate for the government to be joined with a private party for purposes of briefing. The committee concluded that the suggestion should be placed on the agenda for discussion at a later meeting.

Circuit Rules

Five circuits, including the fourth, have local rules or internal operating procedures that encourage or require the filing of a single brief when there are multiple appellants or appellees.[1]

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[1] a) D.C. Cir. I.O.P. IX.A.2. "Parties with common interests in consolidated or joint appeals must join in a single brief, where feasible. . . ."

b) 4th Cir. R. 28(a) ". . . One brief shall be permitted per side, including parties permitted to intervene, in all cases consolidated by court order, unless leave to the contrary is granted upon good cause shown. . . ."

c) 8th Cir. I.O.P. IV.C.2. ". . . Any number of parties on the same side are

The Fourth Circuit is the only one that requires court permission prior to filing separate briefs. In the other four circuits, the decision as to whether to file joint or separate briefs apparently is made by the parties and their counsel. Of the four circuits, only the Tenth requires that the decision be justified to the court. The Tenth Circuit requires that a separately filed brief contain a certificate of counsel plainly stating the reasons why a separate brief is necessary. The D.C. Circuit and the Ninth Circuit both ostensibly require multiple parties to file a single brief but both qualify the requirement. In D.C. a single brief is required "where feasible." In the Ninth Circuit a single brief is required "to the greatest extent practicable." The Eighth Circuit simply encourages parties to file a single brief.

The Ninth and Tenth Circuits distinguish between civil and criminal cases. In both circuits criminal defendants are apparently accorded greater latitude than parties in civil cases. In both circuits the local rules state that all parties on a side in a civil case "shall join in a single brief to the greatest extent possible;" whereas in criminal cases joint briefing is "encouraged."

None of the circuits treats governmental parties differently from private parties.

Drafts

The circuit rules and internal operating procedures offer three basic approaches:
1) simply encouraging a joint brief;
2) requiring a joint brief to the extent possible, with or without requiring a justification for using separate briefs; and,
3) requiring a joint brief unless the court grants permission to file separate briefs.
Once a basic approach is selected, it is necessary to determine whether it should apply in criminal cases as well as civil cases.

The following three draft amendments to Fed. R. App. P. 28(i) employ the approaches used in the circuit provisions, beginning with simply encouraging a joint brief.

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encouraged to join in a single brief, or one party may adopt by reference any part of the brief of another. . . ."

d) 9th Cir. R. 28-4 "In civil cases . . . all parties on a side shall join in a single brief to the greatest extent practicable. . . ." The Advisory Committee Note to Rule 28-4 states: "In multi-defendant criminal appeals raising common issues, parties are encouraged to file a joint brief with respect to the common issues."

e) 10th Cir. R. 31.4 "In civil cases . . . all parties on a side shall join in a single brief to the greatest extent practicable. Any brief filed separately by one of the multiple parties shall contain a certificate of counsel plainly stating the reasons why the separate brief is necessary." 10th Cir. I.O.P. V. states: "Joint briefing is encouraged, but not required in criminal appeals involving more than one appellant or appellee."

1. Draft One

(i) *Briefs in a Cases Involving Multiple Appellants or Appellees.* -- In a cases involving more than one appellant or appellee, including cases consolidated for purposes of the appeal, all parties on a side are encouraged to join in a single brief. If separate briefs are filed, a party ~~any number of either may join in a single brief, and any appellant or appellee~~ may adopt by reference any part of the brief of another. ~~Parties may similarly join in reply briefs.~~

Committee Note

Subdivision (i). The amendment changes the subdivision from one that permits parties to join in a single brief to one that encourages parties to file a single brief. Five circuits currently have local rules that encourage or require the use of a single brief when there is more than one party on a side.

In most cases parties are able to present a concise and consistent point of view within a single brief per side. If parties agree upon the way to present their common position to the court, the resulting joint brief not only relieves judges of the burden of reading multiple, repetitive arguments of the same issues, but it also eliminates the confusion and apparent inconsistencies that often arise from differences in presentation styles in separate briefs.

2. Draft Two

(i) *Briefs in a Cases Involving Multiple Appellants or Appellees.* -- In a cases involving more than one appellant or appellee, including cases consolidated for purposes of the appeal, all parties on a side must join in a single brief to the greatest extent practicable. If a party files a separate brief, the brief must include a certificate stating the reasons why a separate brief is necessary. ~~any number of either may join in a single brief, and any appellant or appellee~~ A separate brief may adopt by reference any part of the brief of another. ~~Parties may similarly join in reply briefs.~~

Committee Note

Subdivision (i). The amendment requires all parties on a side to file a single brief or, if one of the multiple parties on a side files a separate brief, the brief must contain a certificate stating the reasons why a separate brief is necessary. Five circuits currently have local rules that encourage or require the use of a single brief when there is more than one party on a side.

In most cases the parties are able to present a concise and consistent point of view within a single brief per side. If parties agree upon the way to present their common position to the court, the resulting joint brief not only relieves judges of the burden of reading multiple, repetitive arguments of the same issues, but it also eliminates the confusion and apparent inconsistencies that often arise from differences in presentation styles in separate briefs.

Occasionally the interests of parties on the same side of a case are sufficiently adverse or separate that a joint brief is not feasible. In such instances the attorney filing a separate brief or, if the party is proceeding *pro se*, the party must explain the adverse interests in the certificate that the rule requires. Adverse interests are not the only acceptable grounds for filing a separate brief. If geographic separation makes coordination difficult, however, a motion for extension of time to file a joint brief is preferable to filing separate briefs. Similarly, if one party wants to address an issue that is unimportant to other parties, a motion to exceed the page limit is preferable to filing separate briefs.

3. Draft Three

(i) *Briefs in a Cases Involving Multiple Appellants or Appellees.* -- In a cases involving more than one appellant or appellee, all parties on a side must join in a single brief unless the court orders otherwise. ~~any number of either may join in a single brief, and any appellant or appellee may adopt by reference any part of the brief of another. Parties may similarly join in reply briefs.~~

Committee Note

Subdivision (i). The amendment changes the subdivision from one that permits parties to join in a single brief to one that requires parties to file a single brief unless a court order permits the parties to file separate briefs. Five circuits currently have local rules that encourage or require the use of a single brief when there is more than one party on a side.

In most cases parties are able to present a concise and consistent point of view within a single brief per side. If parties can agree upon the way to present their common position to the court, the resulting joint brief will not only relieve judges of the burden of reading multiple, repetitive arguments of the same issues, but it also will eliminate the confusion and apparent inconsistencies that often arise from differences in presentation styles in separate briefs.

Occasionally the interests of parties on the same side of a case are sufficiently adverse or separate that a joint brief is not feasible. A motion to file a separate brief should show particularized need for a separate brief. Adverse interests are not the only acceptable grounds. If geographic separation makes coordination difficult, however, a motion for extension of time to file a joint brief is preferable to filing separate

briefs. Similarly, if one party wants to address an issue that is unimportant to other parties, a motion to exceed the page limit is preferable to filing separate briefs.

Civil v. Criminal

If draft one, or some variation thereof, is selected, there should be no need to distinguish between civil and criminal cases. Draft one encourages the use of a joint brief, but does not require it.

If either draft two or three is selected, there is more reason to consider making a distinction. Both drafts require the use of a joint brief but allow the filing of a separate brief if appropriate. Draft three requires a party who wants to file a separate brief to procure prior court approval, while rule two only requires a party who files a separate brief to provide a contemporaneous justification therefor. Because a party who shows good cause for filing a separate brief is allowed to do so, neither rule should compromise a party's right to review of a trial court decision.[2]

A rule requiring a joint brief, however, presumably would be based upon the assumption that the interests of all parties on the same side are ordinarily compatible if not identical. That assumption is less likely to be true in criminal cases that are consolidated on appeal. While it may be appropriate to try several criminal defendants together, their participation in the criminal activity usually differs; their level of culpability often differs, their defenses often differ; and their grounds for appeal will often differ. In multi-defendant criminal cases, therefore, one would expect frequent requests to file separate briefs. If the motivation for the change is increased efficiency, the change probably should be confined to civil cases.[3]

Drafts 2 and 3 are redrafted to differentiate between civil and criminal cases.

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[2] If draft three were adopted and a criminal defendant moved for permission to file a separate brief and the motion were denied, the defendant might be able to challenge the denial as one that deprived him or her of effective assistance of counsel or of an opportunity to have the case fairly reviewed. A challenge, I think, could be successful only as to the denial of the right to file a separate brief in the particular case and not as to the rule itself.

[3] The Fourth Circuit Local Rule makes no distinction between civil and criminal cases, but the rule applies only to "cases consolidated by court order." It may be that the Fourth Circuit does not often consolidate separately filed criminal appeals and thus avoids the problems I foresee.

4. Draft Two - A

(i) *Briefs in a Cases Involving Multiple Appellants or Appellees.* --

(1) In a civil cases involving more than one appellant or appellee, including cases consolidated for purposes of the appeal, all parties on a side must join in a single brief to the greatest extent practicable. If a party files a separate brief, the brief must include a certificate stating the reasons why a separate brief is necessary. ~~any number of either may join in a single brief, and any appellant or appellee~~ A separate brief may adopt by reference any part of the brief of another. ~~Parties may similarly join in reply briefs.~~

(2) In a multi-defendant criminal appeal, including cases consolidated for purposes of the appeal, parties are encouraged to join in a single brief. If separate briefs are filed, a party may adopt by reference any part of the brief of another.

Committee Note

Subdivision (i). The amendment requires all parties on a side in a civil case to file a single brief or, if one of the multiple parties on a side files a separate brief, the brief must contain a certificate stating the reasons why a separate brief is necessary. Five circuits currently have local rules that encourage or require the use of a single brief when there is

more than one party on a side.

In most civil cases the parties are able to present a concise and consistent point of view within a single brief per side. If parties agree upon the way to present their common position to the court, the resulting joint brief not only relieves judges of the burden of reading multiple, repetitive arguments of the same issues, but it also eliminates the confusion and apparent inconsistencies that often arise from differences in presentation styles in separate briefs.

Occasionally the interests of parties on the same side of a case are sufficiently adverse or separate that a joint brief is not feasible. In such instances the attorney filing a separate brief or, if the party is proceeding *pro se*, the party must explain the adverse interests in the certificate that the rule requires. Adverse interests are not the only acceptable grounds for filing a separate brief. If geographic separation makes coordination difficult, however, a motion for extension of time to file a joint brief is preferable to filing separate briefs. Similarly, if one party wants to address an issue that is unimportant to other parties, a motion to exceed the page limit is preferable to filing separate briefs.

In a criminal case, joint briefing is encouraged but not required.

5. Draft Three - A

(i) *Briefs in a Cases Involving Multiple Appellants or Appellees.* --

(1) In a civil cases involving more than one appellant or appellee, all parties on a side must join in a single brief unless the court orders otherwise. ~~any number of either may join in a single brief, and any appellant or appellee may adopt by reference any part of the brief of another. Parties may similarly join in reply briefs.~~

(2) In a multi-defendant criminal appeal, including cases consolidated for purposes of the appeal, parties are encouraged to join in a single brief. If separate briefs are filed, a party may adopt by reference any part of the brief of another.

Committee Note

Subdivision (i). The amendment changes the subdivision from one that permits parties to join in a single brief to one that requires parties in a civil case to file a single brief unless a court order permits the parties to file separate briefs. Five circuits currently have local rules that encourage or require the use of a single brief when there is more than one party on a side.

In most civil cases parties are able to present a concise and consistent point of view within a single brief per side. If parties can agree upon the way to present their common position to the court, the resulting joint brief will not only

relieve judges of the burden of reading multiple, repetitive arguments of the same issues, but it also will eliminate the confusion and apparent inconsistencies that often arise from differences in presentation styles in separate briefs.

Occasionally the interests of parties on the same side of a case are sufficiently adverse or separate that a joint brief is not feasible. A motion to file a separate brief should show particularized need for a separate brief. Adverse interests are not the only acceptable grounds. If geographic separation makes coordination difficult, however, a motion for extension of time to file a joint brief is preferable to filing separate briefs. Similarly, if one party wants to address an issue that is unimportant to other parties, a motion to exceed the page limit is preferable to filing separate briefs.

In a criminal case, joint briefing is encouraged but not required.

Additional Considerations

1. Is there any need to distinguish between cases consolidated on appeal and joint appeals? A letter from Chief Judge Sloviter is attached to this memorandum. She indicates that the Clerk's Office in the Third Circuit limits parties who file a joint notice of appeal to a single brief. The "One Attorney, One Brief" rule contained in the Eleventh Circuit I.O.P. 28 would usually have the same effect as the Third Circuit practice. Apparently neither circuit limits the parties in consolidated cases to a single brief.

2. Is there a need to treat governmental parties any differently than private parties? None of the existing circuit rules make such a distinction. Under any of the drafts the government would be able to file a separate brief upon showing a need to do so.

D.C. Cir. I.O.P. V. Multiparty Cases
A. Consolidation.

In order to achieve the most efficient use of the Court's resources, as well as to maintain consistency in its decisions, the Court generally will consolidate, on its own motion or on motion of the parties, all appeals and cross-appeals from the same district court judgment or order, and all petitions for review of agency orders entered in the same administrative proceeding. In addition, other cases involving essentially the same parties or the same, similar, or related issues, may be consolidated. When cases are consolidated, the Clerk's Office designates one case (usually the one with the lowest docket number) as the "lead" case, and enters all items filed in any of the consolidated cases only on the docket of the lead case.

As noted supra in Part III.H., parties with common interests may also file a joint notice of appeal or petition for review.

Once cases are consolidated, they are treated as one appeal for most purposes. They generally follow a single briefing schedule; they are assigned for hearing on the same day before the same panel; argument time is allotted to the cases as a group; and they are decided at the same time. Each case retains some of its individual identity, however. Intervention in one case does not automatically confer that status in other cases (see supra Part III.E.3); motions may be filed in one case and not in others; and extensions of time in one case do not necessarily extend the time in any others. Although joint briefs are encouraged pursuant to Rule 28(i) of the Federal Rules of Appellate Procedure, the parties may file separate briefs in each case, unless the Court orders otherwise. Briefing by intervenors is governed by D.C. Cir. R. 11(e)(5). . . .

D.C. Cir. I.O.P. IX. Briefs and Appendix
A. Briefs

* * * * *

2. *Consolidated, Joint, and Cross-Appeals.* (See Rules 3, 28, Federal Rules of Appellate Procedure.)

Parties with common interests in consolidated or joint appeals must join in a single brief, where feasible. The Court has admonished counsel in recent orders that it looks with extreme disfavor on the filing of duplicate briefs in consolidated cases. As an alternative, a party may adopt or incorporate by reference all or any part of the brief of another.

* * * * *

4th Cir. R. 28(a). Consolidated Cases and Briefs.

Related appeals or petitions for review will be consolidated in the Office of the Clerk, with notice to all parties, at the time a briefing schedule is established. One brief shall be permitted per side, including parties permitted to intervene, in all cases consolidated by court order, unless leave to the contrary is granted upon good cause shown. In consolidated cases lead counsel shall be selected by the attorneys on each side and that person's identity made known in writing to the Clerk within seven (7) days of the date of the order of consolidation. In the absence of an agreement by counsel, the Clerk shall designate lead counsel. The individual so designated shall be responsible for the coordination, preparation and filing of the brief and appendix.

4th Cir. I.O.P. 28. Briefs

* * * * *

28.2. *Joint appeals/cross appeals and consolidations.*

Where multiple parties are directed to file a consolidated brief, the joint brief should not exceed 50 page in length. Counsel on the same side of the case should confer and agree upon a means for assuring that the positions of all parties are addressed within the page limits allowed and that each counsel will have an opportunity to review and approve the consolidated brief before it is filed.

Motions to file separate briefs are not favored by the Court and are granted only upon a particularized showing of good cause, such as, but not limited to, cases in which the interests of the parties are adverse. Generally unacceptable grounds for requests to file separate briefs include representations that the issues presented require a brief in excess of 50 pages (appropriately addressed by a motion to exceed page limit), that counsel cannot coordinate their efforts due to different geographical locations, or that the participation of separate counsel in the proceedings below entitles each party to separate briefs on appeal.

If a motion to file separate briefs is granted, the number of pages allowed for such briefs may be limited by the Court. The parties shall continue to share the time allowed for oral argument.

* * * * *

7th Cir. R. 28. Briefs.

* * * * *

(g) *Brief in Multiple Appeals.*

* * * * *

(2) Captions of Briefs in Multiple Appeals. When two or more parties file cross-appeals or other separate but related appeals, the briefs shall bear the appellate case numbers and captions of all related appeals.

8th Cir. I.O.P. IV. Miscellaneous Matters.

* * * * *

C. *Cross-Appeals and Joint Appeals.*

* * * * *

2. *Joint Appeals.* Persons entitled to appeal whose interests are such as to make joinder practicable may file a joint notice of appeal or petition for review or may join the appeal after filing separate timely notices or petitions. The Court may consolidate appeals, or the parties may stipulate to do so. Fed. R. App. P. 3(b) and 14(a). The clerk of the Court of Appeals must initially docket a separate appeal and be paid a separate fee for each notice of appeal filed.

Cooperation among counsel on the same side is essential in arranging for the preparation and transmittal of the record. Any number of parties on the same side are encouraged to join in a single brief, or one party may adopt by reference any part of the brief of another. Fed. R. App. P. 28(i). If more than one case involves the same question on appeal, the appeals will usually be argued together. In some instances, related cases will be set "back-to-back" for argument.

9th Cir. R. 28-4. Joint Briefs in Civil Cases

In civil cases involving more than 1 appellant or appellee, and in cases consolidated for purposes of the appeal, all parties on a side shall join in a single brief to the greatest extent practicable. Upon application, the clerk may extend the time for filing a joint brief up to 21 days and may allow the joint parties up to 5 additional page in which to discuss any differences in their positions.

Advisory Committee Note to Rule 28-4

Joint Briefs in Multi-Defendant Criminal Appeals: In multi-defendant criminal appeals raising common issues, parties are encouraged to file a joint brief with respect to the common issues.

10th Cir. R. 31. Filing and Service of Briefs.

* * * * *

31.3. *Joint Briefing in Criminal Appeals.* Defendants in criminal appeals may file joint or several briefs. Joint briefs shall bear the appellate case numbers and captions of all appeals.

31.4. *Joint Briefing in Civil Appeals.* In civil cases involving more than one appellant, including cases consolidated for purposes of the appeal, all parties on a side shall join in a single brief to the greatest extent practicable. Any brief filed separately by one of the multiple parties shall contain a certificate of counsel plainly stating the reasons why the separate brief is necessary. Upon application by the parties, the clerk may extend the time allowed for briefing to allow the parties time to coordinate the briefs to be submitted on their side.

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

A. Formal Requirements as to Contents.

* * * * *

5. *Joint Briefing.* Joint briefing is encouraged, but not required in criminal appeals involving more than on appellant or appellee. Joint briefing is required to the greatest extent possible in civil appeals involving more than one appellant or appellee. Any separately filed brief shall contain a certificate of counsel stating why a separate brief is necessary. See 10th Cir. R. 31.3 and 31.4.

11th Cir. I.O.P. 28 - Compliance with Format Requirements

* * * * *

"One Attorney, One Brief." Unless otherwise directed by the Court, an attorney representing more than one party in an appeal may only file one principal brief (and one reply brief, if authorized), which will include argument as to all of the parties represented by that attorney in that appeal. A single party represented by more than one attorney is similarly bound.

* * * * *

Adoption of Briefs of Other Parties. The adoption by reference of any part of the brief or another party pursuant to FRAP 28(i) does not fulfill the obligation of a party to file a separate brief which conforms to 11th Cir. R. 28-2, except upon written motion granted by the court.

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

* * * * *

(e) *Statement Regarding Adoption of Briefs of Other Parties.* A party who adopts by reference any part of the brief of another party pursuant to FRAP 28(i) shall include a statement describing in detail which briefs and which portions of those briefs are adopted.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

DOLORES K. SLOVITER
CIRCUIT JUDGE

18614 UNITED STATES COURTHOUSE
INDEPENDENCE MALL WEST
PHILADELPHIA, PA. 19106

October 18, 1989

Hon. Jon O. Newman
United States Court of Appeals
for the Second Circuit
450 Main Street
Hartford, Connecticut 06103

Dear Jon:

I recently raised a minor procedural issue with Joe Weis, who suggested that I send it along to you in your capacity as Chairman of the Advisory Committee on Appellate Rules.

FRAP 3(b) permits parties to file joint notices of appeal "where their interests are such to make joinder practicable." FRAP 28(i) permits, but does not expressly require, appellate parties to file one brief. I had not realized it until recently, but our Clerk's Office has followed a long-standing practice of limiting parties who filed a joint notice of appeal to filing a consolidated brief. Several counsel have recently challenged our Clerk's authority to follow her practice, and I noted there is no FRAP specifically covering the issue. I suppose we can adopt a local rule in this regard. There is some rationale for the practice; if the Clerk's Office is going to be put to the time and effort of docketing, handling, filing, and storing separate briefs, there seems to be no reason why the parties should be entitled to avoid the separate docketing fee.

Because this is not one of the burning issues involved in appellate procedure, I pass it along for information only. Best personal regards.

Sincerely,

Dolores K. Sloviter

DKS/mv

P.S. Is there any meaningful way to limit petitions for rehearing? Would it seriously trample on the right of access to the courts if such petitions could be filed only when the panel, at the time of its disposition, finds there is good reason for a petition for rehearing to the full court?

AGENDA I-B
Item 91-24
Washington, D.C.
September 22-23, 1993

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

FROM: Carol Ann Mooney

DATE: September 4, 1993

SUBJECT: Item 91-24, Amendment of Fed. R. App. P. 29 to include page limits for and contents of an *amicus* brief

Background

Rule 29, governing a brief of an *amicus curiae* is curiously sketchy. The rule provides that an *amicus* brief may be filed by a non-governmental party only with consent of all other parties or by leave of the court. It further provides that an *amicus* brief generally must be filed within the time allowed the party whose position the *amicus* supports. Lastly, it states that an *amicus curiae* will be allowed to participate in oral argument only in extraordinary circumstances. Rule 29 does not specify the length of an *amicus brief* or its contents.

The Report of the Local Rules Project noted that five circuits have local rules that establish page limits for an *amicus* brief. The Report listed those rules as inconsistent with the federal rules on the assumption that failure to treat an *amicus* brief differently than other briefs means that an *amicus* brief is subject only to the ordinary 50 page limitation established in Rule 28.

In its response to the Report of the Local Rules Project the Fifth Circuit offered several suggestions for improvement of the Fed. R. App. P. rules. One such suggestion concerns Rule 29. The Fifth Circuit stated:

> An oft-repeated question from lawyers over the years has been whether the Court required, in an *amicus* brief, a Statement of Issues, Statement of the Case, Summary of Argument, and other basic requirements of the brief rule, because FRAP 28, regulating the content and length of briefs, appeared to refer only to the briefs of the principal parties. We found from experience that, because of this void, an *amicus* would, out of an abundance of caution, usually include in a brief all of the obviously repetitive requirements of a principal party. We concluded that it was necessary for an *amicus* to (1) state only the interest of the *amicus*, and (2) "focus on points either not made or not adequately discussed" in the principal brief the *amicus* supported. Our rule is similar to Supreme Court Rule 37 which sets out that "it shall be sufficient to set forth in the brief the interest of the *amicus curiae*, the argument, the summary of the argument, and the conclusion . . ." Thus, with this limitation on the contents of an *amicus* brief, the maximum length of such briefs was set at 20 pages. To avoid repetition, we also altered the

time for filing the *amicus* brief to 15 days after the briefs of the principal party being supported. Wishing to avoid a return to the confusion previously endemic amongst the Bar, because of the silence of the FRAP, we recommend that the Advisory Committee study the contents of the local rules fixing the contents and limiting the number of pages of amici briefs and the acceptance by the Bar. We are convinced that the members of the Bar would strongly support such a rule on the national level.

The Fifth Circuit Local Rule, Supreme Court Rule 37, and other circuit rules and internal operating procedures governing *amicus* briefs are attached to this memorandum.

The Advisory Committee briefly discussed the Fifth Circuit's suggestion at its December 1991 meeting. The Committee consensus was that a court has authority to refuse an *amicus* brief and the subsidiary authority to limit any *amicus* brief that the court chooses to permit. The Committee concluded that it would place the suggestion on the agenda for future discussion.

Local Rules

Six circuits have local rules that impose a page limit on *amicus* briefs.[1] Only three circuits have rules that list the items that must be included in an *amicus* brief. One of those three requires an *amicus* brief to include all of the same items required in a party's principal brief.[2] The other two circuits permit an *amicus* brief to omit some of the items required in a party's principal brief.[3]

---

[1] a) D.C. Cir. R. 11 limits an *amicus* brief to no more than 25 pages of standard typographical printing or thirty-five pages if typewritten. A proposed D.C. Cir. Rule would limit an *amicus* brief to 28 pages of typographic printing or 28 pages if typewritten in a proportional typeface and 35 pages if typewritten in non-proportional typeface. Proposed D.C. Cir. R. 28 published January 4, 1993.

(b) 5th Cir. R. 29, 7th Cir. R. 29, 8th Cir. R. 29, 10th Cir. R. 29, and Fed. Cir. R. 29 all limit an amicus brief to 20 pages.

[2] 11th Cir. R. 28-2.

[3] 5th Cir. R. 29 states that an "amicus brief need not contain a statement of the issues, statement of the case, request for oral argument, or statement of jurisdiction. Fed. Cir. R. 29(a) provides that "[t]he statements of related cases, of jurisdiction, of the issues, and of the case, and the addendum, may be omitted" from an *amicus* brief.

Four circuits state that an *amicus* brief should avoid repetition of facts or arguments made in the principal brief,[4] but only two allow an *amicus* brief to be filed after the principal brief it supports.[5]

---

[4] a) D.C. Cir. R. 11(e)(2), "The brief shall avoid repetition of facts or legal arguments made in the principal (appellant/petitioner or appellee/respondent) brief, and shall focus on points not made or adequately elaborated upon in the principal brief, although relevant to the issues before this Court." That particular provision is unchanged in D.C. Cir. proposed Rule 28(f).

b) 5th Cir. R. 29, "The brief should avoid the repetition of facts or legal arguments contained in the principal brief and should focus on points either not made or not adequately discussed therein."

c) 7th Cir. R. 29(a), "Before completing the preparation of an amicus brief, counsel for an amicus curiae shall attempt to ascertain the arguments that will be made in the brief of any party whose position the amicus is supporting, with a view to avoiding any unnecessary repetition or restatement of those arguments in the amicus brief.

d) The Advisory Committee Note accompanying 9th Cir. R. 29-1 states: "Movants are reminded that the court will review the amicus curiae brief in conjunction with the briefs submitted by the parties, so that amici briefs should not repeat arguments or factual statements made by the parties."

[5] a) D.C. Cir. R. 11(e)(3), "within 15 days after service of the brief of the party whose side the intervenor or *amicus* supports;" this provision is not included in proposed D.C. Cir. R. 28(f) which provides that an *amicus* brief must be filed within the time provided in FRAP 29.

b) 5th Cir. R. 31.2, "15 days after the filing of the principal brief of the party supported by the intervenor or amicus." The Fifth Circuit rule further provides that with regard to the due date of the next brief, the time is computed from the filing date of the *amicus* brief.

Drafts

1. Draft One

~~**Rule 29. Brief of an amicus curiae**~~

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

Rule 29. Brief of An Amicus Curiae

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

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

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

(3) when requested by the court;

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

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

(1) the movant's interest, and

(2) the reasons why an amicus brief is

desirable.

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

(1) jurisdiction,

(2) the issues,

(3) the case, and

(4) the standard of review.

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

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

(e) *Time for Filing.* -- An amicus brief must be filed no later than 15 days after the party supported by the amicus files its principal brief. If the brief does not support either party, it must be filed no later than 15 days after the appellant's brief is filed. For purposes of Rule 31(a), the time for filing the next brief runs from the date the amicus brief is filed.

Committee Note

Rule 29 is entirely rewritten.

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

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

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

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

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

Subdivision (e). This subdivision is a companion to subdivision (b). It provides that an *amicus* brief must be filed no later than 15 days after the filing of the principal brief of the party the *amicus* supports. If the *amicus* brief does not

support either party, it must be filed no later than 15 days after the filing of the appellant's brief. The delay between the filing of the party's brief and the due date for the *amicus* brief will enable the *amicus* to focus only upon those issues not raised or adequately presented by the party. Repetition of the party's arguments should be eliminated.

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

Draft one assumes that a shorter, more focused, *amicus* brief will result if the time for filing an *amicus* brief is delayed until after the party supported by the amicus files its principal brief. The draft also assumes that receipt of a more focused *amicus* brief is sufficiently important to delay the rest of the briefing schedule.

Draft two assumes that however worthy that aim, a shorter, more focused *amicus* brief is not worth delaying the rest of the briefing schedule. Draft two requires an *amicus* to file at the same time as the party whose position is being supported.

2. Draft Two

Rule 29. Brief of An Amicus Curiae

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

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

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

(3) when requested by the court;

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

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

(1) the movant's interest, and

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

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

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

omit the statements of:

(1) jurisdiction,

(2) the issues,

(3) the case, and

(4) the standard of review.

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

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

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

Committee Note

Rule 29 is entirely rewritten.

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

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

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

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

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

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

D.C. CIRCUIT RULE 11. Briefs.[6]

* * * * *

(e) **Briefs of Intervenors and *Amici Curiae.*** The rules stated below shall apply with respect to the brief for an intervenor in this Court, or *amicus curiae.* For purposes of this Rule, an intervenor is an interested person who has sought and obtained this Court's leave to participate in an already instituted proceeding.

(1) Except by permission or direction of the Court, the brief shall be no longer than twenty-five pages of standard typographical printing, or thirty-five pages if typewritten.[7]

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

(3) The brief shall be filed within fifteen days after service of the brief of the party whose side the intervenor or *amicus* supports. In computing this time, there shall be allowed an additional three days if the party's brief is served on the opposing party by mail.[8]

(4) An individual or entity seeking leave to participate as *amicus curiae* shall, within 30 days of the docketing of the case in this Court, file either a written representation that all parties consent to such participation, or, in the absence of such consent, a motion for leave to participate as *amicus curiae*. The Court may extend this time on a showing of good cause.

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[6] On January 4, 1993, notice was given of the proposed revocation of all existing D.C. Circuit rules and the issuance of new rules. In the proposed new rules, this rule would become Rule 28. Some changes in the substance of this rule are proposed and are noted in the memorandum when relevant.

[7] Under the proposed new circuit rules, an amicus brief cannot exceed 28 pages of standard typographic printing, 28 typewritten pages using a proportional typeface of at least 12 points, or 35 typewritten pages using a non-proportional typeface with no more than 10 characters per inch.

[8] Under the new proposed rule, the "brief shall be filed in accordance with the time limitations described in FRAP 29."

(5) Intervenors and *amici curiae* on the same side shall join in a single brief to the extent practicable. This requirement shall not apply to a governmental party; such a party has an unqualified right to file a brief. For this purpose, the term "governmental party" includes the United States, an officer or agency thereof or the District of Columbia. Any brief filed separately by an intervenor or an *amicus* shall contain a certificate of counsel plainly stating why the separate brief is necessary. Generally unacceptable grounds for the filing of separate briefs include representations that the issues presented require more pages than these Rules allow (appropriately addressed by a motion to exceed page limits), that counsel cannot coordinate their efforts due to geographical dispersion, or that separate presentations were allowed in earlier proceedings.

(6) A reply brief may be filed for an intervenor on the side of appellant or petitioner at the time the appellant's or petitioner's reply brief is due, but no reply brief of an *amicus curiae* will be received.

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

* * * * *

3. *Amici curiae and Intervenors.* (See Rule 29, Federal Rules of Appellate Procedure; D.C. Cir. Rule 11(e).)

A brief of an amicus curiae may be filed only by written consent of all the parties or by leave of the Court, unless the amicus is the United States or a federal agency or officer, or a State or Territory. A motion for leave to file should set forth the interest of the amicus and the reasons why briefing is desirable. Motions for leave to participate amicus curiae, or written representations of the consent of all parties to such participation, are due within 30 days of docketing, unless the Court grants an extension for good cause. See D.C. Cir. Rule 11(e)(4). Parties seeking leave to participate as amicus curiae after the merits panel has been assigned or at the rehearing stage, should be aware that the Court will not accept an amicus brief where it would result in the recusal of a member of the panel or recusal of a member of the en banc Court.

The 1987 revision of the Court's General Rules establishes for the first time reduced page limits for briefs of intervenors and amici curiae. For this purpose the rules define an "intervenor" as an interested person who has sought and obtained this Court's leave to participate in an already instituted proceeding. Printed briefs of an amici and intervenors are limited to 25 pages; typewritten, to 35 pages. The briefs are due 15 days after the brief of the party the intervenor or amicus supports, and the briefs may not repeat facts or legal arguments made and adequately elaborated upon in the parties' brief. D.C. Cir. Rule 11(e)(5) requires consolidated briefing by intervenors and amici on the same side to the extent practicable. Where an intervenor or amicus files a separate brief, counsel must certify in the brief why a separate brief is necessary. Grounds that are not acceptable as reasons for filing a separate brief include representations that the

counsel cannot coordinate filing a single brief because of geographical dispersion; or that separate presentations were permitted in the proceedings below. When a governmental entity is amicus curiae, it is not required to file a joint brief with other amici or intervenors. An intervenor supporting an appellant or petitioner may file a reply brief when the appellant's or petitioner's reply brief is due, but an amicus may not file a reply brief.

4th Cir. I.O.P. 29.1

The Court prefers but does not require that a motion for leave to file a brief as amicus curiae be accompanied by the proposed brief. Any such motion, however, must be filed under separate cover from the proposed brief and contain a statement concerning the consent of the parties as required by Local Rule 27(b).[9]

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

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

29.2. *Contents and Form.* Briefs filed under this rule shall comply with the applicable FRAP provisions and with Local Rules 28, 31 and 32, except that with respect to Fed. R. App. P. 28(a) and Local Rule 28.2, the amicus brief should, in complying with Local Rule 28.2.1,[10] state only the interest of the amicus curiae, and the amicus brief need not contain a statement of the issues, statement of the case, request for oral argument or statement of jurisdiction. The brief should avoid the repetition of facts or legal arguments contained in the principal brief and should focus on points either not made or not adequately discussed therein. Any brief not in conformity herewith may be stricken, on motion or sua sponte.

29.3. *Length of Briefs.* Unless otherwise permitted by the Court, the

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[9] 4th Cir. R. 27(b) requires a motion to "contain a statement by counsel that counsel for the other parties to the appeal have been informed of the intended filing of the motion. The statement shall indicate whether the other parties consent to the granting of the motion, or intend to file responses in opposition."

[10] 5th Cir. R. 28.2.1 is entitled "Certificate of Interested Persons."

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

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

* * * * *

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

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

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

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

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

All amicus curiae briefs shall be limited to 20 pages.

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

No reply brief of an amicus curiae will be received.

Advisory Committee Note to Rule 29-1

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

Amici who wish to join in the arguments or factual statements of a party or

other amici are encouraged to file and serve on all parties a short letter so stating in lieu of a brief. The letter shall be provided in an original and three copies.

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

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

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

A. *Formal Requirements as to Contents.*

* * * * *

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

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

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

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

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

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

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

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

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

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

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

(g) *Statement of the Issues.*

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

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

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

(k) *Conclusion.*

(l) *Certificate of Service.*

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

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

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

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

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

SUPREME COURT RULE 37. BRIEF OF AN AMICUS CURIAE

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

* * * * *

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

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

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

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

AGENDA I-C
Item 91-25
Washington, D.C.
September 22-23, 1993

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

FROM: Carol Ann Mooney, Reporter

DATE: September 1, 1993

SUBJECT: Item 91-25, amendment of Rule 35 to specify the contents of a suggestion/petition for rehearing in banc

Background

The Local Rules Project Report stated:

> Nine of the courts have directives outlining the form of a suggestion for an in banc determination. . . . The courts perceive a need to regulate in this area. Yet, such regulation may be quite confusing to practitioners. It is not clear from these local rules whether the variations found in the rules are actually necessary. The Local Rules Project recommends that the Advisory Committee consider amending Appellate Rule 35 to incorporate a description of the suggestion which would be uniform among all the courts.

When responding to that Report and with regard to that specific recommendation, the Fifth Circuit suggested that the Advisory Committee consider use of the 5th Cir. R. 35. A copy of that Fifth Circuit Rule is attached to this memorandum along with the local rules and internal operating procedures of the other circuits.

The Advisory Committee first discussed the issue at its December 1991 meeting. At that time the consensus of the Committee was that a general review of Rule 35 should be undertaken at some future time but the Committee was not particularly interested in developing a rule specifying the contents of such documents.

Since that initial discussion, the Committee has done a more general review of Rule 35. As a result of that consideration the Advisory Committee has approved a major change in Rule 35. That change, if ultimately enacted, will treat a request for rehearing in banc like a petition for panel rehearing so that a request for rehearing in banc will suspend the finality of a court of appeals' judgment and extend the period for filing a petition for writ of certiorari. In addition, the Committee has approved changing the term "suggestion for rehearing in banc" to "petition for rehearing in banc." Those proposed amendments have been approved by the Standing Committee for publication to the bench and bar and will be published sometime after December 1.

In addition, former Solicitor General Starr proposed that Rule 35 be amended to provide that the existence of inter-circuit conflict is grounds for granting in banc

consideration. The suggestion is docketed as Item 92-4. That proposal is currently on hold until Solicitor General Days has the opportunity to formulate a position.

Because the Advisory Committee's initial response to the suggestion that Rule 35 be amended to specify the contents of a suggestion/petition for rehearing was lukewarm, item 91-25 was included among the possible "dead list" items circulated last March. At that time two members indicated interest in pursuing the suggestion, so it is now before the Committee.

Local Rules

Eleven circuit have local rules that include some provision concerning the contents of a suggestion/petition for in banc consideration.

Fed. R. App. P. 35 states that a hearing or rehearing in banc

> will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance.

Ten circuits require a petition for in banc consideration to include a statement demonstrating that in banc consideration is appropriate. The statement must provide that either:

> 1) the appeal is of exceptional importance (most also require that the issue be set forth in a single sentence); or
>
> 2) the panel decision is contrary to a decision of the circuit or of the Supreme Court, with cites to the decisions, and that consideration by the full court is necessary to secure and maintain uniform circuit decisions.[1]

Eight of those circuits require such a statement only if the petitioner is represented by counsel; two circuits require such a statement without regard to whether the party is represented by counsel.[2] The apparent purpose of the requirement is to cause the drafter of a petition to focus upon the grounds for granting an in banc hearing.

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[1] D.C. Cir. R. 15; 1st Cir. R. 35.1; 3d Cir. R. 22; 5th Cir. R. 35.2.2; 6th Cir. R. 14; 7th Cir. R. 40(c); 8th Cir. R. 35A(c)(2); 10th Cir. R. 35.2.2; 11th Cir. R. 35.6(c); Fed. Cir. R. 35(b).

[2] D.C. Cir. R. 15 (a)(3); and 7th Cir. R. 40(c).

Other than the required "statement" there is little uniformity among the local rules.

1. Five circuits impose page limits on requests for in banc consideration.[3]
2. Two circuits require a request for in banc consideration to include essentially the same items as a brief -- certificate of interested persons, table of contents and table of authorities, statement of the issue/s, statement of the case including necessary facts; argument, conclusion, and certificate of service.[4]
3. Two other circuits require that the suggestion/petition have a table of contents and table of authorities.[5]
4. Two circuits require that a suggestion for rehearing in banc be accompanied by a copy of the opinion, order, or judgment sought to be reviewed.[6]
5. Two circuits require that if a suggestion for rehearing in banc is combined with a petition for panel rehearing that the cover page make reference to both requests.[7]
6. One circuit states that a suggestion for rehearing in banc must "be complete in itself" and not incorporated in the petition for rehearing before the panel and that it cannot adopt by reference any matter from the petition for panel rehearing or from any other brief or motion in the case.[8] Two other circuits state that a

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[3] D.C. Cir. I.O.P. XIII.B.2. (11 printed pages or 15 typewritten pages); 5th Cir. R. 35.5. (15 pages); 10th Cir. R. 35.5. (15 pages); 11th Cir. R. 36-8 (15 pages); Fed. Cir. R. 35 (five pages for a suggestion for hearing in banc and 15 pages for a suggestion for rehearing in banc).

[4] 5th Cir. R. 35.2; and 11th Cir. R. 35-6. The Federal Circuit Rules do not state that such items must be included in a request for in banc consideration; but, when setting page limits, the rule provides that the pages containing certificate of interest, table of contents, table of citations, and any addendum containing statutes, rules, regulations, etc. are excluded. Fed. Cir. R. 35(c) & (d).

[5] 7th Cir. R. 40(a); and Fed. Cir. R. 35(c) & (d).

[6] 3d Cir. R. 22.1; and Fed. Cir. R. 35(d).

[7] 9th Cir. R. 35-1; and 10th Cir. R. 35.2.1.

[8] 5th Cir. R. 35.2. Another proposed amendment to Rule 35 that is scheduled for publication in December omits language from Rule 35 that could be read as prohibiting the Fifth Circuit's requirement that a petition for panel rehearing and a suggestion for in banc rehearing be in separate documents. The second sentence of Rule 35(c) currently states:

> 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 proposed amendment deletes the last phrase beginning with the word "whether."

suggestion may not refer to or adopt by reference any matter from other briefs or motions in the case.[9]

Drafts

1. Draft One.

The vast majority of the circuits have local rules aimed at emphasizing the narrow grounds that will support an order for in banc consideration. The circuits apparently believe either that Fed. R. App. P. 35(a) is not clear enough, or that some additional emphasis is necessary. Therefore, one possible way to amend Rule 35 is to provide such emphasis.

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

(a) *When Hearing or Rehearing in Banc Will Be Ordered.* -- A majority of the circuit judges who are in regular active service may order that an appeal or other proceeding be heard or reheard by the court of appeals in banc. ~~Such a~~ An in banc hearing or rehearing is not favored and ordinarily will not be ordered ~~except when~~ unless:

(1) consideration by the full court is necessary to secure or maintain uniformity of its decisions, or

(2) the proceeding involves a question of exceptional importance.

(b) ~~*Suggestion*~~ *Petition of a Party for Hearing or Rehearing in Banc.* - A party may ~~suggest the appropriateness of~~ petition for a hearing or rehearing in banc. The petition must begin with a statement that either

(1) the panel decision conflicts with a decision of the United States

[9] 8th Cir. R. 35A(c); 10th Cir. R. 35.5.

Supreme Court or of the court to which the petition is addressed (citations to the conflicting case or cases is required) and that consideration by the full court is necessary to secure and maintain uniformity of the court's decisions; or

(2) the appeal involves one or more questions of exceptional importance;

each such question must be concisely stated, preferably in a single sentence. ~~No response shall be filed unless the court shall so order. The clerk shall transmit any such suggestion to the members of the panel and the judges of the court who are in regular active service but a vote need not be taken to determine whether the cause shall be heard or reheard in banc unless a judge in regular active service or a judge who was a member of the panel that rendered a decision sought to be reheard requests a vote on such a suggestion made by a party.~~

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

(d) *Number of Copies.* -- The number of copies that must be filed may be prescribed by local rule and may be altered by order in a particular case.

(e) *Response.*-- No response may be filed to a petition for in banc consideration

unless the court orders a response.

(f) *Voting on a Petition.* -- The clerk must transmit any such petition to the judges of the court who are in regular active service and, with respect to a petition for rehearing, to any other members of the panel that rendered the decision sought to be reheard but a vote need not be taken to determine whether the cause will be heard or reheard in banc unless a judge requests a vote.

Committee Note

Subdivision (a). The only changes are stylistic; no substantive changes are intended.

Subdivision (b). The amendment requires that each petition for in banc consideration begin with a statement that concisely demonstrates that the case meets the criteria for in banc consideration. It is the Committee's hope that requiring such a statement will cause the drafter of a petition to focus on the narrow grounds that support granting in banc consideration and to realize that a petition should not be filed unless the case meets those rigid standards. Counsel are reminded that their duty is fully discharged without filing a petition for rehearing in banc unless the case meets the rigid standards of subdivision (a) of this Rule.

To improve the clarity of the Rule, the material dealing with filing a response to a petition and with voting on a petition have been moved to new subdivisions (e) and (f).

Subdivision (e). This is a new subdivision. The substance of the subdivision, however, was drawn from former subdivision (b). The only changes are stylistic; no substantive changes are intended.

Subdivision (f). This is a new subdivision. The substance of the subdivision, however, was drawn from former subdivision (b). The only changes are stylistic; no substantive changes are intended.

2. Draft Two.

If the Committee is interested in imposing page limits on petitions for in banc consideration or in specifying the contents of such petitions, the existing local rules can serve as a model. The following draft incorporates many of the ideas found in the local rules.

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

(a) *When Hearing or Rehearing in Banc Will Be Ordered.* -- A majority of the circuit judges who are in regular active service may order that an appeal or other proceeding be heard or reheard by the court of appeals in banc. ~~Such a~~ An in banc hearing or rehearing is not favored and ordinarily will not be ordered ~~except when~~ unless:

(1) consideration by the full court is necessary to secure or maintain uniformity of its decisions, or

(2) the proceeding involves a question of exceptional importance.

(b) ~~*Suggestion*~~ *Petition of a Party for Hearing or Rehearing in Banc.* - A party may ~~suggest the appropriateness of~~ petition for a hearing or rehearing in banc.

(1) Contents. --The petition must include in the following order:

(A) a cover as required by Rule 32(b)(1);[10]

(B) a statement that either

(i) the panel decision conflicts with a decision of the

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[10] Rule 32(b)(1), as approved for publication in December, states:

(1) A petition for rehearing, a petition for rehearing in banc, and any response to such petition must ~~shall~~ be produced in a manner prescribed by subdivision (a) with a cover the same color as the party's principal brief.

It does not apply to a petition for an initial hearing in banc. Should it?

United States Supreme Court or of the court to which the petition is addressed (citations to the conflicting case or cases is required) and that consideration by the full court is necessary to secure and maintain uniformity of the court's decisions; or

(ii) the appeal involves one or more questions of exceptional importance; each such question must be concisely stated, preferably in a single sentence;

(C) the corporate disclosure statement required by Rule 26.1;

(D) a table of contents and a table of authorities cited, both with page references;

(E) a statement of the issue or issues meriting in banc consideration;

(F) a statement of the case including the nature of the case, the course of the proceedings, and the disposition of the case;

(G) a statement of any facts necessary to argument of the issues;

(H) an argument that must address specifically not only the merits of the issue but why it is worthy of in banc consideration; and

(I) a conclusion.

(2) Length. -- Except by permission of the court, or as specified by local rule, a petition for in banc consideration must not exceed 15 pages, exclusive of pages containing the corporate disclosure statement, table of contents, table of

authorities, proof of service, and any addendum containing statutes, rules, regulations, etc.

(3) Number of Copies. -- The number of copies that must be filed may be prescribed by local rule and may be altered by order in a particular case.

~~No response shall be filed unless the court shall so order. The clerk shall transmit any such suggestion to the members of the panel and the judges of the court who are in regular active service but a vote need not be taken to determine whether the cause shall be heard or reheard in banc unless a judge in regular active service or a judge who was a member of the panel that rendered a decision sought to be reheard requests a vote on such a suggestion made by a party.~~

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

~~(d) *Number of Copies.* -- The number of copies that must be filed may be prescribed by local rule and may be altered by order in a particular case.~~

(d) *Response.*-- No response may be filed to a petition for in banc consideration unless the court orders a response.

(e) *Voting on a Petition.* -- The clerk must transmit any such petition to the judges of the court who are in regular active service and, with respect to a petition for rehearing, to any other members of the panel that rendered the decision sought to be reheard but a vote need not be taken to determine whether the cause will be heard or reheard in banc unless a judge requests a vote.

Committee Note

Subdivision (a). The only changes are stylistic; no substantive changes are intended.

Subdivision (b) paragraph (1). The amendment creates a separate paragraph that specifies the items that must be included in a petition for in banc consideration. In general the items are the same as those that must be included in a party's principal brief. The amendment, however, also requires each petition for in banc consideration to begin with a concise statement demonstrating that the case meets the criteria for in banc consideration. It is the Committee's hope that requiring such a statement will cause the drafter of a petition to focus on the narrow grounds that support granting in banc consideration and to realize that a petition should not be filed unless the case meets those rigid standards. Counsel are reminded that their duty is fully discharged without filing a petition for rehearing in banc unless the case meets the rigid standards of subdivision (a) of this Rule.

To improve the clarity of the Rule, the material dealing with filing a response to a petition and with voting on a petition have been moved to new subdivisions (d) and (e).

Subdivision (b) paragraph (2). This new provision establishes a maximum length for a petition. Fifteen pages is the length currently used in the D.C., Fifth, Tenth, Eleventh, and Federal Circuits. Each request for in banc consideration must be studied by every active judge of the court and is a serious call on limited judicial resources. The extraordinary nature of the issue or the threat to uniformity of the court's decision can be established in most cases in less than fifteen pages.

Subdivision (b) paragraph (3). The provision governing the number of copies has simply been moved from subdivision (d) to this new paragraph. The change is stylistic; no substantive changes are intended.

Subdivision (d). This is a new subdivision. The substance of the subdivision, however, was drawn from former subdivision (b). The only changes are stylistic; no substantive changes are intended.

Subdivision (e). This is a new subdivision. The substance of the subdivision, however, was drawn from former subdivision (b). The only changes are stylistic; no substantive changes are intended.

D.C. Cir. R. 15. Petitions for Rehearing, Suggestions for Hearing or Rehearing En Banc, Mandates and Remands

(a) Petitions for Rehearing and Suggestions for Hearing and Rehearing En Banc.

* * * * *

(3) *Contents of Suggestion for En Banc Consideration.* A suggestion as to the appropriateness of hearing or rehearing *en banc* should be made only where the criteria for *en banc* consideration set forth in Rule 35(a) of the Federal Rules of Appellate Procedure are satisfied. A suggestion for hearing or rehearing *en banc* shall contain a separate introductory section, captioned "Concise Statement of Issue and Its Importance," that shall set forth the reasons why the case is of exceptional importance or, where applicable, with what decision or decisions of the Supreme Court of the United States, of this Court, or of any other federal appellate court, the panel decision is claimed to be in conflict. Without such a statement, the suggestion will not be accepted for filing.

D.C. Cir. I.O.P. XIII.B. Reconsideration.

2. *Rehearing En Banc.*

. . . The suggestion cannot be more than 11 printed pages in length, or 15 typewritten pages; motions to exceed this limitation are rarely granted. . . .

1st Cir. R. 35.1. Petitions for In Banc Consideration.

Supplementing FRAP Rule 35, the following requirement shall apply:

Each application shall be submitted with ten copies.

Where the party suggesting in banc consideration is represented by counsel, the petition shall include one or both of the following statements as applicable:

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decision(s) of the Supreme Court of the United States or the precedents of this circuit and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this court: [cite specifically the case or cases];

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance: [set forth each question in one sentence].

3rd Cir. R. 22. Required statement of rehearing in banc.

Where the petitioner for rehearing in banc is represented by counsel, the petition shall contain, so far as is pertinent, the following statement of counsel:

> "I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to decisions of the United States Court of Appeals for the Third Circuit or the Supreme Court of the United States, and that consideration of the full court is necessary to secure and maintain uniformity of decision in this Court, to-wit, the panel's decision is contrary to the decisions of this Court or the Supreme Court in [citing specifically the case or cases],
>
> *Or*, that this appeal involves a question of exceptional importance, to wit [set forth in one sentence]."

3rd Cir. R. 22.1. Required attachments to petition for rehearing.

A petition seeking either panel rehearing or rehearing in banc shall include as an exhibit a copy of the panel's Judgment, Order, and Opinion, if any, as to which rehearing is sought.

5th Cir. R. 35. Determination of Causes by the Court En Banc.

35.1. Caution. As is noted in FRAP 35, en banc hearing or rehearing of appeals is not favored. Among the reasons for this is that each request for en banc consideration must be studied by every active judge of the Court and hence is a serious call on limited judicial resources. Counsel have a duty to the Court commensurate with that owed their clients to read with attention and observe with restraint the certificates required of them in 35.2.2 below. The Court takes the view that, given the extraordinary nature of suggestions for en banc consideration, it is fully justified in imposing sanctions of its own initiative under, *inter alia*, Fed. R. App. P. 38 and 28 U.S.C. § 1927, upon the person who signed the suggestions, the represented party, or both, for manifest abuse of the procedure.

35.2. Form of Suggestion. Twenty copies of every suggestion of en banc consideration, whether upon initial hearing or rehearing, shall be filed. The suggestion shall not be incorporated in the petition for rehearing before the panel, if one is filed, but shall be complete in itself. In no case shall a suggestion of en banc consideration adopt by reference any matter from the petitions for panel rehearing or from any other briefs or motions in the case. A suggestion of en banc consideration shall contain the following items, in order:

35.2.1. Certificate of interested persons required for briefs by 28.2.1.

35.2.2. If the party suggesting en banc consideration is represented by counsel, one or both of the following statements of counsel, as

applicable:

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decision(s) of the United States Court of Appeals for the Fifth Circuit [or the Supreme Court of the United States], and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this Court: [citing specifically the case or cases].

I express a belief based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance: [set forth each question in one sentence].

_____

Attorney of record for _____

Counsel are reminded that in every case the duty of counsel is fully discharged without filing a suggestion for rehearing en banc unless the case meets the rigid standards of FRAP 35(a).

35.2.3. Table of contents and citations;

35.2.4. Statement of the issue or issues asserted to merit en banc consideration. It will rarely occur that these will be the same as those appropriate for panel rehearing. A suggestion of en banc consideration must be limited to the circumstances enumerated in FRAP 35(a).

35.2.5. Statement of the course of proceedings and disposition of this case;

35.2.6. Statement of any facts necessary to the argument of the issues;

35.2.7. Argument and authorities. These shall concern only the issues required by paragraph (.2.4) hereof and shall address specifically, not only their merit, but why they are contended to be worthy of en banc consideration.

35.2.8. Conclusion; and

35.2.9. Certificate of service.

* * * * *

35.5. Length. A suggestion for en banc consideration shall not exceed 15 pages in length, without permission of the Court.

6th Cir. R. 14. *En Banc* - Required Statement for Rehearing *En Banc*

* * * * *

(b) Required statement for rehearing *en banc*. Where the petitioner is represented by counsel the petition shall contain, on the first page of the petition, one or both of the following statements of counsel as applicable:

REQUIRED STATEMENTS FOR REHEARING *EN BANC*
(Designate one or both relied on)

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decision(s) of the United States Court of Appeals for the Sixth Circuit [or the Supreme Court of the United States] and that consideration by the full Court is necessary to secure and maintain uniformity of decisions: [citing specifically the case or cases].

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance: [set forth each question in one sentence].

_____

(Signature)

Attorney of record for:

_____

(c) Counsel not obligated to file. *En banc* consideration of a case is an extraordinary measure, and in every case the duty of counsel is fully discharged without filing a suggestion for rehearing *en banc* unless the case meets the rigid standards of Rule 35(a) of the Federal Rules of Appellate Procedure. The filing of a petition for rehearing or suggestion for rehearing *en banc* are not prerequisites to the filing of a petition for writ of certiorari.

7th Cir. R. 40. Petitions for Rehearing

(a) *Table of Contents.* The petition for rehearing shall include a table of contents with page references and a table of cases (alphabetically arranged), statutes and other authorities cited, with reference to the pages of the brief where they are cited.

(b) *Number of Copies.* Fifteen copies of a petition for rehearing shall be filed, except that 25 shall be filed if the petitioner suggests rehearing in banc.

(c) *Required Statement for Suggestion of Rehearing In Banc.* Suggestions that an appeal be reheard in banc shall state in a concise sentence at the beginning of the petition why the appeal is of exceptional importance or with what decision of the United States Supreme Court, this court, or another court of appeals the panel decision is claimed to be in conflict.

8th Cir. R. 35A. Hearing and Rehearing En Banc.

* * * * *

(c) *Suggestion for En Banc Disposition.* A suggestion shall not refer to or adopt by reference any matter from other briefs or motions in the case.

(1) *Number.* A party seeking an en banc proceeding shall file 18 copies of a suggestion for hearing or rehearing en banc.

(2) *Required Statement.* The suggestion of any party represented by counsel and seeking hearing or rehearing en banc shall include one or both of the following statements signed by counsel:

(i) I express a belief, based on a reasoned and studied professional judgment, that the decision is contrary to the following decisions of the United States Court of Appeals for the Eighth Circuit [or the Supreme Court of the United States], and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this court: [cite specifically the case or cases].

_____

Attorney of Record
for [Name of Party]

(ii) I express a belief, based on a reasoned and studied professional judgment, that this appeal raises the following questions of exceptional importance: [set forth each question in one sentence].

Attorney of Record
for [Name of Party]

* * * * *

9th Cir. R. 35-1 Suggestion of the Appropriateness of Rehearing En Banc

Where a suggestion of the appropriateness of a rehearing en banc is made pursuant to FRAP 35(b) as part of a petition for rehearing, a reference to such suggestion, as well as to the petition for rehearing, shall appear on the cover of the combined petition and suggestion.

When the opinion of a panel directly conflicts with an existing opinion by another court of appeals and substantially affects a rule of national application in which there is an overriding need for national uniformity, the existence of such conflict is an appropriate ground for suggestion a rehearing en banc.

10th Cir. R. 35. Determination of Causes by the Court En Banc.

* * * * *

35.2. Form and Content of Suggestion for Hearing or Rehearing En Banc.

35.2.1 Suggestion in Petition for Rehearing. When a suggestion for rehearing en banc is made in a petition for rehearing, a reference to the suggestion, as well as to the petition for rehearing, shall appear on the cover page and in the title of the document.

35.2.2. Essential Allegations. When a party seeking en banc consideration is represented by counsel, the petition must contain one or both of the following statements of counsel, as applicable.

(a) I express a belief based on a reasoned and studied professional judgment that the panel decision is contrary to the following decision(s) of the United States Supreme Court or of the United States Court of Appeals for the Tenth Circuit, and consideration by the full court is necessary to secure and maintain uniformity of decisions in this court [citing specifically the case or cases].

(b) I express a belief based on a reasoned and studied professional judgment that this appeal involves one or more questions of exceptional

importance: [set forth each question in one sentence].

/s/_____
Attorney of Record for _____

* * * * *

35.5. Form of Request. Suggestions for en banc consideration shall not exceed 15 pages in length. If made jointly with a petition for rehearing, the combined documents shall not exceed 15 pages and shall be complete within themselves without reference to prior motions or briefs. . . .

11th Cir. R. 35-6. Form of Suggestion.

A suggestion of en banc consideration shall be bound in a white cover which is clearly labeled with the title "Suggestion of Rehearing (or Hearing) En Banc". A suggestion of rehearing en banc will also be treated as a petition for rehearing before the original panel. A petition for rehearing will not be treated as a suggestion for rehearing en banc. A suggestion of en banc consideration shall contain the following items in this sequence:

(a) a cover page as required by 11th Cir. R. 29-2(a);

(b) A Certificate of Interested Persons and Corporate Disclosure Statement as described in FRAP 26.1 and the accompanying circuit rules.

(c) where the party suggesting en banc consideration is represented by counsel, one or both of the following statements of counsel as applicable:

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decision(s) of the Supreme Court of the United States or the precedents of this circuit and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this court: [cite specifically the case or cases]

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance: [set forth each question in one sentence]

/s/_____
Attorney of Record for
_____

(d) table of contents and citations;

(e) statement of the issue(s) asserted to merit en banc consideration;

(f) statement of the course of proceedings and disposition of the case;

(g) statement of any facts necessary to argument of the issues;

(h) argument and authorities. These shall concern only the issues and shall address specifically not only their merit but why they are contended to be worthy of en banc consideration;

(i) conclusion;

(j) certificate of service.

11th Cir. R. 35-8. Length.

A suggestion of en banc consideration shall not exceed 15 pages, and if made with a petition for rehearing (whether or not they are combined in a single document) the combined documents shall not exceed 15 pages.

Fed. Cir. R. 35. Determination of causes by the court in banc.

* * * * *

(b) Content of suggestion for hearing or rehearing in banc. A suggestion that an appeal be initially heard in banc shall contain the following statement of counsel at the beginning of the suggestion:

> Based on my reasoned and studied professional judgment, I believe this appeal requires answer to one or more precedent-setting questions of exceptional importance: (set forth each question in a separate sentence).
>
> /s/ _____
> Attorney of Record for _____

A suggestion that an appeal be reheard in banc shall contain one or both of the following statements of counsel, as applicable, at the beginning of the suggestion:

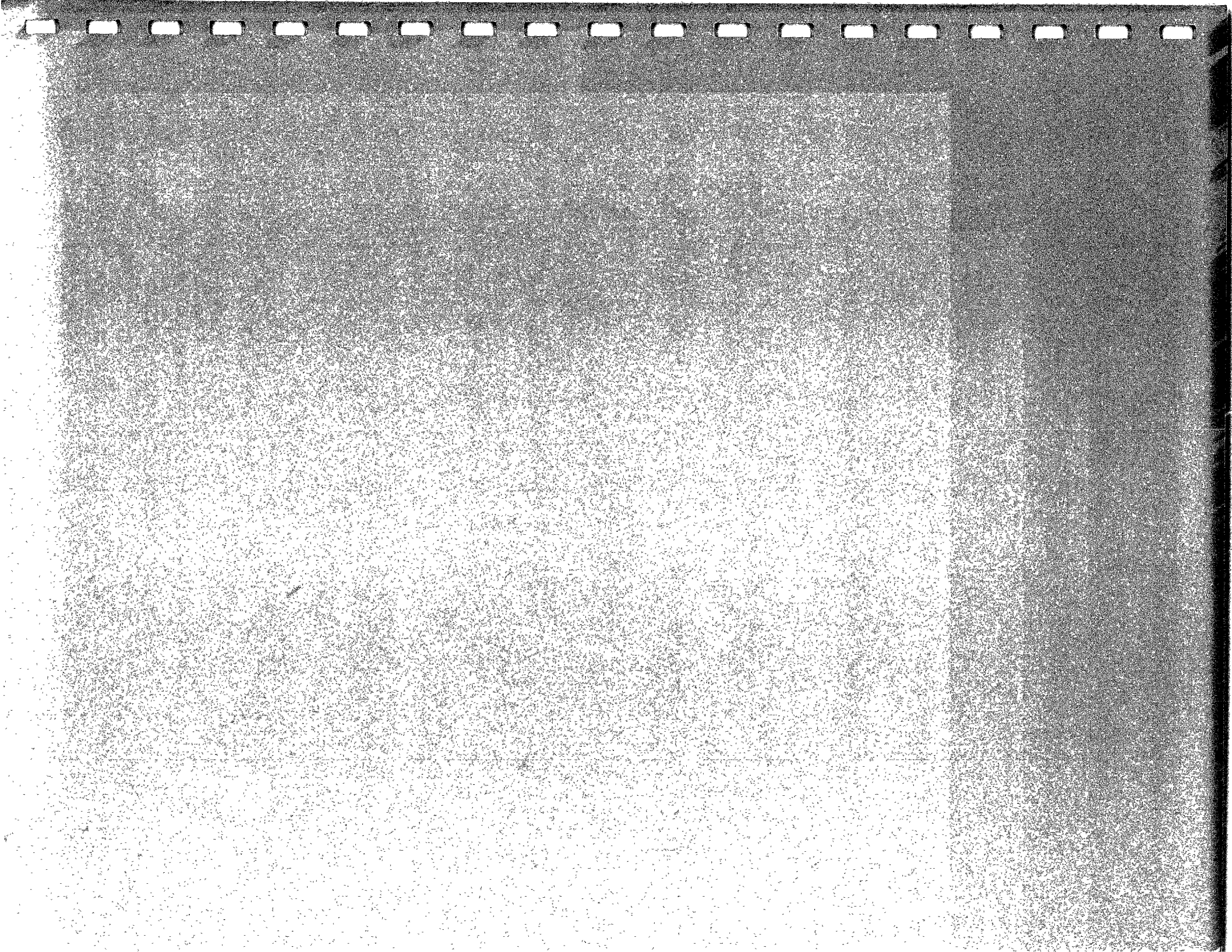
> Based on my reasoned and studied professional judgment, I believe the panel decision is contrary to the following decision(s) of the Supreme Court of the United States or the precedent(a) of this court: (cite specifically the decision(s) or precedent(s)).

Based on my reasoned and studied professional judgment, I believe this appeal requires answer to one or more precedent-setting questions of exceptional importance: (set forth each question in a separate sentence).

/s/ _____
Attorney of Record for _____

(c) Suggestion for hearing in banc; response; format; service; length; cover; certificate of interest; number of copies. A suggestion for hearing in banc or response if requested by the court shall be in the form prescribed by Rule 32(a) of the Federal Rules of Appellate Procedure. A suggestion for hearing in banc shall not exceed five pages, excluding pages containing the certificate of interest, table of contents, table of citations, and any addendum containing statutes, rules, regulations, etc. The cover shall contain the information required of briefs (see Fed. Cir. R. 32(e)). The cover of the suggestion shall be yellow and the cover of the answer, if one is required by the court, shall be brown. A certificate of interest (see Fed. Cir. R. 47.4) shall immediately follow the cover. Fifteen copies of the suggestion for hearing in banc shall be filed with the court, and two copies shall be served on each party separately represented.

(d) Suggestions for rehearing in banc; response; format; service; length; cover; certificate of interest; appendix; number of copies. A suggestion for rehearing in banc or response if requested by the court shall be in the form prescribed by Rule 32(a) of the Federal Rules of Appellate Procedure. A suggestion for rehearing in banc or response may not exceed 15 pages, excluding pages containing the certificate of interest, table of contents, table of citations, and any addendum containing statutes, rules, regulations, etc. The cover shall contain the information required of briefs (see Fed. Cir. R. 32(e)). The cover of the suggestion shall be yellow and the cover of the answer, if one is required by the court, shall be brown. A certificate of interest (see Fed. Cir. R. 47.4) shall immediately follow the cover. A copy of the opinion in the appeal sought to be reheard shall be bound with the suggestion as an appendix. Fifteen copies of the suggestion for rehearing in banc shall be filed with the court, and two copies shall be served on each party separately represented.



U.S. Department of Justice

Office of the Solicitor General

The Solicitor General *Washington, D.C. 20530*

September 13, 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: FRAP Item 92-4: Amendment of Rule 35

Dear Judge Ripple:

Thank you for your letter of August 13, 1993 concerning the above item. The Department has recently completed a study of this item. Based on that study, the Department would like to go forward with our proposal at the September, 1993 meeting. Thus, we request that the item be placed on the agenda for that meeting.

I have revised the proposal in two significant respects. First, I do not propose deleting the language in the existing rule which states that rehearing in banc "is not favored." Second, I do not propose making the existence of a conflict between a panel and a state court of highest resort a ground for rehearing in banc.

I do, however, recommend that Rule 35 be amended to make the existence of an inter-circuit conflict a ground for rehearing in banc. The grounds for this proposal are set forth in the attached memorandum, which describes the results of a study the Department recently conducted concerning this matter.

Thank you for your assistance in this matter.

Sincerely,

—S—

Drew S. Days III
Solicitor General

cc: Carol Ann Mooney
Reporter, Appellate Rules Committee

Robert E. Kopp
Director, Appellate Staff
Civil Division

A STUDY OF WHETHER FRAP 35 SHOULD BE AMENDED TO MAKE THE EXISTENCE OF AN INTER-CIRCUIT CONFLICT AN ADDITIONAL GROUND FOR GRANTING REHEARING IN BANC

I. Introduction and Summary.

Former Solicitor General Starr requested the Appellate Rules Committee to consider whether FRAP 35 should be amended to read as follows:

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

To aid the Committee in considering this proposal, the Department of Justice has conducted a study of the matter, which included a review of the existing use of rehearing in banc by the circuits to prevent unnecessary inter-circuit conflicts. We also surveyed the literature concerning this item and reviewed various other proposals and possible alternatives for helping to prevent unnecessary inter-circuit conflicts.

This memorandum presents the results of our study. We found that inter-circuit conflicts create significant problems for the appellate system. Inter-circuit conflicts create the impression that the law depends on the fortuity of where the litigation occurs, and therefore undermine public confidence in the uniformity of the law. Inter-circuit conflicts also create upward pressure on the Supreme Court's caseload. Yet, because the Supreme Court is taking fewer and fewer cases, the courts of appeals are more than ever the final expositors of the law in the federal system.

We found a number of reasons to suggest that amending Rule 35 to make inter-circuit conflict a ground for rehearing in banc would be a helpful and measured response to the problem.

1. An inter-circuit conflict can already provide a ground for rehearing in banc under existing Rule 35, which authorizes in banc review of questions of "exceptional importance." An inter-circuit conflict often, if not always, presents a question of "exceptional importance," both because of the significance of the issues involved and because of the cost inter-circuit conflicts impose on the system as a whole. Thus, amending Rule 35 would make explicit what is already substantially implicit in the Rule.

2. Four circuits (D.C., 4th, 7th, and 9th) already have rules that make an inter-circuit conflict a ground for rehearing in banc. Therefore, to amend FRAP 35 to that effect would merely extend the practice in those circuits to the other circuits. There was no substantial controversy surrounding the adoption of those local rules in those circuits, and no reason the matter should be any more controversial now.

3. Third, we found that the circuits already are using rehearing in banc to prevent unnecessary inter-circuit conflicts in a significant number of cases. In the circuits we studied, the in banc courts of appeals prevented an unnecessary inter-circuit conflict in 33 (12.3%) of the 268 in banc cases we reviewed that were decided during the years 1988-1992. Although the in-banc courts of appeals also created conflicts in 16 (6%) of those 268 cases, rehearing in banc still prevented twice as many inter-circuit conflicts as it created. (We did not attempt to find out whether the conflict reasserted itself in subsequent circuit court decisions.)

4. A rules change alone will not cause the courts of appeals to revise their existing philosophies with respect to the grant of in banc review, since the size of the court and its tradition of collegiality have more to do with a willingness to grant rehearing in banc than any rules changes. Nevertheless, the courts should be aware that rehearing in banc has certain advantages for the judicial system as a whole, even if it slows down and makes more cumbersome the disposition of a particular case:

a. First, rehearing in banc has significant advantages over other proposals for reducing the Supreme Court's caseload, such as creating an inter-circuit tribunal. Using the in banc procedure does not require any structural alteration of the appellate system, and would not require any major change in how the appellate courts function.

b. Additionally, rehearing in banc provides safeguards against unnecessary inter-circuit conflicts that other existing mechanisms -- such as circulating all panel opinions to the court before they are published -- do not supply. For example, rehearing in banc would allow counsel to identify inter-circuit conflicts that the court may inadvertently have missed in reviewing a panel opinion.

c. The obvious disadvantage of rehearing in banc is the amount of extra judge-power it requires for deciding a case in the court of appeals. However, the cost to the system as a whole of leaving an inter-circuit conflict unresolved can be even greater, since an inter-circuit conflict will inevitably generate significant additional litigation in the other circuits as well as in the circuits that are already in conflict.

In sum, a change to Rule 35 which expressly recognizes that inter-circuit conflicts are a basis for seeking in banc review will not, by itself, produce a change in judicial practice with respect to the grant of in bancs. However, it will serve to acknowledge a legitimate function of rehearing in banc, and to educate the bench and bar concerning that function.

5. We found no significant need to amend FRAP 35 to make the existence of a conflict between a panel opinion and the decision of a state court of last resort a ground for rehearing in banc. Similarly, we could identify no significant ground for deleting the language from Rule 35 which states that rehearing in banc is not favored. This language need not be deleted in order to accommodate our proposal because an inter-circuit conflict is outside the generality of cases, in which in banc is disfavored. Thus, we recommend that these aspects of our original proposal be dropped, and that Rule 35 be amended to state as follows:

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

II. Discussion.

A. The Need to Prevent Inter-Circuit Conflicts.

Inter-circuit conflicts occur in the federal appellate system because each of the circuits is a fully autonomous body and because each judge has an independent duty to decide cases according to his or her own best judgment. Thus, inter-circuit conflicts are not inherently illegitimate. They just mean that one set of judges has disagreed with another.

Moreover, inter-circuit conflicts form an important part of the process by which significant legal issues "percolate" prior to final resolution by the Supreme Court. The Supreme Court can most efficiently grapple with a question if it has the benefit of contrasting court of appeals decisions.

Notwithstanding the beneficial effects of inter-circuit conflicts from the viewpoint of ultimate Supreme Court review, there is a growing consensus that inter-circuit conflicts require some corrective action because they have created serious problems for the federal appellate system.

1. Inter-Circuit Conflicts Undermine Public Confidence in the Uniform Application of the Law.

When the circuits are divided concerning important legal issues, parties' rights and obligations come to be defined by where a case is litigated. That the result in a case should depend on the fortuity of where it was brought undermines the public's faith in the equitableness and constancy of the law.

There are few ideas more fundamental to the fairness of the legal system than the principle that people similarly situated should be treated similarly under the law. The applicability of different legal principles under the laws of different states is acceptable because each state is a sovereign and, through its own body politic, makes its own laws. No justification of similar magnitude exists with respect to different constructions of the same federal law by courts of appeals within the federal system.

2. Unnecessary Inter-Circuit Conflicts Create Pressure on the Supreme Court's Caseload and Ignore The Courts of Appeals' Responsibility to Seek Uniformity in the Law.

A temporary lack of uniform construction of federal law may be a necessary price to pay when the Supreme Court can ultimately be expected to resolve an issue definitively. The Supreme Court, however, is increasingly leaving conflicts unremedied at the court of appeals level.

For example, a recent study commissioned by the Federal Judicial Center demonstrates that, during the Supreme Court's 1989 term, the Supreme Court left unresolved between 163 and 268 inter-circuit conflicts, depending how narrowly or how broadly that concept is defined. See A. Hellman, Unresolved Intercircuit Conflicts: The Nature and Scope of the Problem (Final Report: Phase I), Dec. 1991. There is room for debate over the results of Prof. Hellman's and similar studies. In particular, it is difficult to evaluate how many people are adversely affected by each conflict. Nonetheless, it is apparent to most practitioners that the Supreme Court can be less frequently counted upon promptly to eliminate inter-circuit conflicts.

Indeed, it is inevitable that this is so. The Supreme Court in this century has not changed in size nor changed its method of conducting all review in banc. Yet, the number of cases in the courts of appeals has increased radically. In the 1970 Term, the Supreme Court disposed of 3,318 cases, 141 by written opinion and 200 by per curiam decision. In the 1992 Term, the Court disposed of 6,401 cases, 107 by written opinion and 88 by per curiam opinion or other summary decision. Thus, in short, the number of court of appeals decisions presented to the Supreme Court and not reviewed by it increased from 2,977 in 1970 to 6,206 in 1992.

Assuming that the courts of appeals generated a constant percentage of inter-circuit conflicts during that period, it is apparent that only one-half of the conflicts reviewed in 1970 are now being reviewed. And this assumption is conservative. It is likely that the courts of appeals are generating inter-circuit conflicts today at a greater rate than in 1970, since an increase in the number of court of appeals decisions is likely to produce a greater rate of conflict.

The courts of appeals today thus are ever more frequently the final expositors of the law. Moreover, even when the Supreme Court does ultimately decide an issue, the courts of appeals will provide the last word on the law in their circuit for an extended interim period. Given the reality of appellate litigation today, the courts of appeals should take seriously their responsibility to avoid inter-circuit conflicts where possible and maintain the uniformity of the law across the nation.

B. Reasons Why FRAP 35 Should be Amended to Make Inter-Circuit Conflict a Ground for Rehearing In Banc.

We have shown above that it is important to the judicial system that all appropriate means be used to reduce the number of unresolved inter-circuit conflicts. As we will discuss below, rehearing in banc is a valuable tool for the judicial system to use in achieving that end, and amending FRAP 35 along the lines we have suggested would allow the courts to use that mechanism more effectively.

1. Inter-Circuit Conflicts Can Already Justify Rehearing in Banc Under FRAP 35 Because an Inter-Circuit Conflict Often Presents a Question of "Exceptional Importance."

FRAP 35 currently makes rehearing in banc available when "the proceeding involves a question of exceptional importance." An inter-circuit conflict frequently does present a question of "exceptional importance," not only because of the substantive issues in question, but also because of the cost to the appellate system of having a different interpretation of the law govern in different judicial circuits. Thus, amending FRAP 35 to make inter-circuit conflicts an express ground for rehearing in banc would make explicit what is already substantially implicit in the Rule.

2. Four Circuits Already Have Rules that Expressly Make Inter-Circuit Conflict a Ground for Rehearing In Banc.

Three circuits (the Seventh, Ninth, and D.C. Circuits) have local rules that expressly make the existence of an inter-circuit conflict a ground for rehearing in banc. See Seventh Circuit Rule 40(c); Ninth Circuit Rule 35-1; D.C. Circuit Rule 14. The Fourth Circuit does the same by virtue of its Internal Operating Procedures. See Fourth Circuit IOP 40.5. In the other circuits,

which do not have any such express rule, the parties must rely on the argument that an inter-circuit conflict creates a question of "exceptional importance," which is a ground for rehearing in banc under FRAP 35 and under most local circuit rules.

Thus, to amend FRAP 35 to make inter-circuit conflict a ground for rehearing in banc would merely involve extending the rules that already exist in four circuits to the remaining eight circuits. Our research revealed that the Fourth, Seventh, Ninth, and D.C. Circuits' adoption of local rules expressly authorizing in banc review based on an inter-circuit conflict did not involve any significant controversy. Extending those rules to the system as a whole should be no more controversial, since no court would be required actually to grant rehearing in banc in any case.

3. Research Shows that Rehearing In Banc is an Effective Tool For Preventing Inter-Circuit Conflicts.

During the past several months, we have conducted a survey of the existing use of rehearing in banc to prevent inter-circuit conflicts. The purpose of this survey is to determine the extent to which the courts of appeals are already using rehearing in banc as a means of preventing inter-circuit conflicts.

We began by generating a list of published decisions issued by the in banc courts of appeals during the years 1988-1992. We then reviewed the in banc decisions issued by certain circuits during that five-year period. We selected the D.C., 4th, 7th, and 9th Circuits because they have local rules that expressly identify an inter-circuit conflict as a ground for rehearing in banc. We analyzed the cases from five other circuits (1st, 2nd, 3rd, 5th, and 8th) to complete a representative sample. A list of the in banc opinions we analyzed is attached.

The results of our study show that the D.C., 4th, 7th, and 9th Circuits prevented an inter-circuit conflict in 16 of the 129 (12.4%) cases in which those courts issued in banc opinions from 1988 to 1992. The other circuits we studied (1st, 2nd, 3rd, 5th, and 8th) prevented an inter-circuit conflict in 17 of the 139 (12.2%) cases. Thus, the courts with a formal rule recognizing inter-circuit conflict as a ground for rehearing in banc and the courts without such a rule used rehearing in banc with the same degree of effectiveness in preventing inter-circuit conflicts. Overall, the courts we studied used rehearing in banc to prevent an inter-circuit conflict in 33 of 268 cases (12.3%).

The results of our study also show that in banc courts occasionally have created, rather than eliminated, inter-circuit conflicts. The D.C., 4th, 7th, and 9th Circuits arguably created inter-circuit conflicts in 10 of 129 (7.8%) cases. In bancs in the other circuits arguably created inter-circuit conflicts in 6 of 139 (4.3%) cases. Overall, the in bancs we studied arguably created inter-circuit conflicts in 16 of 268 (6%) cases.

(For purposes of our study, we did not attempt to follow through an issue to ascertain whether, after an in banc decision obviated a conflict, the conflict reasserted itself. This was unnecessary to the purpose of our study, which was to find out how often the courts have used rehearing in banc to prevent inter-circuit conflicts. The point deserves mention, however, because it illustrates that amending Rule 35 would not, by itself, provide a complete solution to the problem of inter-circuit conflicts.)

The other in banc opinions we studied had no effect on the existence of an inter-circuit conflict. That was true for one of several reasons. In most cases, the grant of rehearing in banc simply had nothing to do with an inter-circuit conflict. In a few other cases, an inter-circuit conflict already existed among other circuits, or the in banc court simply declined to prevent an inter-circuit conflict created by the panel.

To summarize, we found that the courts of appeals are already using the rehearing in banc procedure to prevent inter-circuit conflicts in a significant number of cases. The courts with local rules making an inter-circuit conflict a ground for rehearing in banc have used rehearing in banc to prevent inter-circuit conflicts at about the same rate (12.4% to 12.2) as the circuits without a local rule. Therefore, our study shows that rehearing in banc has proved to be a helpful tool for reducing inter-circuit conflicts, but that amending Rule 35 will have only a modest impact on how courts address this problem, since the existing local rules in four circuits on inter-circuit conflicts do not appear to make much of a difference in how the circuits treat petitions.

4. Amending Rule 35 Would Not By Itself Change Judicial Philosophies Concerning Rehearing In Banc, But It Has Several Advantages Over Other Alternatives to Address this Problem and is Cost-Effective for the System As a Whole.

Judicial attitudes concerning matters such as this are most substantially based on factors such as the size of a court, its backlog, its tradition of collegiality, and the judge's own views concerning the appropriateness of rehearing in banc generally and in the particular case. Therefore, as the data described above suggest, a change in the FRAP, by itself, will not have a major impact in changing the practices of the courts with respect to the grant of rehearing in banc.

Also, a recent Federal Judicial Center survey of the sitting federal appellate judges revealed that the judges do not perceive inter-circuit conflicts as a serious problem with the appellate system at this time. Only 5% of the judges said that inter-circuit conflicts are a "large" problem; 30% said inter-circuit conflict is a "moderate" problem; 42% said it is a "small problem;" and 16% said it is not a problem at all. (The results of Federal Judicial Center Study were presented to the Committee at its April 1993 meeting).

Nevertheless, more than half of the responding judges said they would support use of in banc review to avert inter-circuit conflict (25% indicated "strong" support; 32% indicated moderate support). Moreover, rehearing in banc has significant advantages over the other alternatives for addressing the problem of inter-circuit conflicts and is less costly to the judicial system as a whole than leaving inter-circuit conflicts unresolved. While a rules change, by itself, would not necessarily have much impact, it would help sensitize the bench and bar to a legitimate function of rehearing in banc -- preventing inter-circuit conflicts.

a. Proposals for Fundamental Changes to the Existing Appellate System.

Our proposal concerning Rule 35 should be evaluated in the perspective of the alternatives that have been proposed for dealing with the problem of inter-circuit conflicts. For example, in 1972, the Freund Commission recommended the "creation of a National Court of Appeals which would screen all petitions for review now filed in the Supreme Court, and hear and decide * * * many cases of conflicts between the circuits." Federal Judicial Center, Report of the Study Group on the Caseload of the Supreme Court, 57 F.R.D. 573, 575 (1972).

In 1975, the Hruska Commission recommended that Congress create an intermediate court of appeals to hear cases that involve inter-circuit conflicts, but only as referred by the Supreme Court or as transferred from the circuit courts. U.S. Commission on Revisions of the Federal Court Appellate System, Structure and Internal Procedures: Recommendations for Change (1975), reprinted in 67 F.R.D. 195 (1975).

Pressure in support of those early proposals has continued to build over the years. Most recently, two proposals for broad structural change were introduced and seriously considered in the Senate. See S1569, 102d Cong., 2d Sess. (1992) (proposed bill). One proposal would establish an inter-circuit panel, composed of the chief judges of every circuit, to which the Supreme Court could refer inter-circuit conflicts. The second proposal would authorize the Supreme Court to refer inter-circuit conflicts to the in banc court of a circuit that is not part of the conflict.

Using rehearing in banc more aggressively to prevent inter-circuit conflicts would undeniably entail some costs. This change would be much less drastic, however, than making more fundamental structural changes in the system. It would not require creating any new courts or levels of courts, and would not involve adjusting the jurisdiction of any of the existing courts of appeals.

To avoid the need for fundamental structural changes to our judicial system, the courts of appeals should make full use of all the powers that are already available to eliminate conflicts among the circuits. More aggressive use of the powers courts already have will demonstrate that the existing system has the capacity to respond to the pressures that are placed on it. As Fifth Circuit Judge Patrick Higginbotham has noted, we "cannot close our eyes to the rapidly increasing upward pressure of an expanding base of federal cases." Brock v. Merrill Dow Pharmaceuticals, Inc., 884 F.2d 167, 170 (5th Cir. 1989) (Higginbotham, J.) (dissenting from denial of rehearing in banc). We reiterate that the change in Rule 35 that we propose will not, by itself, alter how the courts use the rehearing in banc procedure. But by educating the bench and bar to the availability of rehearing in banc to resolve inter-circuit conflicts, our proposal would acknowledge the availability of one tool for dealing with the problem of inter-circuit conflicts that is within the scope of the existing appellate system. We also doubt that the courts of appeals will be inundated with more rehearing petitions as a result of our proposed amendment to Rule 35. We assume that in a large percentage of cases creating inter-circuit conflicts the losing parties already file rehearing in banc petitions.

b. Other Existing Mechanisms to Prevent Inter-Circuit Conflicts.

In our study of this topic, we also reviewed the literature to determine whether there are other ways to help prevent unnecessary inter-circuit conflicts. We learned that most other proposals are no less drastic than the fundamental structural changes discussed above.

The one proposal that is different is to require the circulation of panel opinions that create an inter-circuit conflict to the full court prior to publication. See A. Leo Levin, "Uniformity of Federal Law," published in The Federal Appellate Judiciary in the Twenty-First Century (Harrison & Wheeler, eds., 1989).

Three circuits currently have rules or internal operating procedures that require the general circulation of panel opinions to all members of the court before publication. See 3d Circuit IOP 5.3.4;[1] 4th Circuit IOP 36.4;[2] 6th Cir. IOP 22.3.[3] Some of the other circuits appear to follow somewhat similar procedures by informal, unpublished rule or practice. See "Mini" In Banc Proceedings: A Survey of Circuit Practices, 34 Clev. St. L. Rev. 530 (1986).

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[1] The Third Circuit IOP 5.3.4 provides, in pertinent part:

> Memorandum opinions and per curiam opinions of the panel which are not to be published and which unanimously affirm the trial court, dismiss the appeal, or enforce the action of the administrative agency are filed forthwith with the Clerk by the opinion-writing judge. All other draft opinions of the panel are circulated to all active judges of the court after the draft opinion has been approved by all three panel members, concurring or dissenting opinions have been transmitted, or all members of the panel have had the time set forth in IOP 5.3.2 to write separate opinions. If the third judge has not timely responded, the draft opinion is circulated to the active judges of the court with the notation added to the opinion that the third judge has not joined in the opinion. The circulation to non-panel active judges contains a request for notification if there is a desire for in banc consideration.

See also 3d Cir. IOP 9.4 (discussing court-originated rehearing in banc).

[2] Fourth Circuit IOP 36.2 states, in pertinent part:

> When a proposed opinion in an argued case is prepared and submitted to other panel members copies are provided to the nonsitting judges including the senior judges and their comments are solicited. The opinion is then finalized and printed in slip opinion form.

[3] Sixth Circuit IOP 22.3 states, in pertinent part, that "[a]ll judges receive copies of any proposed published opinions." See also 6th Cir. IOP 20.6.

Two circuits do not formally require general circulation of panel opinions, but require circulation only if panel opinions create an inter-circuit conflict. See 5th Cir. Rule 47.5.3;[4] 7th Cir. Rule 40(f).[5]

The Eleventh Circuit does not normally circulate opinions, except that in special cases panel members may circulate proposed opinions. See 11th Cir. IOP to Rule 36-2.[6]

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[4] Fifth Circuit Rule 47.5.3, IOP -- Processing of Opinions states as follows in pertinent part:

> Because of the large number of opinions being issued annually, it is impractical for the Court to circulate among the 14 active judges and the senior judges on the Court copies of all proposed opinions. Those which initiate an express conflict with the law of another circuit are to be so circulated before the release however and are subject to polling procedures for en banc consideration should any judge request it. In other special cases, a panel or member thereof may circulate an opinion to all the members of the Court.

[5] Seventh Circuit Rule 40(f) states as follows:

> (f) Rehearing Sua Sponte Before Decision. A proposed opinion approved by a panel of this court adopting a position which would overrule a prior decision of this court or create a conflict between or among circuits shall not be published unless it is first circulated among the active members of this court and a majority of them do not vote to rehear in banc the issue of whether the position should be adopted. In the discretion of the panel, a proposed opinion which would establish a new rule or procedure may be similarly circulated before it is issued. When the position is adopted by the panel after compliance with this procedure, the opinion, when published, shall contain a footnote worded, depending on the circumstances, in substance as follows:
>
> > This opinion has been circulated among all judges of this court in regular active service. (No judge favored, or a majority did not favor) a rehearing in banc on the question of (e.g., overruling Doe v. Roe.)

[6] Section 2 of 11th Circuit IOP to Rule 36-2 states that "[c]opies of proposed opinions are not normally circulated to non-panel members. In special cases, however, a panel or member thereof may circulate a proposed opinion to other members of the court."

To the extent formal rules can guide the courts' internal practice, the Seventh Circuit's rule appears best suited to prevent inter-circuit conflicts. It highlights that a conflict between the circuits is a major matter, and keys the conflict to the possibility of in banc review. While the rules of the other circuits would appear to permit the same practice, the tenor of the Seventh Circuit's rule appears markedly stronger. That rule suggests that a conflict among the circuits is a major matter equivalent to overruling a prior decision of the circuit. The Fifth Circuit's rule goes almost as far. Rules such as the Fifth and Seventh Circuits' also require the panel to focus on specific criteria for circulation and to single cases out for circulation if they create an inter-circuit conflict.

The principal shortcoming of the circulation procedure in preventing inter-circuit conflicts is that it does not involve briefing by counsel. A panel may wrongly believe that it has successfully distinguished precedents from another circuit that are cited by a party in the briefs. Similarly, a panel may wrongly believe that precedents from another circuit need not be addressed at all because they are not relevant. In either circumstance, argument by counsel can help show that the panel's decision in fact creates a conflict.

Obviously, a petition for rehearing in banc is the form in which the full court can receive briefing concerning the possible existence of an inter-circuit conflict. Thus, we recommend that the Committee encourage the Circuits to adopt practices similar to those of the Fifth and Seventh Circuits.

c. Weighing the Costs of In Banc Against the Costs of Leaving Inter-Circuits Unresolved.

Rehearing in banc imposes an obvious cost on the judicial system: it requires the expenditure of far more judicial time and resources on a particular case than does panel resolution. For instance, a court of appeals of fifteen judges requires an expenditure of roughly six times the judicial resources to decide a case in banc than it does to decide it by a panel (five times the original number of judges, and the original panel encounters the case twice). Thus, rehearing in banc necessarily must be restricted to a limited number of cases.

On the other hand, the system-wide cost of an unnecessary inter-circuit conflict can greatly exceed the cost of a rehearing in banc that would have prevented the conflict. An inter-circuit conflict will inevitably generate litigation in other circuits -- perhaps many circuits -- requiring the expenditure of additional judicial resources at the court of appeals and the district court level. Thus, from the vantage point of the judicial system as a whole, to deny rehearing in banc when an inter-circuit conflict

could be avoided by an in banc decision would cause a much greater expenditure of judicial resources than to grant in banc.

Moreover, rehearing in banc has several features that are of significant intrinsic value to the judicial system. An in banc decision is definitively the law of the circuit, since it must be followed by panels in subsequent cases. Also, in banc decisions are authoritative, since they leave no doubt concerning where the law stands in that circuit. An in banc decision discourages unnecessary litigation filed by parties hoping to benefit from uncertainty and panel disagreements, and it prevents subsequent panels from "picking" at a decision they do not like and creating artificial distinctions. And it does not leave other circuits in doubt regarding the state of the law in that circuit.

Second, because an in banc decision requires a collegial decision by the court of appeals as a whole, it forces the judges to operate as a plenary body for their circuit and to reconcile the views of all of the judges (or at least a majority) in their circuit. An in banc decision thus produces the view of the court speaking with one voice, not a possibly atypical outcome produced by the mathematics of panel selection. Development of a court-wide consensus also gives greater guidance to subsequent panels concerning what the court intended by its decision.

Finally, an in banc decision has the capacity to be a decision of higher quality than a panel decision. The in banc court will have the benefit of the opinions and the investment of time and thought of the panel judges. Just as the Supreme Court is aided by the "percolation" of a federal issue in the courts of appeals, so also an in banc court is aided by a panel's previous consideration of an issue. Given the huge press of litigation in the courts of appeals, panels sometimes simply fail adequately to think through their decisions. The in banc process requires the court as a whole to give the issue that additional thinking.

5. There are No Substantial Grounds for Amending Rule 35 to Make the Existence of a Conflict Between a Federal Court and a State Court of Highest Resort a Ground for Rehearing in Banc, or for Deleting the Language in the Rule Which States that in Banc "Is Not Favored."

Our original proposal to amend Rule 35 would recognize as a ground for in banc the situation where a panel "resolves a federal question in a way in conflict with a state court of last resort." We have found little evidence that this is an existing criterion used by the courts of appeals in determining whether to take a case in banc. For this reason, and because inter-circuit conflicts create a greater appearance of disunity than conflicts between federal and state courts, we recommend that this part of our proposal be dropped.

We also found no substantial need to delete from current Rule 35 the statement that rehearing in banc "is not favored." Rehearing in banc is disfavored in the generality of cases. Decisions creating inter-circuit conflicts are not in the generality of cases, however, because of the problems they create for the judicial system (as discussed above). Thus, the language stating that rehearing in banc is not favored need not be deleted in order to accommodate our proposed amendment to the Rule.

CONCLUSION

For the above reasons, we recommend that Rule 35 be amended to add the existence of an inter-circuit conflict as a ground for rehearing in banc.

APPENDIX A: REVISED PROPOSAL FOR AMENDING RULE 35

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

APPENDIX B

The following is a circuit-by-circuit summary of the results of our study of in banc opinions issued during the period from 1988-1992. The figures are based on published in banc decisions, and therefore do not include in banc opinions which lead only to unpublished orders. The elimination of an inter-circuit conflict was determined on the face of the in banc decision. We did not attempt to determine whether the conflict subsequently recurred in other circuits. A list of all the in banc opinions reviewed from each circuit is provided in Appendix B.

A. Circuits Having a Local Rule Authorizing Rehearing In Banc to Prevent Inter-Circuit Conflicts.

1. D.C. Circuit.

We identified eighteen in banc opinions issued by the D.C. Circuit from 1988-1992. One of those opinions eliminated an inter-circuit conflict.

In Moore v. District of Columbia, 886 F.2d 335 (D.C. Cir. 1989), a panel of the D.C. Circuit went into conflict with the Fifth, Sixth, Ninth, and Eleventh Circuits by holding that the Handicapped Children's Protection Act does not authorize an award of attorneys fees to a party who prevails in an administrative proceeding under the Education of the Handicapped Act. The D.C. Circuit granted rehearing in banc and reversed the panel, thus preventing an inter-circuit conflict. Moore v. District of Columbia, 907 F.2d 165 (D.C. Cir.), cert. denied, 111 S. Ct. 556 (1990).

In one other case, the in banc D.C. Circuit created an inter-circuit conflict. Critical Mass Energy Project v. NRC, 975 F.2d 871 (D.C. Cir. 1992) (petition for cert. filed Dec. 17, 1992).

None of the remaining in banc D.C. Circuit opinions had any effect on the existence of an inter-circuit conflict.

2. Fourth Circuit.

We identified thirty-nine in banc opinions issued by the Fourth Circuit from 1988-1992. In three cases, the in banc Fourth Circuit reversed a panel opinion that created an inter-circuit conflict.

In Wilkins v. HHS, 925 F.2d 769 (4th Cir. 1991), a panel of the Fourth Circuit went into conflict with the Fifth, Eighth, and Ninth Circuits by holding that the Department of Health and Human Services ("HHS") is not required to consider new evidence submitted by an applicant after HHS had denied the applicant's request for Social Security disability benefits. The Fourth Circuit granted

rehearing in banc and reversed the panel, thus eliminating the inter-circuit conflict. Wilkins v. HHS, 953 F.2d 93 (4th Cir. 1991).

In part four of the opinion in Busby v. Crown Supply, Inc., 896 F.2d 833 (4th Cir. 1990), the in banc Fourth Circuit rejected its own precedent requiring a distinction between "person" and "enterprise" for purposes of { 1962(a) of RICO. The court explained, as a basis for its decision, that all of the other circuits had rejected the distinction espoused by the earlier precedent.

In Gould v. HHS, 884 F.2d 785 (4th Cir. 1989), a panel of the Fourth Circuit went into conflict with the Third, Sixth, Eighth, and Ninth Circuits by holding that a plaintiff's cause of action under the Federal Tort Claims Act accrues when plaintiff learns of the tortfeasor's identity as a federal employee, rather than when the plaintiff first learns of the existence and cause of an injury. The Fourth Circuit granted rehearing in banc and reversed the panel, thus eliminating the inter-circuit conflict. Gould v. HHS, 905 F.2d 738 (4th Cir. 1990), cert. denied, 111 S. Ct. 673 (1991).

In three other cases, the in banc Fourth Circuit created an inter-circuit conflict. M.A. v. INS, 899 F.2d 304 (4th Cir. 1990); Brown v. Loren, 889 F.2d 58 (4th Cir. 1989), aff'd, 498 U.S. 466 (1991); United States v. Clark, 865 F.2d 1433 (4th Cir. 1989).

None of the remaining cases had any effect on inter-circuit conflicts.

3. Seventh Circuit.

We identified 22 in banc opinions issued by the Seventh Circuit from 1988-1992. The in banc Seventh Circuit voted to eliminate an inter-circuit conflict created by a Seventh Circuit panel in one case.

In Dimeo v. Griffin, 924 F.2d 664 (7th Cir. 1991), a panel of the Seventh Circuit went into conflict with the Third Circuit by holding that random drug testing of horse race participants violates the Fourth Amendment, absent reasonable suspicion. The Seventh Circuit granted rehearing in banc and reversed the panel, thus avoiding an inter-circuit conflict. Dimeo v. Griffin, 943 F.2d 679 (7th Cir. 1991).

In three other cases, the in banc Seventh Circuit arguably created an inter-circuit conflict. See Wallace v. Robinson, 940 F.2d 243 (7th Cir. 1991), cert. denied, 112 S. Ct. 1563 (1992); Newman-Green, Inc. v. Alfonzo-Larrain R., 854 F.2d 916 (7th Cir. 1988), rev'd, 490 U.S. 826 (1989); Illinois v. Panhandle Eastern Pipeline Co., 852 F.2d 891 (7th Cir.), cert. denied, 488 U.S. 986 (1988).

The remaining Seventh Circuit in banc opinions had no effect on inter-circuit conflicts.

4. Ninth Circuit.

We identified fifty in banc opinions issued by the Ninth Circuit from 1988-1992. In eleven of those cases, the in banc Ninth Circuit prevented an inter-circuit conflict by reversing a panel opinion that would have created a conflict.

In United States v. Hardesty, 977 F.2d 1347 (9th Cir. 1992), the in banc court resolved a conflict between two Ninth Circuit cases concerning the ability of federal courts to impose prison sentences consecutive to state sentences. The determination that federal courts have such power was consistent with the rulings of other circuits.

In United States v. Fine, 975 F.2d 596 (9th Cir. 1992), the in banc court remedied a decision of a panel concerning the use of dismissed counts to calculate a defendant's offense level under the Sentencing Guidelines, which had conflicted with rulings from the First, Second, Third, Fourth, Seventh, and Eleventh Circuits.

In United States v. Proa-Tovar, 975 F.2d 592 (9th Cir. 1992), the panel decision had conflicted with decisions from the Fifth, Eighth, and Eleventh Circuits on the need for the government to advise alleged aliens of their appeal rights following an Immigration Judge decision. The in banc court reversed the panel, bringing Ninth Circuit law into line with the other circuits' decisions.

In United States v. Koyomejian, 970 F.2d 536 (9th Cir.), cert. denied, 113 S. Ct. 617 (1992), the panel held that Title I of the Foreign Intelligence Surveillance Act governs video surveillance. The in banc court reversed, harmonizing Ninth Circuit law with decisions of the Second, Fifth, Seventh, and Tenth Circuits.

In United States v. Brackeen, 969 F.2d 827 (9th Cir. 1992), the in banc court addressed conflicting Ninth Circuit precedents concerning whether robbery is a crime of dishonesty within the meaning of Fed. R. Evid. 609. The in banc court ruled that robbery is not a crime of dishonesty, making Ninth Circuit law consistent with the law of the Second, Fourth, Fifth, Sixth, Seventh, Eighth, Tenth, Eleventh, and D.C. Circuits.

In Bunnell v. Sullivan, 912 F.2d 1149 (9th Cir. 1990), two Ninth Circuit panels went into conflict with the First, Second, Third, Fourth, Fifth, Sixth, Eighth, Tenth, Eleventh, and D.C. Circuits by holding that a social security disability plaintiff must produce objective medical evidence proving the severity of the plaintiff's alleged pain. The Ninth Circuit granted rehearing in banc and reversed those panel opinions, thus preventing an inter-

circuit conflict. Bunnell v. Sullivan, 947 F.2d 341 (9th Cir. 1991).

In United States v. Anderson, 895 F.2d 641 (9th Cir. 1990), a Ninth Circuit panel went into conflict with the Sixth, Seventh, and Eleventh Circuits by holding that an upward adjustment of a sentence for exerting a leadership role in a criminal activity is permissible under the Sentencing Guidelines even if only one person is criminally responsible for committing the offense. The Ninth Circuit granted rehearing in banc and reversed, thus preventing an inter-circuit conflict. United States v. Anderson, 942 F.2d 606 (9th Cir. 1991).

In United States v. Kimball, 925 F.2d 356 (9th Cir. 1991), the in banc court reversed the decision of the panel holding that a tax return containing only asterisks qualifies as a "return." The in banc holding that such a filing is not a "return" cured the inter-conflict created by the panel.

In White v. McGinnis, 903 F.2d 699 (9th Cir.), cert. denied, 111 S. Ct. 266 (1990), the in banc court overturned a Ninth Circuit precedent, which made the failure to provide a trial by jury reversible error even in cases where the plaintiff participated in the bench trial without objection. The in banc court noted that its precedent had been flatly rejected by the Second, Fourth, Fifth, Sixth, Seventh, Eighth, and D.C. Circuits.

In United States v. Luttrell, 889 F.2d 806 (9th Cir. 1989), a Ninth Circuit panel went into conflict with the Second, Third, Tenth, and D.C. Circuits by holding that the Due Process Clause requires the government to have "reasoned grounds" to investigate an individual. The Ninth Circuit granted rehearing in banc and reversed, thus preventing an inter-circuit conflict. United States v. Luttrell, 923 F.2d 764 (9th Cir. 1991), cert. denied, 112 S. Ct. 1558 (1992).

In Contreras-Aragon v. INS, 852 F.2d 1088 (9th Cir. 1988), the in banc court cured a conflict between the panel's decision and the Second Circuit by holding that the INS cannot make the expiration of an alien's opportunity for voluntary departure the cost of pursuing an appeal from the INS's decision.

In two other cases, the in banc Ninth Circuit declined to eliminate an inter-circuit conflict that a Ninth Circuit panel had created. United States v. DeGross, 960 F.2d 1433 (9th Cir. 1992); United States v. Zolin, 842 F.2d 1135 (9th Cir. 1988). Additionally, the in banc Ninth Circuit arguably created an inter-circuit conflict in three cases. United States v. Lira-Barraza, 941 F.2d 745 (9th Cir. 1991); United States v. Nolasco, 926 F.2d 869 (9th Cir.), cert. denied, 112 S. Ct. 111 (1991); Stead Motors of Walnut Creek v. Automotive Machinists, 886 F.2d 1200 (9th Cir. 1989), cert. denied, 495 U.S. 946 (1990).

None of the remaining Ninth Circuit cases implicated an inter-circuit conflict.

B. Circuits Without a Local Rule Authorizing Rehearing in Banc to Prevent Inter-Circuit Conflicts.

1. First Circuit

We identified fifteen in banc opinions issued by the First Circuit from 1988-1992. None of those opinions prevents an inter-circuit conflict by reversing a panel opinion that had created a conflict.

In two cases, the in banc First Circuit declined to eliminate an inter-circuit conflict that the panel opinion had created. United States v. Pimienta-Redondo, 874 F.2d 9 (1st Cir.), cert. denied, 493 U.S. 890 (1989); Massachusetts v. HHS, 899 F.2d 53 (1st Cir. 1990), vacated, 111 S. Ct. 2252 (1991). In three other cases, the in banc First Circuit created an inter-circuit conflict for the first time. Rosario-Torres v. Hernandez-Colon, 889 F.2d 314 (1st Cir. 1989); Reardon v. United States, 947 F.2d 1509 (1st Cir. 1991); Fiore v. Washington County Comm. Mental Health Ctr., 960 F.2d 229 (1st Cir. 1992).

None of the in banc First Circuit's remaining decisions had any effect on the existence of an inter-circuit conflict.

2. Second Circuit

We identified ten in banc opinions issued by the Second Circuit from 1988-1992. In three of those cases, the in banc Second Circuit prevented an inter-circuit conflict by reversing a panel decision that had created a conflict.

In Black v. Red Star Towing & Transp. Co., 860 F.2d 30 (2d Cir. 1988), a Second Circuit panel followed prior circuit precedent precluding a shipowner from seeking indemnification against a third-party tortfeasor for maintenance and cure paid to injured seaworkers. The court granted rehearing in banc and reversed its own precedent, noting that its earlier ruling was in conflict with decisions from numerous other circuits. Rehearing in banc thus brought Second Circuit law into line with the trend in other courts.

In United States v. Indelicato, 865 F.2d 1370 (2d Cir.), cert. denied, 493 U.S. 811 (1989), the Second Circuit addressed the elements of a RICO pattern and a RICO enterprise. The court again used the in banc process to eliminate a precedent that conflicted with the decisions of other circuits. The new definition of RICO pattern and enterprise promulgated by the in banc court harmonized with the rulings of other circuits.

In United States v. Chestman, 947 F.2d 551 (2d Cir. 1991), cert. denied, 112 S. Ct. 1759 (1992), a panel followed earlier Second Circuit rulings concerning liability under the Securities Act for use of inside information. The Second Circuit used in banc to modify two of its recent decisions, thereby conforming its law to the misappropriation theory previously adopted by the Third, Seventh, and Ninth Circuits.

In one of its other decisions, the in banc Second Circuit created an inter-circuit conflict. United States v. Monsanto, 852 F.2d 1400 (2d Cir. 1988), rev'd, 491 U.S. 600 (1989).

None of the remaining decisions had any effect on the existence of an inter-circuit conflict.

3. Third Circuit.

We identified nineteen in banc opinions issued by the Third Circuit from 1988-1992. In two of those cases, the in banc Third Circuit prevented an inter-circuit conflict by reversing a panel decision that had created a conflict.

In Americans Disabled for Accessible Public Transp. v. Burnley, 867 F.2d 1471 (3d Cir. 1989), a panel of the Third Circuit went into conflict with the D.C. Circuit and the First Circuit by holding that Section 504 of the Rehabilitation Act requires a mixed system of wheelchair-accessible buses and vans. The Third Circuit granted rehearing in banc and reversed the panel, thus preventing an inter-circuit conflict. Americans Disabled for Accessible Public Transp. v. Burnley, 881 F.2d 1184 (3d Cir. 1989).

In Kenrich Petrochemicals, Inc. v. NLRB, 907 F.2d 400 (3d Cir.), cert. denied, 111 S. Ct. 509 (1990), the panel addressed the capacity of the NLRB to order reinstatement of an employee. A divided panel held that the NLRB lacked the authority to order such relief, over a dissent which pointed out that the majority's ruling conflicted with a decision of the 7th Circuit. The Third Circuit granted rehearing in banc on this single issue and reversed, holding that the NLRB could order reinstatement, thus eliminating the conflict with the Seventh Circuit.

None of the remaining in banc Third Circuit cases had any effect on the existence of an inter-circuit conflict.

4. Fifth Circuit.

We identified forty-seven in banc opinions issued by the Fifth Circuit from 1988-1992. In six of those cases, the in banc Fifth Circuit eliminated an inter-circuit conflict that had been created by a Fifth Circuit panel.

In United States v. Zuniga-Salinas, 945 F.2d 1302 (5th Cir. 1991), a panel of the Fifth Circuit went into conflict with the 11th Circuit by holding that where all but one of the charged conspirators are acquitted, the verdict against the one cannot stand. The Fifth Circuit granted rehearing in banc and reversed the panel, thus preventing an inter-circuit conflict. United States v. Zuniga-Salinas, 952 F.2d 876 (5th Cir. 1992).

In United States v. Bachynsky, 924 F.2d 561 (5th Cir. 1991), a panel of the Fifth Circuit went into conflict with the Eighth, Ninth, and Tenth Circuits by holding that the District Court's failure to mention supervised release automatically mandated that a criminal defendant's sentence be vacated. The Fifth Circuit granted rehearing in banc and reversed the panel, thus preventing an inter-circuit conflict. United States v. Bachynsky, 934 F.2d 1349 (5th Cir.), cert. denied, 112 S. Ct. 402 (1991).

In Texas Employers' Ins. Ass'n v. Jackson, 862 F.2d 491 (5th Cir. 1988), cert. denied, 490 U.S. 1035 (1989), the in banc court reversed a panel decision that conflicted with decisions from the Third, Fourth, Ninth, and Tenth Circuits concerning the availability of declaratory relief where equitable relief is barred by statute.

In Gillespie v. Crawford, 858 F.2d 1101 (5th Cir. 1988) (per curiam), the panel decision conflicted with rulings from the Sixth and Eight Circuits concerning the viability of individual suits attacking prison conditions when a class action is already pending. The in banc court reversed, eliminating the conflict.

In Landry v. Hoepfner, 840 F.2d 1201 (5th Cir. 1988), cert. denied, 489 U.S. 1083 (1989), the panel decision conflicted with a ruling from the Fourth Circuit concerning a defendant's right to a jury trial when charged with DWI. The in banc court reversed the panel, siding with the Fourth Circuit and eliminating the conflict.

In Thomas v. Capital Security Servs., Inc., 836 F.2d 866 (5th Cir. 1988), the in banc court overruled its prior precedent concerning the specificity with which district courts must make findings of fact and conclusions of law in Rule 11 cases, bringing Fifth Circuit law into line with the Seventh and Tenth Circuits. The in banc court also limited the Rule 11 inquiry to the time of filing, reversing the panel and making its law consistent with that of the Second Circuit.

In one other case, the in banc Fifth Circuit created an inter-circuit conflict. United States v. McKeever, 905 F.2d 829 (5th Cir. 1990).

None of the remaining in banc Fifth Circuit cases had any effect on the existence of an inter-circuit conflict.

5. Eighth Circuit.

We identified forty-seven in banc opinions issued by the Eighth Circuit from 1988-1992. In six of those cases, the in banc Eighth Circuit prevented an inter-circuit conflict by reversing a panel opinion that had created a conflict.

In United States v. Galloway, 976 F.2d 414 (8th Cir. 1992), the in banc court reversed a panel decision concerning the authority of the Sentencing Guidelines Commission to promulgate a guideline which considers uncharged conduct in setting a sentence. The in banc court noted that, by reversing, Eighth Circuit law was harmonized with rulings from the Fifth, Sixth, and Seventh Circuits.

In United States v. Wise, 976 F.2d 393 (8th Cir. 1992) (petition for cert. filed Dec. 15, 1992), the in banc court reversed the panel and held that the Confrontation Clause does not apply to the sentencing phase of a criminal case, bringing Eighth Circuit law into line with decisions from the Second, Third, Fourth, Fifth, Sixth, and Tenth Circuits.

In United States v. South Half of Lot 7 & Lot 8, Block 14, 910 F.2d 488 (8th Cir. 1990), cert. denied, 111 S. Ct. 1389 (1991), the in banc court held that real property may be seized under the illegal gambling forfeiture provision of 18 U.S.C. { 1955(d). The in banc decision eliminated a conflict with the Second Circuit.

In Zajac v. Federal Land Bank, 909 F.2d 1181 (8th Cir. 1990), the in banc court held that the Agricultural Credit Act did not create an implied right of action for farmer borrowers. This brought Eighth Circuit law into line with decisions from the Ninth and Tenth Circuits.

In Lewis v. Pearson Foundation, Inc., 908 F.2d 318 (8th Cir. 1990), a panel of the Eighth Circuit went into conflict with the Ninth Circuit by holding that a class of women seeking abortions may bring a claim under 42 U.S.C. 1985(3) where no state action exists and where the class alleges the deprivation of a right protected by state law. The Eighth Circuit granted rehearing in banc and reversed the panel, thus eliminating an inter-circuit conflict. Lewis v. Pearson Foundation, Inc., 917 F.2d 1077 (8th Cir. 1990) (petition for cert. filed, 59 U.S.L.W. 3726 (April 10, 1991)).

In Modern Computer Systems, Inc. v. Modern Banking Systems, Inc., 858 F.2d 1339 (8th Cir. 1988), a panel of the Eighth Circuit went into conflict with the Sixth Circuit by holding that contractual choice-of-law provisions are unenforceable because they violate public policy. The Eighth Circuit granted rehearing in banc and reversed the panel, thus avoiding an inter-circuit

conflict. Modern Computer Systems, Inc. v. Modern Banking Systems, Inc., 871 F.2d 734 (8th Cir. 1989).

In one other case, the in banc Eighth Circuit created an inter-circuit conflict. Irvine v. United States, No. 89-5616, 1992 U.S. App. Lexis 33484 (8th Cir. Dec. 28, 1992).

None of the remaining Eighth Circuit in bancs had an impact upon an inter-circuit conflict.

APPENDIX C

In Banc Opinions Issued By Selected Circuits From 1988-1992

D.C. Circuit

1. Hubbard v. EPA, Nos. 90-5233, -5250, 1992 U.S. App. LEXIS 31130 (D.C. Cir. 1992)
2. Critical Mass Energy Project v. NRC, 975 F.2d 871 (D.C. Cir. 1992) (petition for cert. filed Dec. 17, 1992)
3. Nuclear Information & Resource Serv. v. NRC, 969 F.2d 1169 (D.C. Cir. 1992)
4. FEC v. International Funding Inst., 969 F.2d 1110 (D.C. Cir.), cert. denied, 113 S. Ct. 605 (1992)
5. United States v. Mills, 964 F.2d 1186 (D.C. Cir.), cert. denied, 113 S. Ct. 471 (1992)
6. King v. Palmer, 950 F.2d 771 (D.C. Cir. 1991), cert. denied, 112 S. Ct. 3054 (1992)
7. Coalition for Preservation of Hispanic Broadcasting v. FCC, 931 F.2d 73 (D.C. Cir.), cert. denied, 112 S. Ct. 298 (1991)
8. Hammontree v. NLRB, 925 F.2d 1486 (D.C. Cir. 1991)
9. Clarke v. United States, 915 F.2d 699 (D.C. Cir. 1990)
10. Yellow Bus Lines, Inc. v. Drivers, Chauffers, & Helpers Local Union 639, 913 F.2d 948 (D.C. Cir. 1990), cert. denied, 111 S. Ct. 2839 (1991)
11. Department of Defense Dependents Schs. v. FLRA, 911 F.2d 743 (D.C. Cir. 1990)
12. NTEU v. FLRA, 910 F.2d 964 (D.C. Cir. 1990)
13. Moore v. District of Columbia, 907 F.2d 165 (D.C. Cir.), cert. denied, 111 S. Ct. 556 (1990)
14. National Patent Dev. Corp. v. T.J. Smith & Nephew Ltd., 877 F.2d 1003 (D.C. Cir. 1989)
15. Spagnola v. Mathis, 859 F.2d 223 (D.C. Cir. 1988) (per curiam)
16. Save Our Cumberland Mountains, Inc. v. Hodel, 857 F.2d 1516 (D.C. Cir. 1988)
17. Center for Auto Safety v. Thomas, 847 F.2d 843 (D.C. Cir.), vacated, 856 F.2d 1557 (D.C. Cir. 1988) (in banc)
18. Wolfe v. Department of Health & Human Servs., 839 F.2d 768 (D.C. Cir. 1988).

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1. United States v. Grant, 971 F.2d 799 (1st Cir. 1992)
2. Fiore v. Washington County Comm. Mental Health Ctr., 960 F.2d 229 (1st Cir. 1992)
3. Reardon v. United States, 947 F.2d 1509 (1st Cir. 1991)
4. Associated Builders & Contractors v. Massachusetts Water Resources Auth., 935 F.2d 345 (1st Cir. 1991), cert. granted, 112 S. Ct. 1935 (May 18, 1992)

5. Wynne v. Tufts Univ. Sch. of Medicine, 932 F.2d 19 (1st Cir. 1991)
6. United States v. Martinez-Torres, 912 F.2d 1552 (1st Cir. 1990), vacated, 944 F.2d 51 (1st Cir. 1991) (in banc).
7. Backman v. Polaroid Corp., 910 F.2d 10 (1st Cir. 1990)
8. Massachusetts v. Secretary of HHS, 899 F.2d 53 (1st Cir. 1990), vacated, 111 S. Ct. 2252 (1991)
9. Agosto de Feliciano v. Aponte-Roque, 889 F.2d 1209 (1st Cir. 1989)
10. Rosario-Torres v. Hernandez-Colon, 889 F.2d 314 (1st Cir. 1989)
11. Irons v. Federal Bureau of Investigation, 880 F.2d 1446 (1st Cir. 1989)
12. Cousins v. Secretary of Transp., 880 F.2d 603 (1st Cir. 1989)
13. Figueroa-Rodriguez v. Lopez-Rivera, 878 F.2d 1478 (1st Cir. 1989)
14. United States v. Pimienta-Redondo, 874 F.2d 9 (1st Cir.), cert. denied, 493 U.S. 890 (1989)
15. Redgrave v. Boston Symphony Orchestra, 855 F.2d 888 (1st Cir. 1988), cert. denied, 488 U.S. 1043 (1989).

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1. Bellamy v. Cogdell, 974 F.2d 302 (2d Cir. 1992) (petition for cert. filed Dec. 7, 1992)
2. Asherman v. Meachum, 957 F.2d 978 (2d Cir. 1992)
3. United States v. Chestman, 947 F.2d 551 (2d Cir. 1991), cert. denied, 112 S. Ct. 1759 (1992)
4. United States v. Monsanto, 924 F.2d 1186 (2d Cir.), cert. denied, 112 S. Ct. 382 (1991)
5. United States v. MacDonald, 916 F.2d 766 (2d Cir. 1990), cert. denied, 111 S. Ct. 1071 (1991)
6. Beauford v. Helmsley, 865 F.2d 1386 (2d Cir.), vacated, 492 U.S. 914 (1989)
7. United States v. Indelicato, 865 F.2d 1370 (2d Cir.), cert. denied, 493 U.S. 811 (1989)
8. Black v. Red Star Towing & Transp. Co., 860 F.2d 30 (2d Cir. 1988)
9. United States v. Monsanto, 852 F.2d 1400 (2d Cir. 1988), rev'd, 491 U.S. 600 (1989)
10. Albert v. Carovano, 851 F.2d 561 (2d Cir. 1988).

Third Circuit

1. Clark v. K-Mart Corp., No. 91-3723, 1992 U.S. App. LEXIS 30105 (3d Cir. Nov. 17, 1992)
2. D.R. v. Middle Bucks Area Vocational Tech. Sch., 972 F.2d 1364 (3d Cir. 1992) (petition for cert. filed 61 U.S.L.W. 3403 (Nov. 9, 1992))
3. FLRA v. Department of the Navy, 966 F.2d 747 (3d Cir. 1992)

4. Rock v. Zimmerman, 959 F.2d 1237 (3d Cir.), cert. denied, 112 S. Ct. 3036 (1992)
5. Town Sound & Custom Tops v. Chrysler Motors, 959 F.2d 468 (3d Cir.), cert. denied, 113 S. Ct. 196 (1992)
6. Hanover Potato Prods., Inc. v. Sullivan, No. 90-5738, 1991 U.S. App. LEXIS 33093 (3d Cir. May 22, 1991)
7. Bolden v. Southeastern Pa. Transp. Auth., 953 F.2d 807 (3d Cir. 1991), cert. denied, 112 S. Ct. 2281 (1992)
8. Limbach Co. v. Sheet Metal Workers Int'l Ass'n, 949 F.2d 1241 (3d Cir. 1991)
9. Colgan v. Fisher Scientific Co., 935 F.2d 1407 (3d Cir.), cert. denied, 112 S. Ct. 379 (1991)
10. Kenrich Petrochemicals, Inc. v. NLRB, 907 F.2d 400 (3d Cir.), cert. denied, 111 S. Ct. 509 (1990)
11. Shendock v. Director, OWCP, 893 F.2d 1458 (3d Cir.), cert. denied, 111 S. Ct. 81 (1990)
12. Waste Conversion, Inc. v. Rollins Envir. Servs., Inc., 893 F.2d 605 (3d Cir. 1990)
13. Americans Disabled for Accessible Pub. Transp. v. Skinner, 881 F.2d 1184 (3d Cir. 1989)
14. United States v. Balascsak, 873 F.2d 673 (3d Cir. 1989)
15. Fitchik v. New Jersey Transit Rail Operations, Inc., 873 F.2d 655 (3d Cir.), cert. denied, 493 U.S. 850 (1989)
16. Cohen v. Board of Trustees of the Univ. of Medicine & Dentistry, 867 F.2d 1455 (3d Cir. 1989)
17. W.D.D., Inc. v. Thornbury Township, 850 F.2d 170 (3d Cir.), cert. denied, 488 U.S. 892 (1988)
18. In re Data Access Sys. Securities Litig., 843 F.2d 1537 (3d Cir.), cert. denied, 488 U.S. 849 (1988)
19. Thorstenn v. Barnard, 842 F.2d 1393 (3d Cir. 1988), aff'd, 489 U.S. 546 (1989).

Fourth Circuit

1. Catawba Indian Tribe v. South Carolina, No. 90-2446, 1992 U.S. App. LEXIS 23215 (4th Cir. Sept. 22, 1992) (petition for cert. filed Jan. 6, 1993)
2. Johnson v. Hugo's Skateway, 974 F.2d 1408 (4th Cir. 1992)
3. United States v. Lambey, 974 F.2d 1389 (4th Cir. 1992)
4. Wilson v. City of Charlotte, 964 F.2d 1391 (4th Cir. 1992)
5. Gooden v. Howard Co., 954 F.2d 960 (4th Cir. 1992)
6. Wilkins v. HHS, 953 F.2d 93 (4th Cir. 1991)
7. Estate of Reno v. Commissioner, 945 F.2d 733 (4th Cir. 1991)
8. Oksanen v. Page Memorial Hosp., 945 F.2d 696 (4th Cir. 1991), cert. denied, 112 S. Ct. 973 (1992)
9. Defender Indus., Inc. v. Northwestern Mut. Life Ins. Co., 938 F.2d 502 (4th Cir. 1991)
10. McCormick v. AT&T Tech., Inc., 934 F.2d 531 (4th Cir. 1991), cert. denied, 112 S. Ct. 912 (1992)
11. Hamilton v. First Source Bank, 928 F.2d 86 (4th Cir. 1990)
12. Reuber v. Food Chem. News, Inc., 925 F.2d 703 (4th Cir.), cert. denied, 111 S. Ct. 2814 (1991)

13. Miller v. Leathers, 913 F.2d 1085 (4th Cir. 1990), cert. denied, 111 S. Ct. 1018 (1991)
14. Gould v. HHS, 905 F.2d 738 (4th Cir. 1990), cert. denied, 111 S. Ct. 673 (1991)
15. Meadows v. Legursky, 904 F.2d 903 (4th Cir.), cert. denied, 111 S. Ct. 523 (1990)
16. Paroline v. Unisys Corp., 900 F.2d 27 (4th Cir. 1990)
17. M.A. A26851062 v. INS, 899 F.2d 304 (4th Cir. 1990)
18. Busby v. Crown Supply, Inc., 896 F.2d 833 (4th Cir. 1990)
19. Brown v. Lowen, 889 F.2d 58 (4th Cir. 1989), aff'd, 498 U.S. 466 (1991)
20. Sutton v. Maryland, 886 F.2d 708 (4th Cir. 1989), cert. denied, 494 U.S. 1036 (1990)
21. Rowland v. Patterson, 882 F.2d 97 (4th Cir. 1989)
22. Patterson v. United States, 881 F.2d 127 (4th Cir. 1989)
23. NRC v. FLRA, 879 F.2d 1225 (4th Cir. 1989), vacated, 496 U.S. 901 (1990)
24. Austin v. Berryman, 878 F.2d 786 (4th Cir.), cert. denied, 493 U.S. 941 (1989)
25. Baker, Watts & Co. v. Miles & Stockbridge, 876 F.2d 1101 (4th Cir. 1989)
26. Smart v. Leeke, 873 F.2d 1558 (4th Cir. 1988), cert. denied, 493 U.S. 867 (1989)
27. United States v. Clark, 865 F.2d 1433 (4th Cir. 1989)
28. United States v. Charters, 863 F.2d 302 (4th Cir. 1988), cert. denied, 494 U.S. 1016 (1990)
29. Deel v. Jackson, 862 F.2d 1079 (4th Cir. 1988), cert. denied, 490 U.S. 1092 (1989)
30. United States v. Friedhaber, 856 F.2d 640 (4th Cir. 1988)
31. EEOC v. Ithaca Indus., Inc., 849 F.2d 116 (4th Cir.), cert. denied, 488 U.S. 924 (1988)
32. United States Dep't of Health & Human Servs. v. FLRA, 844 F.2d 1087 (4th Cir. 1988)
33. United States v. Pupo, 841 F.2d 1235 (4th Cir.), cert. denied, 488 U.S. 842 (1988)
34. United States v. Hooker, 841 F.2d 1225 (4th Cir. 1988)
35. Smith v. Bounds, 841 F.2d 77 (4th Cir.), cert. denied, 488 U.S. 869 (1988)
36. IU Int'l Corp. v. NX Acquisition Corp., 840 F.2d 229 (4th Cir. 1988)
37. In re Forfeiture Hearings as to Caplin & Drysdale, Chartered, 837 F.2d 637 (4th Cir. 1988), aff'd, 491 U.S. 617 (1989)
38. United States v. Cecil, 836 F.2d 1431 (4th Cir.), cert. denied, 487 U.S. 1205 (1988)
39. Warren v. Halstead Indus., Inc., 835 F.2d 535 (4th Cir.), cert. denied, 487 U.S. 1218 (1988)

Fifth Circuit

1. Derden v. McNeel, No. 90-1230, 1992 U.S. App. Lexis 32562 (5th Cir. Dec. 16, 1992)
2. United States v. Rideau, 969 F.2d 1572 (5th Cir. 1992)
3. United States v. Greer, 968 F.2d 433 (5th Cir. 1992) (petition for cert. filed Dec. 7, 1992)
4. Plaisance v. Texaco, Inc., 966 F.2d 166 (5th Cir.), cert. denied, 113 S. Ct. 604 (1992)
5. In re Meyerland Co., 960 F.2d 512 (5th Cir. 1992), cert. denied, 61 U.S.L.W. 3303 (Jan. 11, 1993)
6. Society of Separationists, Inc. v. Herman, 959 F.2d 1283 (5th Cir.), cert. denied, 113 S. Ct. 191 (1992)
7. United States v. Pierre, 958 F.2d 1304 (5th Cir.), cert. denied, 113 S. Ct. 280 (1992)
8. Fleming v. Collins, 954 F.2d 1109 (5th Cir. 1992)
9. United States v. Zuniga-Salinas, 952 F.2d 876 (5th Cir. 1992)
10. United States v. Vontsteen, 950 F.2d 1086 (5th Cir.), cert. denied, 112 S. Ct. 3039 (1992)
11. Rohner Gehrig Co. v. Tri-State Motor Transit, 950 F.2d 1079 (5th Cir. 1992)
12. Graham v. Collins, 950 F.2d 1009 (5th Cir. 1992), cert. granted, 112 S. Ct. 2937 (June 8, 1992)
13. Kinsey v. Salado Indep. School Dist., 950 F.2d 988 (5th Cir.), cert. denied, 112 S. Ct. 2275 (1992)
14. Micheaux v. Collins, 944 F.2d 231 (5th Cir. 1991), cert. denied, 112 S. Ct. 1226 (1992)
15. Resolution Trust Corp. v. Montross, 944 F.2d 227 (5th Cir. 1991)
16. Caine v. Hardy, 943 F.2d 1406 (5th Cir. 1991), cert. denied, 112 S. Ct. 1474 (1992)
17. Christopherson v. Allied-Signal Corp., 939 F.2d 1106 (5th Cir. 1991), cert. denied, 112 S. Ct. 1288 (1992)
18. Young v. Herring, 938 F.2d 543 (5th Cir. 1991), cert. denied, 112 S. Ct. 1485 (1992)
19. United States v. Shaid, 937 F.2d 228 (5th Cir. 1991), cert. denied, 112 S. Ct. 978 (1992)
20. United States v. Bachynsky, 934 F.2d 1349 (5th Cir.), cert. denied, 112 S. Ct. 402 (1991)
21. Bright v. Houston Northwest Medical Center Survivor, Inc., 934 F.2d 671 (5th Cir. 1991), cert. denied, 112 S. Ct. 882 (1992)
22. United States v. De Leon-Reyna, 930 F.2d 396 (5th Cir. 1991)
23. Nicklos Drilling Co. v. Cowart, 927 F.2d 828 (5th Cir. 1991), aff'd, 112 S. Ct. 2589 (1992)
24. League of United Latin Am. Citizens v. Clements, 923 F.2d 365 (5th Cir. 1991)
25. Ayers v. Allain, 914 F.2d 676 (5th Cir. 1990), vacated, 112 S. Ct. 2727 (1992)

26. League of United Latin Am. Citizens Council No. 4434 v. Clements, 914 F.2d 620 (5th Cir. 1990), rev'd, 111 S. Ct. 2376 (1991)
27. Kelly v. Lee's Old Fashioned Hamburgers, Inc., 908 F.2d 1218 (5th Cir. 1990)
28. United States v. McKeever, 905 F.2d 829 (5th Cir. 1990)
29. Rosenstein v. City of Dallas, 901 F.2d 61 (5th Cir.), cert. denied, 111 S. Ct. 153 (1990)
30. Phillips v. Marine Concrete Structures, Inc., 895 F.2d 1033 (5th Cir. 1990)
31. Edmonson v. Leesville Concrete Co., 895 F.2d 218 (5th Cir. 1990), rev'd, 111 S. Ct. 2077 (1991)
32. Boureslan v. Aramco, 892 F.2d 1271 (5th Cir. 1990), aff'd, 111 S. Ct. 1227 (1991)
33. Bhandari v. First Nat'l Bank of Commerce, 887 F.2d 609 (5th Cir. 1989), cert. denied, 494 U.S. 1061 (1990)
34. United States v. Anderson, 885 F.2d 1248 (5th Cir. 1989)
35. In re Air Crash Disaster Near New Orleans, La., 883 F.2d 17 (5th Cir. 1989)
36. Sawyer v. Butler, 881 F.2d 1273 (5th Cir. 1989), aff'd, 497 U.S. 227 (1990)
37. Mills v. Director, 877 F.2d 356 (5th Cir. 1989)
38. United States v. Jones, 877 F.2d 341 (5th Cir. 1989)
39. Johnson v. Moral, 876 F.2d 477 (5th Cir. 1989)
40. International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America v. Southwest Airlines Co., 875 F.2d 1129 (5th Cir. 1989), cert. denied, 493 U.S. 1043 (1990)
41. EEOC v. Mississippi State Tax Comm'n, 873 F.2d 97 (5th Cir. 1989)
42. Texas Employers' Ins. Ass'n v. Jackson, 862 F.2d 491 (5th Cir. 1988), cert. denied, 490 U.S. 1035 (1989)
43. Gillespie v. Crawford, 858 F.2d 1101 (5th Cir. 1988) (per curiam)
44. King v. Lynaugh, 850 F.2d 1055 (5th Cir. 1988), cert. denied, 489 U.S. 1093 (1989)
45. Landry v. Hoepfner, 840 F.2d 1201 (5th Cir. 1988), cert. denied, 112 S. Ct. 402 (1991)
46. United States v. Barrett, 837 F.2d 1341 (5th Cir. 1988), cert. denied, 492 U.S. 926 (1989)
47. Thomas v. Capital Sec. Servs., Inc., 836 F.2d 866 (5th Cir. 1988).

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1. Doe v. Small, 964 F.2d 611 (7th Cir. 1992)
2. U.S. Marine Corps v. NLRB, 944 F.2d 1305 (7th Cir. 1991), cert. denied, 112 S. Ct. 1474 (1992)
3. Dimeo v. Griffin, 943 F.2d 679 (7th Cir. 1991)
4. Soldal v. County of Cook, 942 F.2d 1073 (7th Cir. 1991), rev'd, 113 S. Ct. 538 (1992)

5. Wallace v. Robinson, 940 F.2d 243 (7th Cir. 1991), cert. denied, 112 S. Ct. 1563 (1992)
6. United States v. Best, 939 F.2d 425 (7th Cir. 1991), cert. denied, 112 S. Ct. 1243 (1992)
7. Hunter v. Clark, 934 F.2d 856 (7th Cir.), cert. denied, 112 S. Ct. 388 (1991)
8. Johnson v. Sullivan, 922 F.2d 346 (7th Cir. 1990)
9. United States v. Marshall, 908 F.2d 1312 (7th Cir. 1990), aff'd, 111 S. Ct. 1919 (1991)
10. United States v. Martinez de Ortiz, 907 F.2d 629 (7th Cir. 1990), cert. denied, 111 S. Ct. 684 (1991)
11. Miller v. Civil City of South Bend, 904 F.2d 1081 (7th Cir. 1990), rev'd, 111 S. Ct. 2456 (1991)
12. International Union, UAW v. Johnson Controls, Inc., 886 F.2d 871 (7th Cir. 1989)
13. Easter House v. Felder, 879 F.2d 1458 (7th Cir. 1989), vacated, 494 U.S. 1014 (1990)
14. Central States, Southeast & Southwest Areas Pension Fund v. Gerber Truck Service, Inc., 870 F.2d 1148 (7th Cir. 1989)
15. Sherrod v. Berry, 856 F.2d 802 (7th Cir. 1988)
16. Ford v. Childers, 855 F.2d 1271 (7th Cir. 1988)
17. Newman-Green, Inc. v. Alfonzo-Larrain Ry., 854 F.2d 916 (7th Cir. 1988), rev'd, 490 U.S. 826 (1989)
18. Marozsan v. United States, 852 F.2d 1469 (7th Cir. 1988)
19. Illinois ex rel. Hartigan v. Panhandle Eastern Pipeline Co., 852 F.2d 891 (7th Cir.), cert. denied, 488 U.S. 986 (1988)
20. Rakovich v. Wade, 850 F.2d 1180 (7th Cir.), cert. denied, 488 U.S. 968 (1988)
21. Greenberg v. Kmetko, 840 F.2d 467 (7th Cir. 1988)
22. United States v. Schmuck, 840 F.2d 384 (7th Cir. 1988), aff'd, 489 U.S. 705 (1989).

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1. Hicks v. Brown Group, Inc., Nos. 88-2769, -2817, 1992 U.S. App. LEXIS 33730 (8th Cir. Dec. 30, 1992)
2. Irvine v. United States, No. 89-5616, 1992 U.S. App. LEXIS 33484 (8th Cir. Dec. 28, 1992)
3. Butler v. Dowd, Nos. 90-2090EM, -2091EM, 2782EM, 1992 U.S. App. LEXIS 29604 (8th Cir. Nov. 11, 1992)
4. Lee v. Rapid City Area Sch. Dist. No. 51-4, Nos. 90-5499, 5500, 1992 U.S. App. LEXIS 31580 (8th Cir. Dec. 3, 1992)
5. United States v. Davis, 978 F.2d 415 (8th Cir. 1992)
6. United States v. Galloway, 976 F.2d 414 (8th Cir. 1992) (petition for cert. filed Dec. 14, 1992))
7. United States v. Wise, 976 F.2d 393 (8th Cir. 1992) (petition for cert. filed Dec. 15, 1992))
8. Cornell v. Nix, 976 F.2d 376 (8th Cir. 1992)
9. Gregory v. City of Rogers, Arkansas, 974 F.2d 1006 (8th Cir. 1992) (petition for cert. filed Dec. 8, 1992))
10. Moreland v. United States, 968 F.2d 655 (8th Cir.), cert. denied, 61 U.S.L.W. 3419 (Dec. 7, 1992)

11. Pletka v. Nix, 957 F.2d 1480 (8th Cir.), cert. denied, 113 S.Ct. 163 (1992)
12. United States v. Kelley, 956 F.2d 748 (8th Cir. 1992)
13. United States v. Wickman, 955 F.2d 592 (8th Cir. 1992)
14. Murdock v. United States, 951 F.2d 907 (8th Cir. 1991), cert. denied, 112 S. Ct. 2996 (1992)
15. Johnson v. State Mut. Life Assurance Co. of America, 942 F.2d 1260 (8th Cir. 1991)
16. Brewer v. Chauvin, 938 F.2d 860 (8th Cir. 1991)
17. Taggart v. Jefferson County Child Support Enforcement Unit, 935 F.2d 947 (8th Cir. 1991)
18. United States v. McKines, 933 F.2d 1412 (8th Cir.), cert. denied, 112 S. Ct. 593 (1991)
19. Lewis v. Pearson Foundation, Inc., 917 F.2d 1077 (8th Cir. 1990) (petition for cert. filed, 59 U.S.L.W. 3726 (April 10, 1991))
20. United States v. Jacobson, 916 F.2d 467 (8th Cir. 1990), rev'd, 112 S. Ct. 1535 (1992)
21. United States v. Kroh, 915 F.2d 326 (8th Cir. 1990)
22. Bush v. Taylor, 912 F.2d 989 (8th Cir. 1990)
23. Williams v. Armontrout, 912 F.2d 924 (8th Cir. 1990), cert. denied, 111 S. Ct. 1092 (1991)
24. United States v. South Half of Lot 7 & Lot 8, Block 14, 910 F.2d 488 (8th Cir. 1990), cert. denied, 111 S. Ct. 1389 (1991)
25. Zajac v. Federal Land Bank, 909 F.2d 1181 (8th Cir. 1990)
26. In re NWFX, Inc., 904 F.2d 469 (8th Cir.), cert. denied, 111 S. Ct. 349 (1990)
27. Papachristou v. Turbines, Inc., 902 F.2d 685 (8th Cir. 1990)
28. In re LeMaire, 898 F.2d 1346 (8th Cir. 1990)
29. Hill v. Lockhart, 894 F.2d 1009 (8th Cir.), cert. denied, 497 U.S. 1011 (1990)
30. United States v. Arpen, 887 F.2d 873 (8th Cir. 1989)
31. United States v. Newman, 887 F.2d 880 (8th Cir. 1989), cert. denied, 495 U.S. 949 (1990)
32. United States v. Wilson, 884 F.2d 1121 (8th Cir. 1989)
33. Perpich v. United States Dep't of Defense, 880 F.2d 11 (8th Cir. 1989), aff'd, 496 U.S. 334 (1990)
34. Minnesota v. MSPB, 875 F.2d 179 (8th Cir. 1989)
35. In re Hartley, 874 F.2d 1254 (8th Cir. 1989)
36. Modern Computer Systems, Inc. v. Modern Banking Systems, Inc., 871 F.2d 734 (8th Cir. 1989)
37. Gilbert v. City of Little Rock, Arkansas, 867 F.2d 1062 (8th Cir. 1989)
38. Flittie v. Solem, 867 F.2d 1053 (8th Cir. 1988)
39. Twin City Constr. Co. v. Turtle Mountain Band of Chippewa Indians, 866 F.2d 971 (8th Cir.), cert. denied, 490 U.S. 1085 (1989)
40. Smith v. Armontrout, 865 F.2d 1501 (8th Cir. 1988)
41. Tyler v. Black, 865 F.2d 181 (8th Cir.), cert. denied, 490 U.S. 1027 (1989)

42. Warren v. City of Lincoln, Nebraska, 864 F.2d 1436 (8th Cir.), cert. denied, 490 U.S. 1091 (1989)
43. Williams v. Butler, 863 F.2d 1398 (8th Cir. 1988), cert. denied, 492 U.S. 906 (1989)
44. Laws v. Armontrout, 863 F.2d 1377 (8th Cir. 1988), cert. denied, 490 U.S. 1040 (1989)
45. United States v. Townsley, 856 F.2d 1189 (8th Cir. 1988), cert. dismissed, 111 S. Ct. 1406 (1991)
46. Hodgson v. Minnesota, 853 F.2d 1452 (8th Cir. 1988), aff'd, 497 U.S. 417 (1990)
47. International Ass'n of Machinists v. Soo Line Ry., 850 F.2d 368 (8th Cir. 1988), cert. denied, 489 U.S. 1010 (1989).

Ninth Circuit

1. United States v. Hardesty, 977 F.2d 1347 (9th Cir. 1992) (per curiam)
2. United States v. Fine, 975 F.2d 596 (9th Cir. 1992)
3. United States v. Proa-Tovar, 975 F.2d 592 (9th Cir. 1992)
4. Carriger v. Lewis, 971 F.2d 329 (9th Cir. 1992)
5. United States v. Koyomejian, 970 F.2d 536 (9th Cir.), cert. denied, 113 S. Ct. 617 (1992)
6. United States v. Brackeen, 969 F.2d 827 (9th Cir. 1992)
7. Adams v. Peterson, 968 F.2d 835 (9th Cir. 1992) (petition for cert. filed Sept. 22, 1992)
8. United States v. Rubio-Villareal, 967 F.2d 294 (9th Cir. 1992)
9. Oscar v. University Students Cooperative Assoc., 965 F.2d 783 (9th Cir.), cert. denied, 61 U.S.L.W. 3171 (Dec. 7, 1992)
10. Stock West Corp. v. Taylor, 964 F.2d 912 (9th Cir. 1992)
11. Cooper v. Dupnik, 963 F.2d 1220 (9th Cir. 1992), cert. denied, 113 S. Ct. 407 (1992)
12. Lipscomb v. Simmons, 962 F.2d 1374 (9th Cir. 1992)
13. United States v. DeGross, 960 F.2d 1433 (9th Cir. 1992)
14. Adamson v. Lewis, 955 F.2d 614 (9th Cir.), cert. denied, 112 S. Ct. 3015 (1992)
15. Haphey v. Linn County, 953 F.2d 549 (9th Cir. 1992)
16. Bunnell v. Sullivan, 947 F.2d 341 (9th Cir. 1991)
17. United States v. Restrepo, 946 F.2d 654 (9th Cir. 1991), cert. denied, 112 S. Ct. 1564 (1992)
18. Redman v. County of San Diego, 942 F.2d 1435 (9th Cir. 1991), cert. denied, 112 S. Ct. 972 (1992)
19. Flores v. Meese, 942 F.2d 1352 (9th Cir. 1991), cert. granted, 112 S. Ct. 1261 (1992)
20. United States v. Anderson, 942 F.2d 606 (9th Cir. 1991)
21. Planned Parenthood of Southern Nevada, Inc. v. Clark County School Dist., 941 F.2d 817 (9th Cir. 1991)
22. United States v. Lira-Barraza, 941 F.2d 745 (9th Cir. 1991)
23. Collazo v. Estelle, 940 F.2d 411 (9th Cir. 1991), cert. denied, 112 S. Ct. 870 (1992)
24. Townsend v. Holman Consulting Corp., 929 F.2d 1358 (9th Cir. 1990)

25. United States v. Nolasco, 926 F.2d 869 (9th Cir.), cert. denied, 112 S. Ct. 111 (1991)
26. United States v. Kimball, 925 F.2d 356 (9th Cir. 1991)
27. United States v. Luttrell, 923 F.2d 764 (9th Cir. 1991), cert. denied, 112 S. Ct. 1558 (1992)
28. Partington v. Gedan, 923 F.2d 686 (9th Cir. 1991)
29. Hollinger v. Titan Capital Corp., 914 F.2d 1564 (9th Cir. 1990), cert. denied, 111 S. Ct. 1621 (1991)
30. Geary v. Renne, 911 F.2d 280 (9th Cir. 1990), vacated, 111 S Ct. 2331 (1991)
31. White v. McGinnis, 903 F.2d 699 (9th Cir.), cert. denied, 111 S. Ct. 266 (1990)
32. United States v. Fernandez-Angulo, 897 F.2d 1514 (9th Cir. 1990)
33. Lear Siegler, Inc. v. Lehman, 893 F.2d 205 (9th Cir. 1989)
34. R.C. Dick Geothermal Corp. v. Thermogenics, Inc., 890 F.2d 139 (9th Cir. 1989)
35. Stead Motors of Walnut Creek v. Automotive Machinists, etc. 886 F.2d 1200 (9th Cir. 1989), cert. denied, 495 U.S. 946 (1990)
36. Hocking v. DuBois, 885 F.2d 1449 (9th Cir. 1989), cert. denied, 494 U.S. 1078 (1990)
37. Watkins v. U.S. Army, 875 F.2d 699 (9th Cir. 1989), cert. denied, 111 S. Ct. 384 (1990)
38. Coleman v. McCormick, 874 F.2d 1280 (9th Cir.), cert. denied, 493 U.S. 944 (1989)
39. United States v. Facchini, 874 F.2d 638 (9th Cir. 1989)
40. United Steelworkers v. Phelps Dodge Corp., 865 F.2d 1539 (9th Cir.), cert. denied, 493 U.S. 809 (1989)
41. Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988), cert. denied, 110 S. Ct. 3287 (1990)
42. Republic of the Philipines v. Marcos, 862 F.2d 1355 (9th Cir. 1988), cert. denied, 490 U.S. 1035 (1989)
43. Mesa Verde Constr. Co. v. Northern Ca. Dist. Council of Laborers, 861 F.2d 1124 (9th Cir. 1988)
44. Contreras-Aragon v. INS, 852 F.2d 1088 (9th Cir. 1988)
45. United States v. Aguon, 851 F.2d 1158 (9th Cir. 1988)
46. Guam v. Yang, 850 F.2d 507 (9th Cir. 1988)
47. United States v. Winsor, 846 F.2d 1569 (9th Cir. 1988)
48. McKenzie v. Risley, 842 F.2d 1525 (9th Cir.), cert. denied, 488 U.S. 901 (1988)
49. United States v. Zolin, 842 F.2d 1135 (9th Cir. 1988)
50. Escobar-Ruiz v. INS, 838 F.2d 1020 (9th Cir. 1988).

AGENDA I-D
Item 91-28
Washington, D.C.
September 22-23, 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.

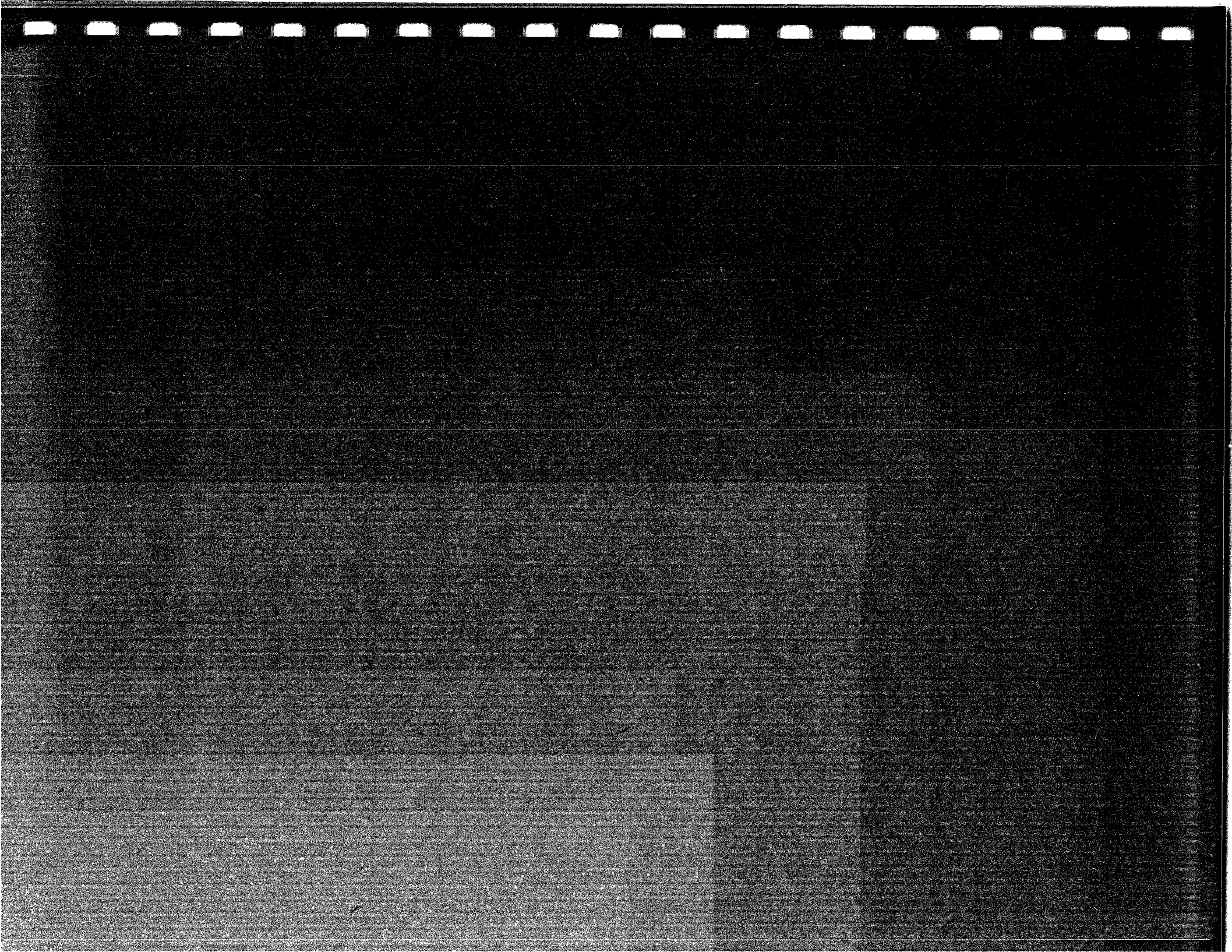
(b) Determination of Motions for Procedural Orders. Notwithstanding the provisions of (a) of this Rule 27 as to motions generally, motions for procedural orders, including any motion under Rule 26(b), may be acted upon at any time, without awaiting a response thereto, and pursuant to rule or order of 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.

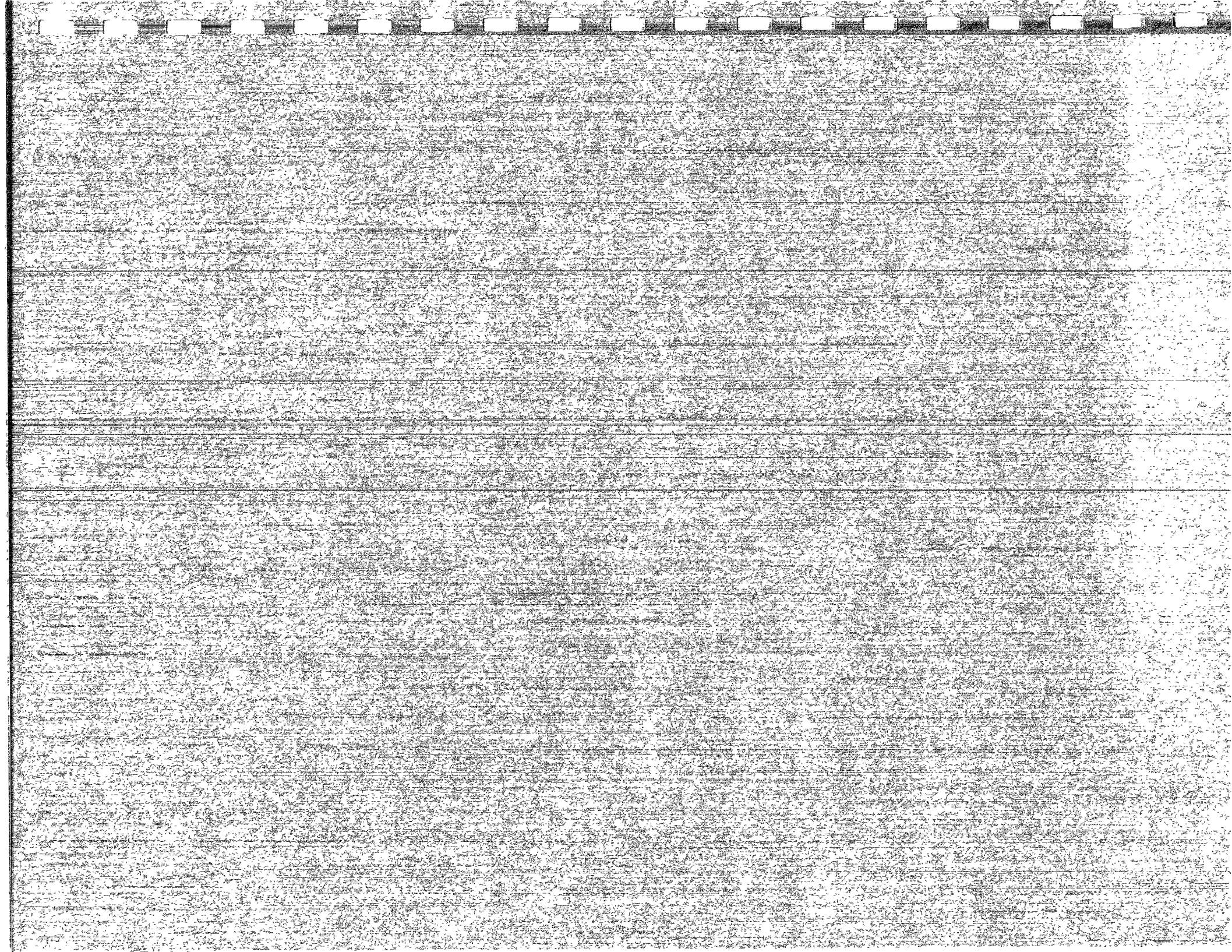
(c) Power of a Single Judge to Entertain Motions. In addition to the authority expressly conferred by these rules or by law, a single judge of a court of appeals may entertain and may grant or deny any request for relief which under these rules may properly be sought by motion, except that a single judge 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.





September 8, 1993

Amended FRAP Rule 27 - Motions

Department of Justice Draft, with Comments by DOJ and by judges and other personnel of the Federal, 1st, 7th, 10th, 11th, and D.C. Circuits, and by members of Rule 27 subcommittee

General Comments

[DOJ.] 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. -

Rule 27. Motions

(a) Form and Content of Motions.

General Comments

[DOJ.] 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.

* * *

[DOJ.] 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, 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.

[Mr. Munford.] The existing Rule states that "an application for . . . relief shall be made by filing a motion." Maybe this is obvious, but shouldn't it be in the Rule somewhere?

[DOJ Proposal.] Rule 27(a)(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.

Comments

[DOJ.] 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 Circuit 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.

[Federal Circuit.] Our practice has always been that motions must be in writing, a matter that we believe is fairly to be implied in the Federal rule.

[First Circuit.] All motions, whether made in open court or otherwise, should be in writing and not be oral. Since we are not a court of record, there would be no record of the oral motions. Our tapes of oral argument are destroyed after mandate issues. If an oral motion was accepted, to be followed by a written copy, there would be no assurance that the wording would be the same. Further, a written motion may be referred to at a later date.

[10th Circuit.] We have no objection to some rewriting of the rule to state more explicitly that all motions be in writing unless they are made in open court. Motions made in open court should be reduced to writing thereafter unless the court directs otherwise.

[Mr. Munford.] I agree with the First Circuit's position on motions at oral argument. Oral argument is not "of record." Also, argument time is too precious to waste with motions of no substance. If a motion has substance, it cannot be decided at oral argument because there is no opportunity for deliberation.

With respect to the requirement that all motions be in writing, see my comments on Rule 27(b) below.

[Judge Williams.] The 1st Circuit and Mr. Munford suggest problems with the reference to the possibility of motions in open court with opposing counsel present. I doubt very much if the problems the 1st Circuit alludes to, arising from the destruction of tapes after the mandate issues, are very serious. Most oral motions seem likely to be housekeeping items (e.g., motions to admit counsel pro hac vice); if not, might not the 1st Circuit solve the problem by preserving the tapes as needed? And while it is true that any complex motion would surely require papers, the draft's modest allusion to motions in open court leaves the panel free to order appropriate documentation.

[DOJ Proposal.] Rule 27(a)(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.

Comments

Proposed Order. [DOJ.] 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."

[10th Circuit.] We agree with the Justice Department the current version is confusing and could be read to require the moving parties submit an actual form of a proposed order. We believe that the submission of a form of proposed order is generally undesirable and that the only requirement should be that the moving parties state with particularity the relief sought.

* * *

Supporting Papers. [DOJ.] 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.

[See also DOJ's general comment on proposed Rule 27(a).]

[Federal Circuit.] Fed. Cir. R. 27(a)(8) already requires an affidavit for facts subject to dispute. Requiring a copy of the trial court opinion or agency decision as a separately identified exhibit in all motions for substantive relief is a sound proposal.

See also note on preemption.

[Mr. Munford.] Pertaining to Rule 27(a)(2)(c), should we add the words "and not previously submitted by a party"?

[Mr. Froeb.] I would not include subparagraphs (a)(b) and (c) since they are too specific and would be done by counsel in most instances anyway.

[10th Circuit] We do not agree with the Second Circuit rule and think no further specificity is necessary as to supporting papers because of the infinite variation in the kinds of motions that might be made. We agree that any document supporting the motion should be attached and designated as an exhibit or attachment.

* * *

Briefs. [DOJ.] 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."

[Federal Circuit.] The proposed rule prohibits separate briefs in support of a motion or response. We have the same requirement. Fed. Cir. R. 27(c)

[10th Circuit.] We agree with the Justice Department insofar as it seems to delete the reference to briefs, because we believe the motion should include all arguments and citation of authorities within the document containing the motion itself.

[Mr. Munford.] If we intend to ban separate briefs submitted with motions, then we should say so. Otherwise, many lawyers will naturally tend to follow trial court practice in the appellate court and submit a separate motion.

[DOJ Proposal.] Rule 27(a)(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.

Comments

[DOJ.] FRAP 27 does not establish page limits for motions and responses. The D.C. Circuit's rules limit motions and responses to motions to 20 pages, and replies to responses 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.

[Federal Circuit.] DOJ proposes a 20-Page limit on motions and responses and a 10-page limit on replies to responses. We find DOJ's proposal overly generous. Our local rules allow 25 pages in rule 8 applications and responses and only 10 pages for all others. Replies are not allowed except by invitation or with leave. Because these limitations are one of the principal ways that a court can allocate its judge's time, they are best left to local regulation.

[First Circuit.] There is no need for a page limit for motions. Most motions only contain a few pages. If there was a page limit, we would be receiving motions to enlarge the page limit, as we now do for briefs. This means further unnecessary work. Most motions are seen only by the clerk's office and the staff attorneys' office and few go to a judge

[10th Circuit.] We believe there should be a fifteen-page limit on motions absent an explicit order of the court to exceed that number of pages. We agree that the page limit should include all arguments and citations of authority supporting the motion--i.e., there be no separate brief or memorandum of authority supporting the motion

[Judge Williams.] The complaints against having any page limit seem to me overdrawn. We have such a limit, and are not

inundated with motions for additional pages (I don't believe I've seen one in seven years). And circuit variety in page limits on motions seems to me an odd way to preserve circuit power to allocate their judges' time. (If judges find motion papers unduly onerous, they can skim or can rely more on clerks.).

[DOJ Proposal.] Rule 27(a)(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.

Comments

[DOJ.] 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 nonproportional 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).

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.

[Federal Circuit.] The proposal is more restrictive on counsel than Fed. Cir. R. 32(g) governing the form of motions and responses to motions, which allows the same type size, spacing, margins and footnotes as for briefs. The principal difference is the proposal's requirement for pica nonproportional type, a less flexible requirement than in our local rules.

[First Circuit.] There is no need for a requirement that motions be typewritten or for the other suggested page

requirements. Many motions are filed by prisoners or pro se parties who do not have a typewriter and would not follow the other specifications. This is an unreasonable requirement. All attorneys submit their motions in typewritten form and in a reasonable format.

[10th Circuit.] We think no change is necessary. Our judges do not prefer the D.C. Circuit's format, line, and type style limitations.

[Mr. Munford.] Take out "thereto". My vote would be with the Federal Circuit to cross-reference Rule 32. It would truly be odd for us to ban proportional type in motions yet permit it in briefs.

[Mr. Froeb.] This should be coordinated with Rule 32 so that type and format is the same for motions as well as briefs.

[Judge Williams.] I think the Federal Circuit comment on type specification is well taken; should this not be resolved within the context of the quantitative limits generally?

The First Circuit point on prisoners is sound, though the problem is solved here evidently by clerk discretion. An express qualification for prisoners' motions would be a good idea.

[DOJ Proposal.] Rule 27(a)(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.

Comments

[DOJ.] 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.

[D.C. Circuit.] The commentary raises the question whether the FRAP should adopt the Fourth Circuit's rule that prohibits responses to motions unless requested by the court. The proposed new rule 27, however, does not include the Fourth Circuit approach. I believe the proposed rule is sound in this respect. Imposing a requirement that the Court order responses in all appropriate cases could impose a significant administrative burden on this court since many of our motions are dispositive and would rarely, if ever, be decided without affording the other side an opportunity to respond.

Finally, since the proposed rule adopts the D.C. Circuit practice of allowing an opposition to a motion to be combined with a motion for affirmative relief (for example an opposition to a motion to stay might include a motion for

summary affirmance), it might be helpful for a new rule to adopt the proposed page limits set out in our revised rules.

NOTE: The passage on page limits provides as follows:

> Such a combined motion and response shall be limited to 30 pages, the response to such a combined filing shall be limited to 15 pages, and the final reply for such a combined filing shall be limited to 10 pages.

[10th Circuit.] We believe that FRAP Rule 27 is adequate now. We do not object to clarifying the situation when the responsive brief itself asks for some affirmative relief, to treat such a request in a responsive brief as a new motion.

[Mr. Munford.] I would omit the special provision for motions seeking affirmative relief. The circumstance is rare and the solution is obvious: caption the document both as a response and as a motion, call the clerk's office and find out whether and when you get a reply.

[Mr. Froeb.] Only the first sentence is necessary, so I would omit the rest. The quest for affirmative relief will take care of itself. In any event I think a party should be able to respond without waiting for the court to request it.

[Judge Williams.] I think adoption of some language on page limits such as the D.C. Circuit's would be a good idea.

[DOJ Proposal.] Rule 27(a)(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.

Comments

[DOJ.] 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 response 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.

[Federal Circuit.] We believe that a right to reply would needlessly prolong the time period for acting on motions. Our experience has been that a reply by invitation or with leave is all that is required.

[D.C. Circuit.] The proposed rule limits the reply to the opposition to the motion to seven pages. Our current rules provide for ten pages, or half the total of the opposition. Our current practice is more consistent with Fed. R. App. P. 28(g) which allows the reply brief to be 25-pages, half the size of appellee's 50 page brief.

[10th Circuit.] We do not agree with the Justice Department on this matter. We do not believe that the rule should provide explicitly for a reply and indeed would support a statement that no reply shall be permitted except by permission of the court.

[Mr. Munford.] Seven pages is enough for me.

[Mr. Froeb.] I would eliminate the language referring to affirmative relief, as in 27(a)(5), since it will take care of itself. I would drop the last sentence, since lawyers should know this anyway.

[Judge Williams.] I think the Federal Circuit concern over undue prolongation is overdrawn.

I think the D.C. Circuit reasoning on the page limit for the Reply is sound.

[DOJ Proposal.] **Rule 27(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.

Comments

[Federal Circuit.] Although not discussed in the text of your memo, the department's proposed rule adds a provision which requires treating a timely opposition to a motion that is filed after the motion is granted in whole or in part as a motion to vacate the order on the motion. Our practice has been that a post-order opposition is moot. If the opposing party wishes to press the matter, a motion to reconsider must be filed. Our experience has been that the opposing party usually accepts the court's ruling in the absence of compelling circumstances. The routine grounds put forth in the mooted opposition are unlikely to be sufficient to compel vacating the order so that an additional submission by that party will be necessary in any event. DOJ's proposal would place an additional and unnecessary burden on judges in every case.

[7th Circuit.] "After the meeting, Dick Posner pointed out to me a matter on page 3, subsection (b). With respect to the sentence permitting "[A]ny party adversely affected..." to request reconsideration, Dick suggests that it is not clear whether this phrase refers to all motions or simply to those determined by the clerk. He also suggests that we have a provision dealing with whether a party can request an en banc hearing on a motions matter. Our court has been confronted with such requests from time to time."

[Mr. Munford.] I would limit the clerk to deciding unopposed motions. That is the Fifth Circuit's practice and it seems to work well. It also solves the problem of needing any specific rehearing requirement.

Perhaps we should also make some provision for decisions by the clerk on oral motions. For example, the Fifth Circuit has an informal practice which permits a party to get an extension of time for filing a brief for a limited number of days by calling the clerk's office, receiving the extension, and then confirming the extension in a letter to the clerk

copied to counsel opposite. This procedure works well and I do not see any reason to preempt it.

[Judge Williams.] The Federal Circuit comment seems to assume that treatment of the mooted reply creates a big deal. That is not so in my experience; unless it contains a startling new point, it is likely not to change matters but will be denied routinely.

Dick Posner's two points seem sound. I think we should reword the sentence so that it covers all decisions on motions, regardless of the decider.

As to en banc applications, maybe we should look at the language of the specific rule on en bancs.

[DOJ Proposal.] Rule 27(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.

Comments

[Federal Circuit.] The proposal acknowledges the need for local regulation, as this court has done in Fed. Cir. R. 27(f).

[10th Circuit.] We agree with the Justice Department that this matter is adequately taken care of and does not require amendment of FRAP 27.

[Judge Williams.] Evidently no problem.

[DOJ Proposal.] Rule 27(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.

Comments

[DOJ.] 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.

[Federal Circuit.] DOJ would require an original and four copies, an across-the-circuits increase of one copy. This is wasteful. It will also require increased and needless processing in the clerk's office if the requirement is not met. Moreover, our local rules require 15 copies of en banc matters, Fed. Cir. R. 27(h), and two sets of motion papers (confidential and nonconfidential) when referring to material subject to statutorily-mandated confidentiality or to a judicial or administrative protective order, Fed. Cir. R. 27

(1). Depending on the scope of preemption, which is not clear, we object if these aspects of our local rules are not accommodated.

[10th Circuit.] We believe that the current FRAP Rule 27(d), requiring three copies to be filed with the original but permitting the circuit to require a different number, is quite satisfactory as is. It fits the format of the proposed changes in the other FRAP rules, which permits local variation on all numbers for filing.

[11th Circuit.] This circuit, like some others, requires the filing of an original and one copy of any motion to be decided by the Clerk or by a single judge, and an original and three copies of any other motion. The Department of Justice proposes that all circuit courts require the filing of four copies of every motion, even if the motion is one normally ruled upon by the Clerk or a single judge (memo, p. 6), and also proposes that circuit courts be prohibited from requiring a lesser number of copies by local rule (draft rule, pg. 4).

If the Department of Justice as a national litigator wishes to expend its resources in order to achieve uniformity in its internal procedures, that is its prerogative, and it is free to file three additional (though unnecessary) copies of every motion with this court. There does not, however, seem to be any logical reason for requiring all members of the various circuit bars to do likewise. The clerks of those circuit courts that require less than four copies of specified motions may dispose of any extra copies filed by the Department of Justice without placing on opposing counsel the additional financial burden of making and sending unnecessary copies.

[Mr. Munford.] I agree that the circuits should have the authority to decrease the number of required copies by rule. I am leery of allowing the courts to regulate the procedure for presenting an appeal by "internal operating procedure" which may not be widely published, and I certainly would not allow the court to do so by "practice."

[Judge Williams.] The concern about wasteful excess appears sound. We could solve it by a modification of the second sentence, allowing decreases by rule. National litigators can then make their own calculations on whether it is worth checking to see if a local rule had reduced the number needed.

[DOJ Proposal.] **Rule 27(e). Oral Argument.** All motions will be decided without oral argument unless the court orders otherwise.

Comments

[DOJ.] 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.

[Federal Circuit.] The proposed rule is the same as Fed. Cir. R. 34 (f), which states that oral argument is normally not granted on motions.

[10th Circuit.] We agree with the Justice Department's suggestion that FRAP 27 be amended to state that the parties have no right to oral argument with respect to motions unless ordered by the court.

[Judge Williams.] Evidently no problem.

[DOJ Proposal.] Rule 27(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.

Comments

[DOJ.] Given the multiplicity of local rules that now exists 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.

[Federal Circuit.] DOJ proposes that Federal Rule 27 should preempt most, and possibly all, local rules concerning motions unless specifically allowed by the national rule. Local rules respecting some aspects of motions practice not covered by the national rule should be allowed, regardless of what national rule is adopted. For example, our local rules prohibit motions to strike a brief when a responsive brief is authorized and motions to dismiss after the appellant's brief has been filed. These rules foreclose the use of motions as a delaying tactic. If the DOJ proposal means these or other local rules will be prohibited, unless authorized by the national rule, we object.

* * *

[Federal Circuit.] DOJ proposes to eliminate any miscellaneous forms required for motions in local rules. We require private litigants to file a certificate of interest, Fed. Cir. R. 27(a)(7). DOJ specifically targets this requirement. It is unclear why DOJ objects to our requirement because it does not apply to the United States. In any event, this local requirement is a necessary adjunct to our procedures because many motions must be acted on by a motions panel before cases are assigned to a merits panel. While other rules are adequate for identifying conflicts for judges assigned to merits panels, this particular requirement is designed to protect judges on a motions panel who should recuse. For this reason, we object to an outright ban on local rules concerning miscellaneous forms in motions practice.

[7th Circuit.] "Frank Easterbrook suggests that the preemption issue be determined at a more general level than FRAP 27."

[10th Circuit.] We read this reference to other requirements as informative only. We take the firm position that local variations should be permitted, that there should be room for local rules to deal with matters of this sort, and that the national rules should not preempt local variations. Because there is a general preemption in another section of the Federal Rules of Civil Procedure for inconsistent local rules we see no reason to deal with that here. Our judges do not oppose some possible additions to the national rule as long as local variation is permitted.

[11th Circuit.] The DOJ proposes that FRAP Rule 27 include a provision specifically preempting local rules concerning the same subject (memo, pg. 10). In fact, the proposed draft rule (at pg. 4) states that FRAP Rule 27 "...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."

I note first that FRAP Rule 47 already prohibits circuit courts from enacting local rules that are "inconsistent" with the Federal Rules of Appellate Procedure. To the extent that the DOJ proposal duplicates the provisions of FRAP Rule 47, it is unnecessary.

To the extent that the Department's proposal would prohibit the adoption of local rules supplementing or clarifying this (or any other) FRAP Rule, we believe such a limitation would be both inappropriate and unwise. Local rules often supplement or clarify aspects of practice when the Rules are either silent or when they address a subject generally. Indeed, one of the important functions of local rules is to provide detailed guidance which is sometimes absent from the Federal Rules of Appellate Procedure. They also allow circuit courts to function as laboratories for experimentation to discover more effective and efficient procedures. We suggest that the interests of national litigators such as the DOJ can be adequately met without jeopardizing these important functions.

[D.C. Circuit.] The proposed rule preempts circuit rules regulating motions practice. This seems acceptable if the proposed rule allows modifications in individual cases. Since I read the rule to allow such individual modifications, preemption does not appear objectionable. The Court should be aware, however, that the proposed rule would limit the rulemaking power of the circuit courts.

[Mr. Munford.] I agree that we should duck the preemption issue which is adequately handled by Rule 47. On the other hand, the Second Circuit's notice of motion practice seems so wasteful to me that I would be tempted to insert

language in Rule 27(a)(2) that preempted it. Perhaps that Rule should say "No notice of motion or separate brief shall be required."

[Mr. Froeb.] I do not favor across-the-board preemption of local rules, because often there is good reason for them and they offer a testing laboratory for handling appeals more efficiently. From the standpoint of the bar, I think there is more of a problem with the frequency local rules are changed than with the fact that they are there in the first place.

[Judge Williams.] All the usual preemption problems are implicitly raised here. My intuitive sense is that (a) Frank Easterbrook is right that a specific preemption provision here is inappropriate, and (b) human foresight is not adequate to frame a precise preemption rule, or at any rate one consistent with the desirability of circuits conducting reasonable experimentation. If preemption is governed by some statement of general principle, it would (or should) leave the Federal Circuit freedom to retain practices of special value to it.

My inclination is not to have any Rule 27-specific preemption section, with the exception of the ceiling on number of copies, Rule 27(d).

Extra comments (no specific draft)

[DOJ.] 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.

AGENDA I-E
Item 93-1
Washington, D.C.
September 22-23, 1993

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

FROM: Carol Ann Mooney, Reporter

DATE: September 4, 1993

SUBJECT: Item 93-1, conflict between Fed. R. Civ. P. 9(h) and 28 U.S.C. § 1292(a)(3) re: interlocutory appeal of admiralty cases with non-admiralty claims.

Judge Edward Becker of the Third Circuit wrote to Judge Ripple last winter about an apparent conflict between Fed. R. Civ. P. 9(h) and 28 U.S.C. § 1292(a)(3) with respect to interlocutory appeal of admiralty cases that include non-admiralty claims. A copy of Judge Becker's letter is attached.

Section 1292 is, of course, the section governing interlocutory appeals. It provides in pertinent part:

> (a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:
>
> * * * * *
>
> (3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed.

Because section 1292(a)(3) allows interlocutory appeal from a decree in an admiralty case, as distinguished from an admiralty claim, Judge Becker believes that a litigant can bring an interlocutory appeal of a non-admiralty claim that is part of a larger admiralty case. A copy of the opinion in Roco Carriers, Ltd. v. M/V Nurnberg Express, which supports that reading is attached to this memorandum.

However, Judge Becker believes that the last sentence of Fed. R. Civ. P. 9(h) may preclude such a reading of § 1292(a)(3) or at least conflict with it. The last sentence of Fed. R. Civ. P. 9(h) states:

> The reference in Title 28, U.S.C. § 1292(a)(3), to admiralty cases shall be construed to mean admiralty and maritime claims within the meaning of this subdivisions (h).

Judge Becker has read the last sentence of Rule 9(h) as an attempt to limit the broad grant in § 1292(a)(3) of interlocutory appeal in admiralty cases (presumably

allowing interlocutory appeal of a non-admiralty claim in an admiralty case) to one that allows only interlocutory appeal of admiralty claims.

One of the cases Judge Becker cites as supporting that reading is Alleman v. Bunge, 756 F.2d 344 (5th Cir. 1984). Alleman may say something much narrower. Alleman can be read as saying that the last sentence of Rule 9(h) means only that a case is not an admiralty case (for purposes of § 1292(a)(3)) unless it involves at least one admiralty claim as defined by 9(h).[1] In other words, unless a case involves an admiralty claim (as defined in Rule 9(h)), there cannot be interlocutory appeal under 28 U.S.C. § 1292(a)(3). A copy of the Alleman opinion is attached to this memorandum.

In Alleman, **plaintiffs brought suit in state court** for injuries to a longshoreman on a grain barge. The suit was brought under the Longshoremen's and Harbor Workers' Compensation Act, general maritime law, and state law. A defendant removed the case to federal court on the basis of diversity jurisdiction.

The federal district court granted summary judgment to eight of the defendants. Another defendant attempted to bring an interlocutory appeal of the grant of summary judgment under § 1292(a)(3). The court of appeals dismissed the appeal. The court of appeals' position was that it had jurisdiction only on the basis of diversity and that § 1292(a)(3) applies only if the court has admiralty jurisdiction, which the court did not have.

Although the plaintiffs in Alleman could have brought their suit in federal court and they could have invoked admiralty jurisdiction by including a statement identifying their claim as a maritime claim, they did not do so. The result of those decisions was that under Fed. R. Civ. P. 9(h), their claim was not an admiralty claim. The case was before the district court, as the result of the removal, solely on the basis of diversity jurisdiction.

Alleman is not a case in which a federal court had before it a case involving an admiralty claim and interlocutory appeal of a separate non-admiralty claim was prohibited. The case involved essentially only one claim and it was not an admiralty claim, as defined by 9(h), even though it could have been had the plaintiffs chosen to sue

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[1] The main purpose of Fed. R. Civ. P. 9(h) is to define an admiralty and maritime claim. The rule establishes two governing principles:

1. if a claim is cognizable only in admiralty, then it is automatically an admiralty or maritime claim; and
2. if a claim for relief is within a district court's jurisdiction on the basis of admiralty law and it is also within the court's jurisdiction on some other ground, is an admiralty claim only if the party's pleading contains a statement identifying the claim as an admiralty claim.

in federal court and to claim admiralty jurisdiction. The case and the last sentence of Rule 9(h) simply may mean that unless a case involves an admiralty claim determined according to Rule 9(h), there cannot be interlocutory appeal under 28 U.S.C. § 1292(a)(3).

As Judge Becker's letter notes there is virtually no case law on this issue. Most of the litigation about § 1292(a)(3) jurisdiction deals with whether the decision sought to be reviewed determined the "rights and liabilities" of the parties. My research discloses no cases on point other than those cited by Judge Becker. All of which leaves us approximately where we began, with a sentence in Civil Rule 9(h) that is, as Judge Becker describes it, "opaque." There may or may not be a conflict between it and section 1292(a)(3).

The questions for the Committee appear to be:

1. Should steps be taken to clear up the ambiguity? If so, is it really a matter for the Advisory Committee on Civil Rules?
2. Because this involves a question of interlocutory appeal and the Rules Enabling Act has been amended to allow expansion, by rule, of the types of interlocutory appeals permitted, should the whole issue be put on hold until such time as the Committee is ready to look at the question of interlocutory appeals generally?

United States Court Of Appeals
For The Third Circuit

Chambers of
Edward R. Becker
United States Circuit Judge

19613 United States Courthouse
Independence Mall West
Philadelphia, Pa. 19106-1782

February 23, 1993

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

Dear Ken:

As you may recall from our telephone conversation last fall, in the course of working up a case for argument I recently discovered what appears to be a conflict between Fed. R. Civ. P. 9(h) and 28 U.S.C. § 1292(a)(3) with respect to the interlocutory appeal of admiralty cases that include non-admiralty claims. I never did get to write an opinion on this issue, and so am writing this letter to inform you of this apparent glitch.

The language of § 1292(a)(3) suggests that it is a case-specific provision. Although it is not entirely clear, the wording of § 1292(a)(3) suggests that litigants can take advantage of the statute's liberal policy governing appellate admiralty jurisdiction as long as they seek to appeal a claim that is within an admiralty case. The statute provides that appeals may be taken from "[i]nterlocutory decrees . . . determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed." 28 U.S.C. § 1292(a)(3) (emphasis added). In my view, and I have found one court that agrees, see Roco Carriers, Ltd. v. M/V Nurnberg Express, 899 F.2d 1292, 1297 (2d Cir. 1990), the case-specific orientation of § 1292(a)(3) implies that a litigant can appeal a non-admiralty claim that is part of a larger admiralty case.

However, Fed. R. Civ. P. 9(h), which purports to construe the scope of § 1292(a)(3), suggests otherwise due to its claim-specific approach. Rule 9(h) provides that "[t]he reference in Title 28, U.S.C., § 1292(a)(3), to admiralty cases shall be construed to mean admiralty and maritime claims within the meaning of this subdivision (h)." Fed. R. Civ. P. 9(h) (emphasis added). As I read this statement -- though it is somewhat opaque -- it construes § 1292(a)(3) only to cover admiralty claims, which would exclude non-maritime claims contained within admiralty cases (i.e., a non-admiralty counter-

claim). In addition, some courts have followed this interpretation of Rule 9(h) in the course of construing § 1292(a)(3). See Alleman v. Bunge, 756 F.2d 344 (5th Cir. 1984); Focht v. United States Army Corps. of Eng'rs, 714 F.2d 139 (6th Cir. 1983) (unpublished); accord 9 James W. Moore, Moore's Federal Practice, ¶ 110.19[3], at 209 (1992).

Perhaps your reading of § 1292(a)(3) and Rule 9(h) is such that no such contradiction arises. I, however, found the two provisions to conflict. I bring it to your attention, and through you to that of the Advisory Commmittee, in the hopes that something can be done to clarify matters and remove uncertainty.

Sincerely,

Edward R. Becker

ERB:pmk

cc: Prof. Carol Ann Mooney, Reporter

with much too broad a brush, as I see it, in its reference to "the dangers of asbestos."

The clear implication is that once a product is shown to be dangerous to some persons under some circumstances, punitive damages can be awarded against a manufacturer who fails to anticipate its subsequently discovered propensity to endanger other persons in markedly different circumstances. This is hardly the "recklessness" ... close to criminality" which we described in *Roginsky* as the standard for awarding punitive damages under New York law. As Judge Friendly there said, "error in failing to make what hindsight demonstrates to have been the proper response—even 'gross' error—is not enough to warrant submission of punitive damages to the jury." 378 F.2d at 843.

I therefore respectfully dissent from the majority's affirmance of the jury's awards of punitive damages.

ROCO CARRIERS, LTD.,
Plaintiff-Appellee,

v.

M/V NURNBERG EXPRESS, her engines, boilers, etc., Hapag-Lloyd Aktiengesellschaft, and Aid Export Trucking Corp., Defendants,

Aid Export Trucking Corp.,
Defendant-Appellant.

Docket Nos. 528, 529, 89-7768, 89-7770.

United States Court of Appeals,
Second Circuit.

Argued Jan. 8, 1990.

Decided March 22, 1990.

Nonvessel operating common carrier brought separate actions against employer of terminal operator, and against warehouseman, alleging admiralty jurisdiction in both actions. The United States District Court for the Southern District of New York, John F. Keenan, J., consolidated the two actions and dismissed the complaint as to the operator, and granted carrier's cross motion for summary judgment against warehouseman. Warehouseman appealed. The Court of Appeals, Meskill, Circuit Judge, held that: (1) pendent party jurisdiction was available; (2) warehouseman could avail itself of provisions of statute permitting interlocutory appeals in admiralty actions; and (3) summary judgment in favor of carrier was proper due to warehouseman's failure to meet its burden following carrier's presentation of evidence of delivery of goods to the warehouseman and subsequent loss of the goods.

Affirmed.

1. Admiralty ⇐1.20(2), 12

Nonvessel operating common carrier's claim against warehouseman was grounded on state law and not within federal admiralty jurisdiction, where the claim arose from the warehouseman's handling of cargo which was on land.

2. Admiralty ⇐1(3)

Pendent party jurisdiction is available in admiralty cases in those instances in which the state law claim against the additional party arises out of a common nucleus of operative facts with the admiralty claim and the resolution of the factually connected claims in a single proceeding would further the interests of conserving judicial resources and fairness to the parties.

3. United States ⇐125(6)

Jurisdictional grants waiving sovereign immunity are ordinarily interpreted narrowly.

4. Admiralty ⇐1(3)

Admiralty jurisdiction extends to an entire case, including nonadmiralty claims against a second defendant. 28 U.S.C.A. § 1333(1).

5. Admiralty ⇐103

Warehouseman, against whom nonvessel operating common carrier brought pendent party claim grounded in state law, in action in which carrier brought admiralty claim against employer of terminal operator, could avail itself of provisions of statute which permit interlocutory appeals in admiralty actions, following district court's determination of liability against warehouseman, and nonliability of carrier, but before determination of damages. 28 U.S.C.A. § 1292(a)(3).

6. Warehousemen ⇐24(1)

Warehouseman failed to explain loss of goods delivered to the warehouseman by common carrier, and thus common carrier was entitled to summary judgment, under New York law, on its pendent state law claim against warehouseman, in action in which carrier brought admiralty claim against employer of terminal operator; affidavit of warehouseman's president in which president asserted that he personally counted goods as they were being loaded did not raise a factual issue, and warehouseman failed to provide a specific factual basis, as opposed to an inexact guess, about what could have happened to the goods.

7. Warehousemen ⇐34(5)

Under New York law, once a plaintiff has presented uncontroverted evidence of delivery of goods to a warehouseman and of the warehouseman's failure to honor the demand for the release of the stored goods, the warehouseman bears the burden of providing an explanation for loss of the goods supported by evidence sufficient to create a question of fact.

8. Warehousemen ⇐34(5)

Under New York law, the mere allegation that a loss occurred elsewhere does not excuse a warehouseman from meeting its burden of offering a sufficiently supported explanation for the loss of goods which have been delivered to the warehouseman, any more than would an allegation that the goods were stolen by some third party despite the warehouseman's exercise of due care.

9. Federal Civil Procedure ⇐2544

A party opposing a motion for summary judgment must set forth specific facts demonstrating the existence of a genuine issue of fact.

Norman Ingber, Salzman, Ingber & Winer, New York City, for defendant-appellant.

Stephen A. Agus, New York City (Agus & Hatem, New York City, of counsel), for plaintiff-appellee.

Before MESKILL and NEWMAN, Circuit Judges, and WEINSTEIN,* District Judge.

MESKILL, Circuit Judge:

Defendant-appellant Aid Export Trucking Corporation (Aid Export) appeals from judgments entered in the United States District Court for the Southern District of New York, Keenan, *J.*, in two cases consolidated by the district court involving the loss of cargo. We are presented with the questions whether pendent party jurisdiction is available in admiralty cases, whether a pendent party may take advantage of the provisions of 28 U.S.C. § 1292(a)(3), which permit interlocutory appeals in admiralty cases, and whether the district court properly granted summary judgment in favor of plaintiff-appellee Roco Carriers, Ltd. (Roco) and against Aid Export.

BACKGROUND

Most of the facts are undisputed. Roco, a New York corporation, is a non-vessel operating common carrier. In September 1982, it engaged Aid Export, also a New York corporation and a warehouseman and trucking company, to prepare for shipment 100 cartons of "Zippo" lighters. The cartons were allegedly loaded into a container, and the container was sealed at Aid Ex-

* Hon. Jack B. Weinstein, United States District Judge for the Eastern District of New York, sitting by designation.

port's warehouse. Aid Export transported the container by truck to a stevedoring company and terminal operator hired by Hapag-Lloyd Aktiengesellschaft (Hapag-Lloyd) so that the container could be loaded on Hapag-Lloyd's vessel, the NURNBERG EXPRESS.

Before the truck entered the terminal, the container was opened and the Aid Export seal broken in the presence of Aid Export's driver so that a Hapag-Lloyd representative could inspect how certain hazardous cargo also in the container was secured. After the container was inspected, it was resealed with a Hapag-Lloyd seal. The truck and the container were then weighed, and the cargo weight was calculated to be 19,765 pounds. The bill of lading prepared by Roco, however, listed the cargo weight at 20,608 pounds.

The container was loaded onto the NURNBERG EXPRESS. It was then transported to Hamburg, West Germany, where it was unloaded from the ship and a West German customs seal was placed on it. The container was then delivered by truck to a warehouse, where it was stripped. At the warehouse, thirty-one of the one hundred cartons were missing, even though the Hapag-Lloyd and West German seals appeared intact.

In February 1983, Roco again used Aid Export to prepare a shipment of 100 cartons of lighters. Aid Export loaded the cartons into a container, sealed the container with one of its seals and delivered it by truck to a terminal for loading on Hapag-Lloyd's ship, the DUSSELDORF EXPRESS. At the terminal, the truck and cargo were weighed, and the cargo weight was calculated at 29,230 pounds. Once again, this was inconsistent with the bill of lading, which listed the cargo weight to be 30,313 pounds.

Upon arrival in West Germany, a West German customs seal was placed on the container, and it was delivered to a warehouse in Hamburg. After the container was stripped at the warehouse, thirty-four cartons were missing. The Aid Export and West German seals appeared intact when the container was stripped.

Roco brought separate actions regarding the two shipments against Hapag-Lloyd and Aid Export, alleging admiralty jurisdiction in both. The district court consolidated the two actions for all purposes. Hapag-Lloyd moved for summary judgment, and Roco made a cross-motion for summary judgment against Hapag-Lloyd or, in the alternative, against Aid Export. The court granted Hapag-Lloyd's motion and dismissed the complaint as to Hapag-Lloyd. It also granted Roco's cross-motion against Aid Export, concluding that Aid Export had failed to raise a genuine issue of material fact in the face of Roco's *prima facie* showing of conversion.

DISCUSSION

Aid Export argues on appeal that the district court improperly granted summary judgment when genuine issues of material fact remained about who had possession of the cargo when the loss occurred. Roco questions whether Aid Export, as a pendent party against whom only a state law claim is asserted, can avail itself of the provisions of 28 U.S.C. § 1292(a)(3), which, in admiralty cases, permit interlocutory appeals from determinations of liability prior to an award of damages. However, neither party, before us or below, has raised the more fundamental question whether pendent party jurisdiction is available at all in admiralty cases. In light of the Supreme Court's decision in *Finley v. United States*, — U.S. —, 109 S.Ct. 2003, 104 L.Ed.2d 593 (1989), we must first address the question of subject matter jurisdiction over the claim against Aid Export. *See Republic of Philippines v. Marcos*, 806 F.2d 344, 352 (2d Cir.1986) ("[A] federal court has a duty on its own motion to consider whether there is properly federal jurisdiction in the case before it."), *cert. dismissed sub nom. Ancor Holdings, N.V. v. Republic of Philippines*, 480 U.S. 942, 107 S.Ct. 1597, 94 L.Ed.2d 784 *cert. denied sub nom. New York Land Co. v. Republic of Philippines*, 481 U.S. 1048, 107 S.Ct. 2178, 95 L.Ed.2d 835 (1987).

A. *Pendent Party Jurisdiction After* Finley

[1] Roco's claim against Hapag-Lloyd falls within the scope of the district court's admiralty jurisdiction. *See* 28 U.S.C. § 1333(1). However, inasmuch as any claim against Aid Export arose while the cargo was on land, Roco's claim against Aid Export is grounded on state law and not within federal admiralty jurisdiction. *See Colgate Palmolive Co. v. S/S DART CANADA*, 724 F.2d 313, 315 (2d Cir.1983), *cert. denied*, 466 U.S. 963, 104 S.Ct. 2181, 80 L.Ed.2d 562 (1984); *Leather's Best, Inc. v. S.S. MORMACLYNX*, 451 F.2d 800, 808 (2d Cir.1971). Moreover, because Roco and Aid Export are citizens of the same state, there is no diversity of citizenship to serve as an independent ground for asserting subject matter jurisdiction. The only other basis for jurisdiction over the claim against Aid Export might be pendent party jurisdiction.

[2] The established rule of this Circuit has been that pendent party jurisdiction is available in admiralty cases in those instances in which the state law claim against the additional party arises out of a common nucleus of operative facts with the admiralty claim and the resolution of the factually connected claims in a single proceeding would further the interests of conserving judicial resources and fairness to the parties. *E.g., National Resources Trading, Inc. v. Trans Freight Lines*, 766 F.2d 65, 68 (2d Cir.1985); *Leather's Best*, 451 F.2d at 809–11. *See generally United Mine Workers v. Gibbs*, 383 U.S. 715, 725–27, 86 S.Ct. 1130, 1138–39, 16 L.Ed.2d 218 (1966). This is also the rule in other circuits. *E.g., Feigler v. Tidex, Inc.*, 826 F.2d 1435, 1439 (5th Cir.1987); *In re Oil Spill by Amoco Cadiz Off Coast of France*, 699 F.2d 909, 913–14 (7th Cir.), *cert. denied sub nom. Astilleros Espanoles, S.A. v. Standard Oil Co. (Indiana)*, 464 U.S. 864, 104 S.Ct. 196, 78 L.Ed.2d 172 (1983). However, after the Supreme Court's decision in *Finley*, the continued viability of the doctrine of pendent party jurisdiction in any context is seriously in question. *See Staffer v. Bouchard Transp. Co.*, 878 F.2d 638, 643 n. 5 (2d Cir.1989) (suggesting in dicta that "pendent-party jurisdiction apparently is no longer a viable concept").

In *Finley*, the Supreme Court held that pendent party jurisdiction is not available when the primary claim is brought under the Federal Tort Claims Act (FTCA), 28 U.S.C. § 1346(b). 109 S.Ct. at 2010. Employing a restrictive reading of pendent party jurisdiction, the Court determined that factual similarity and judicial economy alone are insufficient to exert jurisdiction over state law claims involving additional parties without an independent basis for jurisdiction. *Id.* at 2008. Relying on the general proposition that a federal court's subject matter jurisdiction is limited to the bounds set forth by the Constitution *and* to the extent that, within those limits, jurisdiction is authorized by Congress, *id.* at 2005–06; *see The Mayor v. Cooper*, 73 U.S. (6 Wall.) 247, 252, 18 L.Ed. 851 (1868); *Ex Parte Bollman*, 8 U.S. (4 Cranch) 75, 93, 2 L.Ed. 554 (1807), the Court concluded that pendent party jurisdiction is available only if the statute providing federal jurisdiction over the primary claim can also be interpreted as specifically conferring jurisdiction over other claims against additional parties. 109 S.Ct. at 2008–09; *see also Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 98 S.Ct. 2396, 57 L.Ed.2d 274 (1978); *Aldinger v. Howard*, 427 U.S. 1, 96 S.Ct. 2413, 49 L.Ed.2d 276 (1976); *Zahn v. International Paper Co.*, 414 U.S. 291, 94 S.Ct. 505, 38 L.Ed.2d 511 (1973).

[3] An action brought into federal court by way of the FTCA, such as that in *Finley*, and an action brought pursuant to the court's admiralty jurisdiction, such as that in the instant case, are by no means identical in terms of the nature of the relevant statutory grants of jurisdiction. First, a federal court's jurisdiction under the FTCA is predicated on a waiver of sovereign immunity permitting individuals to bring tort claims against the United States. Jurisdictional grants waiving sovereign immunity are ordinarily interpreted narrowly. *See United States v. Sherwood*, 312 U.S. 584, 590, 61 S.Ct. 767, 771, 85 L.Ed. 1058 (1941).

This factor is entirely absent in the context of the instant case.

Second, underlying admiralty jurisdiction is the sound policy of permitting claims arising in the admiralty or maritime context to be resolved in a single setting. *See British Transp. Comm'n v. United States*, 354 U.S. 129, 137–38, 77 S.Ct. 1103, 1107, 1 L.Ed.2d 1234 (1957). This is not merely a matter of convenience for the parties. Rather, it stems from the historical recognition of the importance that maritime claims in particular be subjected to efficient and uniform procedures and treatment. *See In Re Oil Spill*, 699 F.2d at 913–14.

Third, and most important for the analysis under *Finley*, the language of the relevant statutory grants of jurisdiction in *Finley* and in our case are substantially different. The jurisdictional statute for FTCA claims provides, in pertinent part, that the federal courts "shall have exclusive jurisdiction of civil actions on claims against the United States." 28 U.S.C. § 1346(b). The Supreme Court placed great significance on the fact that this jurisdictional grant was limited to claims against a specific party—the United States. It therefore concluded that section 1346(b) "defines jurisdiction in a manner that does not reach defendants other than the United States." 109 S.Ct. at 2009. By contrast, the statute providing admiralty jurisdiction is strikingly broad: It confers exclusive jurisdiction over "[a]ny civil case of admiralty or maritime jurisdiction." 28 U.S.C. § 1333(1).

The importance of this last distinction is illustrated by a comparison of cases in other circuits decided in the wake of *Finley*. The Eighth Circuit, in *Lockard v. Missouri Pacific R.R. Co.*, 894 F.2d 299 (8th Cir. 1990), applied *Finley*'s strict rule of construction to the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51, 56, and held that the FELA's jurisdictional grant did not extend to pendent party claims. 894 F.2d at 302–03. The court's holding rested on the language of the FELA, which imposes liability on "[e]very common carrier by railroad" for injuries sustained by railroad employees. 45 U.S.C. § 51. Thus, the court concluded that the FELA, like the FTCA, created "a grant of jurisdiction over claims involving particular parties," and the statutory language simply could not be read to include claims against other parties. 894 F.2d at 302; *see also Stallworth v. City of Cleveland*, 893 F.2d 830, 838 (6th Cir.1990) (no pendent party jurisdiction under 42 U.S.C. § 1983 over state law claim of loss of consortium); *Iron Workers Mid-South Pension Fund v. Terotechnology Corp.*, 891 F.2d 548, 551 (5th Cir.1990) (no pendent party jurisdiction under Employee Retirement Income Security Act, 29 U.S.C. § 1132(e), over state law claim to enforce lien).

By contrast, in *Teledyne, Inc. v. Kone Corp.*, 892 F.2d 1404 (9th Cir.1989), the Ninth Circuit determined that the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1330, does provide for pendent party jurisdiction. *Id.* at 1409–10. The *Teledyne* Court found the language of the FSIA's jurisdictional grant unlike that of the FTCA in that the former provided jurisdiction over a "civil *action* against a foreign state," 28 U.S.C. § 1330(a) (emphasis added), while the latter provided jurisdiction only for "*claims* against the United States." 28 U.S.C. § 1346(b) (emphasis added). The Ninth Circuit concluded that the choice of the word "action," rather than "claim," in the FSIA indicated that the FSIA's jurisdictional grant included claims against parties other than foreign states that arise out of the same nucleus of operative facts and thus would ordinarily be part of the same action as the primary claim. 892 F.2d at 1409.

[4] The admiralty jurisdictional statute does not contain a limitation as to a certain category of parties, as does the FTCA and the FELA. Nor does it contain a limitation as to a certain category of claims. Rather, it creates jurisdiction over an admiralty "case." 28 U.S.C. § 1333(1). Therefore, while the FTCA confers jurisdiction over claims "against the United States and no one else," *Finley*, 109 S.Ct. at 2008, admiralty jurisdiction extends to an entire case, including non-admiralty claims against a second defendant. *See Teledyne*, 892 F.2d

at 1409. *See generally Osborn v. United States Bank*, 22 U.S. (9 Wheat.) 737, 822–23, 6 L.Ed. 204 (1824).

In light of the broadly worded jurisdictional grant over admiralty cases and "the strong admiralty policy in favor of providing efficient procedures for resolving maritime disputes," *In Re Oil Spill*, 699 F.2d at 914, we see no reason at this juncture to depart from the established rule of this Circuit that pendent party jurisdiction is available in the unique area of admiralty. Accordingly, the district court had subject matter jurisdiction over the pendent party claim against Aid Export, and it did not abuse its discretion in exercising that jurisdiction. *See Leather's Best*, 451 F.2d at 811.

B. *Appellate Jurisdiction Under § 1292(a)(3)*

[5] Roco argues that, because Aid Export is a pendent party and the claim against it is grounded in state law rather than admiralty, Aid Export may not avail itself of the provisions of 28 U.S.C. § 1292(a)(3) permitting interlocutory appeals in admiralty actions. Neither party has provided us with case law specifically addressing that question, and the issue appears to be a novel one. Nevertheless, it need not detain us for long.

Section 1292(a)(3) provides, in pertinent part, that appeals may be taken from "[i]nterlocutory decrees ... determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed." This exception to the final judgment rule has its historical origins in the once common practice in admiralty cases of referring the determination of damages to a master or commissioner after resolving the question of liability. *See* Fed.R.Civ.P. 53(b). Section 1292(a)(3) permitted parties to appeal the finding of liability before facing a potentially costly damages proceeding. *See* 9 J. Moore, B. Ward & J. Lucas, *Moore's Federal Practice* ¶ 110.19[3], at 210 (2d ed. 1989).

We see no reason to deny a pendent party the right to appeal an interlocutory determination of liability when the same decision can be appealed by the other parties in the case. The determination of liability against Aid Export is integrally linked with the determination of non-liability on the part of Hapag–Lloyd. Moreover, the language of section 1292(a)(3) is not limited to admiralty *claims;* instead, it refers to admiralty *cases.* The state law claim against Aid Export is in federal court only because Roco is permitted to append it to the admiralty claim against Hapag–Lloyd. It is thus part of the admiralty case, and we therefore conclude that we have appellate jurisdiction.

C. *Summary Judgment*

[6] Finally we reach the merits of Aid Export's appeal. Aid Export argues first that the district court improperly saddled it with the burden of coming forward with an explanation of the loss of the cargo. Second, it contends that the district court erred in granting summary judgment when genuine issues of material fact exist about who had possession of the cargo when the loss occurred.

[7] Under New York law, which governs Roco's claim against Aid Export, once a plaintiff has presented uncontroverted evidence of delivery of goods to a warehouseman and of the warehouseman's failure to honor the demand for the release of stored goods, the warehouseman bears the burden of providing an explanation for the loss of the goods supported by evidence sufficient to create a question of fact. *Colgate Palmolive*, 724 F.2d at 317; *I.C.C. Metals, Inc. v. Municipal Warehouse Co.*, 50 N.Y.2d 657, 664, 409 N.E.2d 849, 853–54, 431 N.Y.S.2d 372, 378–79 (1980). The warehouseman's explanation "cannot be merely the product of speculation and conjecture" and must show not just "what might conceivably have happened to the goods, but rather what actually happened to the goods." *I.C.C. Metals*, 50 N.Y.2d at 664 n. 3, 409 N.E.2d at 853 n. 3, 431 N.Y.S.2d at 377 n. 3.

[8] Aid Export argues that this burden-shifting rule should not be applied to it because a factual dispute exists over

whether the loss occurred while the cargo of lighters was in its possession. Indeed, the rule is predicated on the "practical necessity" that results from the warehouseman's exclusive control over stored goods, placing it in the best position to explain any loss of the goods. *Id.* at 665, 409 N.E.2d at 854, 431 N.Y.S.2d at 377. Yet, the mere allegation that the loss occurred elsewhere does not excuse the warehouseman from meeting its burden of offering a sufficiently supported explanation any more than would an allegation that the goods were stolen by some third party despite the warehouseman's exercise of due care.

In an effort to create a factual dispute on the issue of who had possession of the cargo when the loss took place, Aid Export relies almost exclusively on the affidavit of Sabato F. Catucci, its president. In his affidavit, Catucci asserts that he personally counted the cartons as they were being loaded into the container. He does not and apparently cannot state, however, that he observed the container at all times prior to its being sealed. Catucci maintains in the affidavit that the plastic seals that were used on the container were capable of being bypassed, but provides no basis or support for this conclusory assertion. He also states that the discrepancy in the weight of the cargo discovered at the terminal "could be due to something as simple as the amount of gas in the trucks." Aid Export attempts to bolster this explanation for the weight discrepancy by pointing to the deposition testimony of a Hapag-Lloyd employee who commented that a discrepancy of two or three hundred pounds was not out of the ordinary. Yet, Aid Export fails to provide a specific factual basis, as opposed to an inexact guess about what "could" be, that would explain the weight discrepancies of 843 and 1,083 pounds in the two shipments.

[9] The conclusory statements and unsupported assertions presented by Aid Export are insufficient to meets its burden. A party opposing a motion for summary judgment must set forth specific facts demonstrating the existence of a genuine issue of fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The evidence on which Aid Export relies falls short of creating a genuine factual dispute about the reliability of the plastic seals, the weight discrepancies or the integrity of the cargo while the cargo was in its possession.

Roco made a *prima facie* showing of conversion under New York law. Aid Export, after several years of discovery, is unable to rebut that showing by coming forward with adequate support for its explanation for the loss of the cargo. In these circumstances, Roco is entitled to summary judgment in its favor.

CONCLUSION

The judgments of the district court are affirmed.

Marjorie DATSKOW, Executrix of the Estates of Robert C. Gross and Susan C. Gross, deceased, and Administratrix of the Estates of Michael and David Gross, deceased, and Grossair, Inc., Plaintiffs-Appellants,

v.

TELEDYNE, INC., CONTINENTAL PRODUCTS DIVISION, Defendant-Appellee.

No. 622, Docket 89-7916.

United States Court of Appeals, Second Circuit.

Argued Jan. 10, 1990.

Decided March 23, 1990.

Opinion on Denial of Rehearing May 2, 1990.

Plaintiffs in wrongful death and survival action appealed from order of the United States District Court for the Western District of New York, David G. Larimer, J., which dismissed for lack of jurisdiction and insufficiency of process. The

If this is to continue to be the law governing such matters, then we have, in simple terms, given to the plaintiff in circumstances such as these a ticket to ride serenely past the bar of the domestic relations exception by the simple expedient of alleging "intentional infliction of emotional distress". There is no question that the proof of that tort does not require the proof of a domestic relations factor, but it is equally certain that in these cases the offense arises out of the domestic relations relationship and that the relationship is a salient factor—probably the most salient factor—in showing the degree of emotional distress suffered by the plaintiff. I simply cannot agree that the plaintiff, for future cases, under these circumstances should be permitted to avoid the exception.

As set out above, the law in this Circuit is so clearly stated that the writer is forced to concur in the result reached in the majority opinion.

I concur.

James J. ALLEMAN and Shirley Alleman, Plaintiffs,

v.

BUNGE CORPORATION, et al., Defendants-Appellants,

v.

REPUBLIC INSURANCE CO., et al., Defendants-Appellees.

No. 84-3209
Summary Calendar.

United States Court of Appeals, Fifth Circuit.

Dec. 19, 1984.

Longshoreman and his wife brought suit in Louisiana state court to recover for personal injuries that resulted from longshoreman's falling in open hole on grain barge while employed as longshoreman. Claims were brought under Longshoremen's and Harbor Workers' Compensation Act, general maritime law, and Louisiana state law against employer and several insurers. Employer removed action to federal court on basis of diversity jurisdiction. The United States District Court for the Eastern District of Louisiana, at New Orleans, Frederick J.R. Heebe, Chief Judge, granted eight insurance companies summary judgment on grounds that their policy with employer excluded coverage of claims by employees, and employer appealed. The Court of Appeals, Reavley, Circuit Judge, held that: (1) action was not in federal admiralty court's jurisdiction, and (2) appeal could not be based upon statute which permits appeal of interlocutory decrees in admiralty cases.

Appeal dismissed.

1. Removal of Cases ⇐95

Although longshoreman and his wife could have invoked admiralty jurisdiction of federal courts by filing statement with their complaint identifying it as maritime claim, where they exercised their historical option to bring action in state court under savings to suitors clause, by removing action to federal court, employer could not alter their substantive rights or destroy their right to prosecute their action in common-law tort, but could remove action only to federal diversity court; thus, action was not in federal admiralty court's jurisdiction. 28 U.S.C.A. §§ 1292(a)(3), 1332(a), 1333; Fed.Rules Civ.Proc.Rule 9(h), 28 U.S.C.A.

2. Federal Courts ⇐576

Where federal court's admiralty jurisdiction was not invoked, employer sued by longshoreman and his wife under Longshoremen's and Harbor Workers' Compensation Act, general maritime law, and Louisiana state law, could not base its appeal of dismissal of several insurers on statute which permits appeal of interlocutory decrees in admiralty cases. Longshoremen's

and Harbor Workers' Compensation Act, §§ 1–51, 33 U.S.C.A. §§ 901–950; LSA-C.C. art. 2315; 28 U.S.C.A. §§ 1292(a)(3), 1332(a), 1333; Fed.Rules Civ.Proc.Rule 9(h), 28 U.S.C.A.

John E. Galloway, New Orleans, La., for Bunge Corp. & Ins. Co. of North America.

Robert S. Reich, Charles F. Lozes, New Orleans, La., for Republic Ins. Co., et al.

Norman C. Sullivan, Jr., New Orleans, La., for St. Louis Shipbuilding.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before REAVLEY, POLITZ and HIGGINBOTHAM, Circuit Judges.

REAVLEY, Circuit Judge:

Bunge Corp. and Insurance Co. of North America (hereinafter referred to collectively as Bunge) appeal a summary judgment in favor of eight insurance companies.[1] Bunge attempts to base this appeal on 28 U.S.C. § 1292(a)(3) (1982), which permits appeal of interlocutory decrees in admiralty cases. Because this appeal is not from a maritime action and no other jurisdiction exists, we dismiss the appeal.

James and Shirley Alleman brought suit in Louisiana state court to recover for personal injuries that resulted from James' falling in an open hole on a grain barge while employed by Bunge as a longshoreman. The Allemans brought claims under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901–950 (1982), general maritime law, and Louisiana state law, La.Civ.Code Ann. art. 2315 (West Supp.1984), against, among others, Bunge and eight other insurance companies with which Bunge had an insurance policy. Bunge removed the action to federal court on the basis of diversity jurisdiction, 28 U.S.C. § 1332(a) (1982). The federal district court then granted the eight insurance companies summary judgment on grounds that their policy with Bunge excluded coverage of claims by employees.

[1] The admiralty jurisdiction of the federal courts, 28 U.S.C. § 1333 (1982), could have been invoked in this case. The Allemans could have filed their complaint with a statement identifying it as a maritime claim, Fed.R.Civ.P. 9(h),[2] in admiralty court. *Bynum v. Patterson Truck Lines, Inc.*, 655 F.2d 643, 644 (5th Cir.1981) (Longshoremen's and Harbor Workers' Compensation Act is a maritime cause of action). Instead, the Allemans exercised their "historic option," *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 371, 79 S.Ct. 468, 480, 3 L.Ed.2d 368 (1959), to bring their action in state court under the savings to suitors clause of 28 U.S.C. § 1333(1) (1982). Numerous and important consequences flow from the Allemans' decision to bring their action in state court. *See T.N.T. Marine Service, Inc. v. Weaver Shipyards & Dry Docks, Inc.*, 702 F.2d 585, 586–87 (5th Cir.), *cert. denied*, — U.S. —, 104 S.Ct. 151, 78 L.Ed.2d 141 (1983) (jurisdiction invoked governs venue, interlocutory appeals, remedies available, right to jury trial, and law that applies). By removing this action, Bunge could not alter the Allemans' substantive rights or destroy their right to prosecute their action in a common law court. Bunge could have re-

1. The insurance companies are: Continental Insurance Co., Bellefonte Insurance Co., Midland Insurance Co., Northeastern Insurance Co., Penn Lumberman's Mutual Insurance Co., The Lumberman Insurance Co., Ranger Insurance Co., and Republic Insurance Co.

2. A pleading or count setting forth a claim for relief within the admiralty and maritime jurisdiction that is also within the jurisdiction of the district court on some other ground may contain a statement identifying the claim as an admiralty or maritime claim for the purposes of Rules 14(c), 38(e), 82, and the Supplemental Rules for Certain Admiralty and Maritime Claims. If the claim is cognizable only in admiralty, it is an admiralty or maritime claim for those purposes whether so identified or not. The amendment of a pleading to add or withdraw an identifying statement is governed by the principles of Rule 15. The reference in Title 28, U.S.C. § 1292(a)(3), to admiralty cases shall be construed to mean admiralty and maritime claims within the meaning of this subdivision (h).

AGENDA I-F
Item 93-3 and 93-6
Washington, D.C.
September 22-23, 1993

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

FROM: Carol Ann Mooney, Reporter

DATE: September 6, 1993

SUBJECT: Item 93-3, Amendment of Rule 41 re: 7-day period for issuance of the mandate; and
Item 93-6, Amendment of Rule 41 to specify when the mandate becomes effective.

Item 93-3

At the Advisory Committee's April 1993 meeting, the Committee reviewed proposed amendments to Rules 40 and 41 following publication. The proposed amendments lengthen the time for filing a petition for rehearing in a civil case involving the United States. That change was requested by former Solicitor General Starr and is docketed as item 91-2. The amendments were ultimately approved by both the Advisory Committee and the Standing Committee. Copies of the proposed changes as submitted to the Judicial Conference are attachment A to this memorandum.

The proposed amendment to Rule 40 lengthens the time for filing a petition for rehearing in some, but not all, cases from 14 to 45 days after entry of judgment. As a consequence of that change, the provision in Rule 41(a) requiring a court of appeals to issue the mandate 21 days after entry of judgment also must be changed. The proposed amendment to Rule 41 requires a court of appeals to issue the mandate 7 days after expiration of the time for filing a petition for rehearing.

Judge Newman commented upon the proposed change to Rule 41(a). He stated that he sees no need to delay the issuance of the mandate until 7 days after the time for seeking rehearing has expired. He suggested that a court should be able to issue the mandate "within 7 days" after expiration of the time for filing a petition for rehearing.

Several members of the Committee expressed a preference for a day certain for issuance of the mandate. That is, they preferred a rule that requires the mandate to issue 7 days after expiration of the time for filing a petition for rehearing rather than one that would require the court to issue the mandate "within 7 days."

Ironically, the Advisory Committee's discussion of the comment actually focused upon whether 7 days is too short a time rather than too long a time. A 7-day period is

provided by the current rule;[1] therefore, the proposed amendment to Rule 41(a) does not change the time frame. Proposed amendments to Rule 41(b), however, establish standards for granting a stay of mandate and may make it more difficult for a party to obtain a stay of mandate within the 7-day period.[2] Proposed amendments to Rule 41(b) require a party seeking a stay of mandate to show that a petition for *certiorari* "would present a substantial question and that there is good cause for a stay."

The members of the Advisory Committee made two observations about the sufficiency of the 7-day period. First, although changes to Rule 41(b) require a party to establish grounds for a stay, a party has the time period for filing the petition for rehearing as well as the 7 days thereafter to formulate arguments for granting a stay. In fact, the arguments for granting a stay are often the same arguments presented in the petition for rehearing.

Second, the seven day time period does not currently cause any difficulties. As a pragmatic matter, if a mandate issues and a stay is subsequently granted, the court recalls the mandate. If that practice is problematic, an amendment stating that if an application for a stay is filed, the mandate cannot issue until the court acts on the application might be preferable to lengthening the 7-day period. D.C. Cir. R. 15(b) includes such a provision.[3] (The D.C. Cir. R. as well as the local rules and internal operating procedures from the other circuits are attachment B to this memorandum.)

The question before the Committee is whether the 7 day period is the right length of time.

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[1] Rule 41(a) currently requires the mandate to issue 21 days after entry of judgment. Because Rule 40 says that a petition for rehearing must be entered within 14 days after entry of judgment, the effect is that Rule 41(a) requires the mandate to issue 7 days after expiration of the time for filing a petition for rehearing.

[2] The local rules in six circuits, however, require a similar showing. D.C. Cir. R. 15 (b)(1); 4th Cir. I.O.P. 41.2; 5th Cir. R. 41.1; 7th Cir. R. 41(a); 8th Cir. R. 41A; and 11th Cir. 41-1(a). Four other circuits make it clear that a stay of mandate is not granted simply upon request. 1st Cir. R. 41; 6th Cir. R. 15(a); 9th Cir. R. 41-1; 10th Cir. R. 41.1. Therefore, the change in Fed. R. App. P. 41(b) may not significantly alter the type of information that must be presented to a court to obtain a stay or the ease with which stays are granted.

[3] On January 4, 1993, the D.C. Circuit announced its intention to revoke all existing circuit rules and issue new rules numbered to correspond to the Federal Rules of Appellate Procedure. Proposed D.C. Cir. R. 41 contains a provision identical to that in D.C. Cir. R. 15(b), providing that the mandate will not issue while an application for a stay is pending.

Item 93-6

This August, Solicitor General Days wrote to Judge Ripple proposing a different amendment to Fed. R. App. P. 41(a). He suggests that Rule 41 should specify that a mandate is effective upon issuance.[4] A copy of his letter, which includes a proposed draft, is attachment C to this memorandum.

In addition to the Fourth Circuit authority cited in the letter,[5] the Tenth Circuit also has an I.O.P. governing the effectiveness of a judgment. It provides that "judgments of the court take effect upon the issuance of the mandate."[6]

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[4] The Solicitor General's letter is not the first time that the uncertainty about the effective date of a court's judgment or order has been brought to the attention of the Advisory Committee.

In addition to Judge Newman's comment about the time for issuance of the mandate under Rule 41, the NLRB also submitted a comment concerning the proposed amendments to Rules 40 and 41 that would lengthen the time for filing a petition for rehearing in civil cases. The NLRB opposed the changes because they would delay the effectiveness of enforcement orders. The NLRB stated that although the law is unclear about the effective date of a judgment or order, it believes that an enforcement order becomes effective only upon issuance of the mandate and, as a consequence, the changes would delay the effectiveness of enforcement orders.

In response to the NLRB's comment, several members of the Advisory Committee noted that a court may direct that the mandate issued forthwith when its immediate issuance is warranted. The Committee approved the amendments as published, making only minor stylistic changes.

[5] Although the letter cites 4th Cir. R. 41.1, my 1992 version of the 4th Circuit rules includes no such rule. I believe the correct citation is to 4th Cir. I.O.P. 41.1.

[6] 10th Cir. I.O.P. VIII.B.1.

Rule 40. Petition for Rehearing

(a) *Time for Filing; Content; Answer; Action by Court if Granted.*-- A petition for rehearing may be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order or by local rule. However, in all civil cases in which the United States or an agency or officer thereof is a party, the time within which any party may seek rehearing shall be 45 days after entry of judgment unless the time is shortened or enlarged by order. The petition ~~shall~~ must state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended and ~~shall~~ must contain such argument in support of the petition as the petitioner desires to present. Oral argument in support of the petition will not be permitted. No answer to a petition for rehearing will be received unless requested by the court, but a petition for rehearing will ordinarily not be granted in the absence of such a request. If a petition for rehearing is

granted, the court may make a final disposition of the cause without reargument or may restore it to the calendar for reargument or resubmission or may make such other orders as are deemed appropriate under the circumstances of the particular case.

Committee Note

Subdivision (a). The amendment lengthens the time for filing a petition for rehearing from 14 to 45 days in civil cases involving the United States or its agencies or officers. It has no effect upon the time for filing in criminal cases. The amendment makes nation-wide the current practice in the District of Columbia and the Tenth Circuits, *see* D.C. Cir. R. 15(a), 10th Cir. R. 40.3. This amendment, analogous to the provision in Rule 4(a) extending the time for filing a notice of appeal in cases involving the United States, recognizes that the Solicitor General needs time to conduct a thorough review of the merits of a case before requesting a rehearing. In a case in which a court of appeals believes it necessary to restrict the time for filing a rehearing petition, the amendment provides that the court may do so by order. Although the first sentence of Rule 40 permits a court of appeals to shorten or lengthen the usual 14 day filing period by order or by local rule, the sentence governing appeals in civil cases involving the United States purposely limits a court's power to alter the 45 day period to orders in specific cases. If a court of appeals could adopt a local rule shortening the time for filing a petition for rehearing in all cases involving the United States, the purpose of the amendment would be defeated.

Rule 41. Issuance of Mandate; Stay of Mandate

(a) *Date of Issuance.* -- The mandate of the court ~~shall~~ must issue ~~21~~ 7 days after the ~~entry of judgment~~ expiration of the time for filing a petition for rehearing unless such a petition is filed or the time is shortened or enlarged by order. A certified copy of the judgment and a copy of the opinion of the court, if any, and any direction as to costs shall constitute the mandate, unless the court directs that a formal mandate issue. The timely filing of a petition for rehearing will stay the mandate until disposition of the petition unless otherwise ordered by the court. If the petition is denied, the mandate ~~shall~~ must issue 7 days after entry of the order denying the petition unless the time is shortened or enlarged by order.

(b) *Stay of Mandate Pending ~~Application~~ Petition for Certiorari.* ~~--A stay of the mandate pending application to the Supreme Court for a writ of certiorari may be granted upon motion, reasonable notice of which shall be given to all parties.~~ A party

who files a motion requesting a stay of mandate pending petition to the Supreme Court for a writ of certiorari must file, at the same time, proof of service on all other parties. The motion must show that a petition for certiorari would present a substantial question and that there is good cause for a stay. The stay ~~shall~~ cannot exceed 30 days unless the period is extended for cause shown. ~~If~~ or unless during the period of the stay, ~~there is filed with the clerk of the court of appeals~~, a notice from the clerk of the Supreme Court is filed showing that the party who has obtained the stay has filed a petition for the writ ~~in that court~~, in which case the stay ~~shall~~ will continue until final disposition by the Supreme Court. ~~Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari the mandate shall issue immediately.~~ A The court of appeals must issue the mandate immediately when a copy of a Supreme Court order denying the petition for writ of certiorari is filed. The court may require a bond or

other security ~~may be required~~ as a condition to the grant or continuance of a stay of the mandate.

Committee Note

Subdivision (a). The amendment conforms Rule 41(a) to the amendment made to Rule 40(a). The amendment keys the time for issuance of the mandate to the expiration of the time for filing a petition for rehearing, unless such a petition is filed in which case the mandate issues 7 days after the entry of the order denying the petition. Because the amendment to Rule 40(a) lengthens the time for filing a petition for rehearing in civil cases involving the United States from 14 to 45 days, the rule requiring the mandate to issue 21 days after the entry of judgment would cause the mandate to issue while the government is still considering requesting a rehearing. Therefore, the amendment generally requires the mandate to issue 7 days after the expiration of the time for filing a petition for rehearing.

Subdivision (b). The amendment requires a party who files a motion requesting a stay of mandate to file, at the same time, proof of service on all other parties. The old rule required the party to give notice to the other parties; the amendment merely requires the party to provide the court with evidence of having done so.

The amendment also states that the motion must show that a petition for certiorari would present a substantial question and that there is good cause for a stay. The amendment is intended to alert the parties to the fact that a stay of mandate is not granted automatically and to the type of showing that needs to be made. The Supreme Court has established conditions that must be met before it will stay a mandate. *See* Robert L. Stern et al., Supreme Court Practice § 17.19 (6th ed. 1986).

LOCAL RULES AND I.O.P.'s

D.C. Cir. R. 15. Petitions for Rehearing, Suggestions for Hearing or Rehearing En Banc, Mandates and Remands

* * * * *

(b) *Mandates.*

(1) Stay of Mandate. A motion for a stay of the issuance of mandate shall not be granted unless the motion sets forth facts showing good cause for the relief sought.

(2) Time for Issuance. While retaining discretion to direct immediate issuance of its mandate in an appropriate case, this Court ordinarily will include as part of its disposition an instruction that the clerk will withhold issuance of the mandate until the expiration of the time for filing a petition for rehearing or a suggestion for rehearing en banc and, if such petition or suggestion is timely filed, until seven days after disposition thereof. Such an instruction is without prejudice to the right of any party at any time to move for expedited issuance of the mandate for good cause shown. If a timely motion to stay issuance of the mandate has been filed, the mandate shall not issue while the motion is pending. If the motion is denied, the mandate ordinarily would be issued seven days thereafter. If the motion is granted, the stay would not ordinarily extend beyond 30 days from the date that the mandate would otherwise have been issued.

(3) Writs. No mandate shall issue in connection with an order granting or denying a writ of mandamus or other special writ but the order or judgment granting or denying the relief sought shall become effective automatically twenty-one days after issuance in the absence of an order or other special direction of this Court to the contrary.

(4) When rehearing en banc is granted, the court will recall the mandate if it has issued.

1st Cir. R. 41. Stay of Mandate.

Whereas an increasingly large percentage of unsuccessful petitions for certiorari have been filed in this circuit in criminal cases in recent years, in the interests of minimizing unnecessary delay in the administration of justice mandate will not be stayed hereafter in criminal cases following the affirmance of a conviction simply upon request. On the contrary, mandate will issue and bail will be revoked at such time as the court shall order except upon a showing, or an independent finding by the court, of probable cause to believe that a petition would not be frivolous, or filed merely for delay. See 18 U.S.C. § 3148. The

court will revoke bail even before mandate is due. A comparable principle will be applied in connection with affirmed orders of the NLRB, see *NLRB v. Athbro Precision Engineering*, 423 F.2d 573 (1st Cir. 1970), and in other cases where the court believes that the only effect of a petition for certiorari would be pointless delay.

2nd Cir. R. 41. Issuance of mandate.

Unless otherwise ordered by the court, the mandate shall issue forthwith in all cases in which (1) an appeal from an order or judgment of a district court or a petition to review or enforce an order of an agency is decided in open court, (2) a petition for a writ of mandamus or other extraordinary writ is adjudicated, or (3) the clerk enters an order dismissing an appeal or a petition to review or enforce an order of an agency for a default in filings, as directed by an order of the court or a judge.

4th Cir. I.O.P. 41. Issuance of Mandate; Stay of Mandate.

41.1 Mandate. On the date of issuance of mandate, the Clerk of the Court will issue written notice to the parties and the clerk of the lower court that the judgment of the Court of Appeals takes effect that day. The trial court record will be returned to the clerk of the court simultaneously with the issuance of the mandate.

41.2. Motion for stay of the mandate. A motion for stay of the issuance of the mandate shall not be granted simply upon request. Ordinarily the motion shall be denied unless there is a specific showing that it is not frivolous or filed merely for delay. The motion must present a substantial question or set forth good or probable cause for a stay. Only the original of the motion need be filed. Stay requests are normally acted upon without a request for a response.

* * * * *

5th Cir. R. 41. Issuance of Mandate; Stay of Mandate

41.1. Stay of Mandate -- Criminal Appeals. A motion for a stay of the issuance of a mandate in a direct criminal appeal filed under FRAP 41 shall not be granted simply upon request. Unless the petition sets forth good cause for stay or clearly demonstrates that a substantial question is to be presented to the Supreme Court, the motion shall be denied and the mandate thereafter issued forthwith.

41.2. Recall of Mandate. A mandate once issued shall not be recalled

except to prevent injustice.

41.3. Effect of Granting Rehearing En Banc. Unless otherwise expressly provided, the effect of granting a rehearing en banc is to vacate the panel opinion and judgment of the Court and to stay the mandate.

6th Cir. R. 15. Mandate

(a) **Stay of Mandate.** In the interest of minimizing unnecessary delay in the administration of justice, the issuance of the mandate will not be stayed simply upon request. The mandate ordinarily will issue pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure unless there is a showing, or an independent determination by the court that a petition for writ of certiorari would not be frivolous or filed merely for delay.

(b) **Time for Filing Motion to Stay.** A motion to stay the mandate must be received in the clerk's office within twenty-one (21) days after the entry of judgment or seven (7) days from entry of order on petition for rehearing.

(c) **Duration of Stay Pending Application for Certiorari.** A stay of the mandate pending application to the Supreme Court for a writ of certiorari shall not be effective later than the date on which the movant's application for a writ of certiorari must be filed pursuant to 28 U.S.C. § 2101 or Rule 20 of the Supreme Court Rules, as applicable. If during the period of the stay there is filed with the clerk a notice from the clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that court, the stay shall continue until final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari, the mandate shall issue immediately.

7th Cir R. 41. Stay of Mandate or Stay of Execution of Judgment Enforcing Administrative Order

(a) *Mandate Ordinarily Will Not Be Stayed.* In the absence of extraordinary need, the mandate will not be stayed at the request of a party, except upon a specific motion which includes:

(1) A certification of counsel that a petition for certiorari to the Supreme Court of the United States is being filed and is not merely for delay.

(2) A statement of the specific issues to be raised in the petition for certiorari.

(3) A substantial showing that the petition for certiorari which is being filed raises an important question meriting review by the Supreme Court.

(b) *Time for Filing Motion to Stay.* A motion to stay the mandate must be filed prior to the regularly scheduled date for issuance of the mandate.

(c) *Stay of Execution of Judgment Enforcing Administrative Order Subject to Same Requirement as Stay of Mandate.* Execution of a judgment enforcing an order of an administrative agency will be stayed only on the conditions provided in subparagraph (a) with respect to a mandate.

(d) *Notice to Clerk of Filing Petition for Certiorari.* An attorney filing a petition for certiorari or notice of appeal with the Supreme Court shall, on the date it is mailed or filed, notify the clerk of this court by telephone of the mailing or filing.

8th Cir. R. 41A. Stay or Recall of Mandate

In a direct criminal appeal, the court will grant a motion for stay of issuance of a mandate under FRAP 41 only if the motion sets forth good cause for a stay or clearly demonstrates a substantial question is to be presented to the Supreme Court.

In civil cases including agency proceedings, the court may deny a stay of mandate if the question would not likely be appropriate for determination by the Supreme Court.

Once issued, a mandate will be recalled only to prevent injustice.

9th Cir. R. 41-1 Stay of Mandate

In the interest of minimizing unnecessary delay in the administration of criminal justice, a motion for stay of mandate pursuant to FRAP 41(b), pending petition to the Supreme Court for certiorari, will not be granted as a matter of course, but will be denied if the Court determines that the petition for certiorari would be frivolous or filed merely for delay.

In other cases including National Labor Relations Board proceedings, the Court may likewise deny a motion for stay of mandate upon the basis of a similar determination.

Circuit Advisory Committee
Note to Rule 41-1

Only in exceptional circumstances will a panel order the mandate to issue immediately upon the filing of a disposition. Such circumstances include cases where a petition for rehearing, suggestion for rehearing en banc, or petition for writ of certiorari would be legally frivolous; or where an emergency situation requires that the action of the Court become final and mandate issue at once. The mandate will not be stayed automatically upon the filing of an application to the Supreme Court for writ of certiorari. However, a stay may be granted upon

motion.

When the Court receives a motion for stay or recall of mandate, the Clerk sends it to the author of the disposition or if the author is a visiting judge, to the presiding judge of the panel. The author or presiding judge rules on the motion. The motion will not be routinely granted; it will be denied if the Court determined that the application for certiorari would be frivolous or is made merely for delay.

10th Cir. R. 41 Issuance of Mandate; Stay of Mandate

41.1. Stay Not Routinely Granted

41.1.1. Criminal Cases. To minimize delay in the administration of justice, following the affirmance of a conviction in criminal cases the mandate will issue and bail will be revoked at such time as the court shall order except upon a showing that a petition to stay the mandate would not be frivolous or filed merely for delay, or an independent finding by the court to the same effect, or by a judge of the hearing panel to the same effect. The court, or a judge of the hearing panel, may revoke bail before the mandate is issued. See 18 U.S.C. § 3141(b).

41.1.2. Civil Cases. A principle comparable to 10th Cir. R. 41.1.1 will be applied in connection with affirmed orders of the National Labor Relations Board and in other cases, absent a finding by the court that a petition for certiorari would not result in pointless delay.

41.2. Effect of Petition for Rehearing. A timely filed petition for rehearing will stay the mandate until disposition of the petition, unless otherwise ordered by the court. If the court has ordered the mandate to issue forthwith to minimize delay in the resolution of the appeal, a timely petition for rehearing may be denied without recalling the mandate. If the petition is granted, the mandate will be recalled.

10th Cir. I.O.P. VIII. Decision--Mandate--Costs.

* * * * *

B. *Mandate.*

1. Issuance. Judgments of the court take effect upon the issuance of the mandate. The mandate of the court of appeals is issued 21 days after entry of judgment, unless either a timely petition for rehearing is pending or an explicit court order shortens or lengthens this period. . . .

* * * * *

11th Cir. R. 41-1. Stay or Recall of Mandate.

(a) A motion filed under FRAP 41 for a stay of the issuance of a mandate in a direct criminal appeal shall not be granted upon request. Ordinarily the motion will be denied unless it shows that it is not frivolous, not filed merely for delay, and shows that a substantial question is to be presented to the Supreme Court or otherwise sets forth good cause for a stay.

(b) A mandate once issued shall not be recalled except to prevent injustice.

(c) Unless otherwise expressly provided, granting a suggestion for rehearing en banc vacates the panel opinion and stays the mandate.

(d) Because the timely filing of a petition for rehearing will stay the mandate under FRAP 41, and because a suggestion for rehearing en banc is also treated as a petition for rehearing under 11th Cir. R. 35-6, upon timely filing of a petition for panel rehearing or suggestion of rehearing en banc, the mandate is stayed until disposition thereof unless otherwise ordered by the court.

Fed. Cir. R. 41. Issuance of mandate; stay of mandate.

An order dismissing a case on consent or for failure to prosecute, or dismissing, remanding, or transferring a case on motion, shall constitute the mandate. The date of the certified order shall be the date of the mandate. In appeals dismissed or transferred by the court sua sponte in an opinion, the mandate shall be issued in regular course.

Practice Note. *Suggestion for rehearing in banc does not stay mandate.* If a petition for rehearing is denied, the mandate will be issued 7 days thereafter even if a suggestion for rehearing in banc is pending.

Relation of mandate to application for certiorari; stay of mandate. That a mandate has issued does not affect the right to apply to the Supreme Court for writ of certiorari. Consequently, a motion to stay the mandate is expected to advance reasons for the stay other than merely the intention to apply for certiorari, e.g., to forestall action in the trial court or agency that would necessitate a remedial order of the Supreme Court if the writ of certiorari were to be granted.

U.S. Department of Justice

Office of the Solicitor General

The Solicitor General *Washington, DC 20530*

AUG 12 1993

The Honorable Kenneth F. Ripple
Chairman, Advisory Committee on
Appellate Rules
208 U.S. Courthouse
204 Main Street
South Bend, Indiana 46601-2122

Re: Proposal For Amendment to FRAP 41 Concerning the Issuance of Mandates.

Dear Judge Ripple:

I would like to propose that the Committee consider amending FRAP 41 to clear up a matter of confusion concerning the issuance of mandates by the courts of appeals.

Rule 41(a) currently states that the mandate of the court shall issue 21 days after the entry of judgment, unless the time is shortened or enlarged by order. A timely-filed petition for rehearing will stay the mandate until disposition of the petition unless otherwise ordered by the court. If a petition is denied, the mandate will issue 7 days after entry of the order denying the petition, unless the time is enlarged or shortened by order. A certified copy of the judgment and a copy of the opinion of the court, if any, constitutes the mandate, unless the court directs that a formal mandate issue.

Although Rule 41(a) adequately explains when the mandate will issue, the Rule does not specify when the mandate becomes effective. This omission raises the question whether a mandate becomes effective when it is issued, when it is received by the district court or agency to which it is sent, or when the court or agency below acts upon it.

This problem is significant. For example, if a district court were to issue an injunction that is reversed on appeal, the prevailing party on appeal could not be certain under Rule 41(a) whether he must continue to comply with the injunction until the mandate physically arrives in the district court clerk's office and the district court issues an order vacating the injunction, consistent with the court of appeals mandate. We believe that the court of appeals mandate should govern as soon as it issues, even if the district court or agency below delays, or never does anything, in response to that mandate.

We not been able to find any case law that addresses this issue. The cases hold that district courts are without power to do anything contrary to a court of appeals' mandate, but they do not clarify when the mandate becomes effective. See Finberg v. Sullivan, 659 F.2d 93, 96 n.5 (3d Cir. 1981) (en banc); City of Cleveland v. FPC, 561 F.2d 344, 346 (D.C. Cir. 1977).

Furthermore, only one circuit has a local rule that addresses this problem. Fourth Circuit Rule 41.1 states that "[o]n the date of issuance of mandate, the Clerk of the Court will issue written notice to the parties and the clerk of the lower court that the judgment of the Court of Appeals takes effect that day." Thus, by local rule, a mandate of the Fourth Circuit takes effect on the day it is issued.

We recommend that the Committee adopt the Fourth Circuit's practice as a national rule. In particular, we suggest that the Committee add the following sentence to Rule 41(a):

> The mandate of the court is effective on the date it is issued, and shall be considered as having been entered on the docket of the court or agency below on the date of its issuance.

This language would make it clear that a mandate is effective immediately upon issuance, rather than when a copy of the mandate physically arrives at the district court clerk's office or at the agency, or when those bodies act upon it.

We also note that the same issue arises with respect to Supreme Court mandates, since there is no Supreme Court rule or FRAP rule that states when a Supreme Court mandate is effective. Thus, if the Committee agrees that FRAP 41(a) should be amended along the lines we have suggested above, it also should propose a new rule addressing the effective date of Supreme Court mandates. The new rule concerning Supreme Court mandates could be placed in rule 41 as a new subsection (c), providing as follows:

> **(c) Effective Date of Supreme Court Mandates.** The mandate of the Supreme Court in any case on review from a federal court of appeals shall be treated as effective on the date it is issued, and shall be considered as having been entered on the docket of the court of appeals on the date of its issuance.

Alternatively, the Committee may wish to suggest that the Supreme Court amend its rules to include such a provision.

Thank you for your assistance in this matter.

Sincerely,

Drew S. Days, III
Solicitor General

cc: Carol Ann Mooney
Reporter, Appellate Rules Committee

Robert E. Kopp
Director, Appellate Staff
Civil Division

AGENDA I-G
Item 93-4
Washington, D.C.
September 22-23, 1993

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

FROM: Carol Ann Mooney, Reporter

DATE: September 11, 1993

SUBJECT: Item 93-4, amendment of Rule 41 re: length of time for stay of mandate

A proposed amendment to Rule 41(b) provides that a motion for a stay of mandate must show that a petition for *certiorari* would present a substantial question and that there is good cause for a stay. (A copy of the proposed amendment as submitted to the Judicial Conference is attached to this memorandum.) The proposed amendment was published for comment in January 1993 and the comments were discussed by the Advisory Committee at its April 1993 meeting. In its comment the National Association of Criminal Defense lawyers suggested that the rule be amended further to expand the presumptive period for a stay from 30 days to 90 days. The Committee decided that such a change would need to be published for comment and, as a result, the discussion of the suggestion should be postponed until a later meeting. The suggestion is now before the Committee.

Unless stayed, the mandate of a court of appeals issues 21 days after judgment (except in cases involving the United States[1]). A motion for a stay of mandate must be filed during that time. Fed. R. App. P. 41(b) states that if a stay of mandate is granted, it may not "exceed 30 days unless the period is extended for cause shown." If, however, during the period of the stay, the court of appeals receives notice from the clerk of the Supreme Court that the party who obtained the stay has filed a petition for *certiorari*, the stay continues until final disposition by the Supreme Court.

A party who desires a continuous stay of the mandate, therefore, has less than 51 days in which to file a petition for *certiorari*. (A stay of mandate is issued within 21 days after judgment and it lasts for 30 days, within which time the court of appeals must receive notice from the Supreme Court of the filing of the petition for *certiorari*.) According to the Supreme Court Rules a party who loses in the court of appeals has 90 days in which to petition for *certiorari*. Sup. Ct. R. 31. If, however, the party believes that a continuous stay of the mandate is important and the court of appeals does not extend the mandate beyond the 30 days, the party must file the petition for certiorari

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[1] A proposed amendment to Rule 41(a) provides that in cases involving the United States, the parties have 45 days to file a petition for panel rehearing or petition for rehearing in banc, and the mandate will not issue until 7 days after the expiration of the time for filing a petition or, if a petition is filed, 7 days after denial of the petition. The proposed amendments will be presented to the Judicial Conference this fall.

earlier.

The National Association of Criminal Defense Lawyers points out that the 30-day presumptive period for a stay pending *certiorari* was written into the rule when the period for filing a petition for a writ of *certiorari* in a criminal case was only 30 days. Because the period for filing a petition for *certiorari* is now 90 days in both criminal and civil cases, the association argues that the presumptive period should also be expanded to 90 days. Alternatively, the association suggests that the period be expanded to at least 60 days so that a party has a "reasonable amount of time within which to prepare and file a petition for a writ of certiorari."

The 30-day period may be beneficial because it provides incentive for a party to move quickly to prepare the petition for a writ of *certiorari*. The expenditure of time and money associated with the preparation of a petition for a writ of *certiorari* provides some evidence of the seriousness of the party's belief in his/her position and, therefore, if the petition is filed during the period of the stay, it results in extension of the stay until disposition by Supreme Court. The 30-day period, therefore, insures that the mandate is not stayed for an extended period in a case in which the party may never petition for *certiorari*.

The proposed changes to Rule 41(b) which require a motion for a stay to show that a petition for *certiorari* would present a substantial question and that there is good cause for a stay, may mean that the 30-day period is not needed. If both those criteria are satisfied, is it important to limit the period of the stay to 30 days? If the petition would present a substantial question and if there is good cause for a stay, why should the party be required to prepare the petition in a shorter period than the usual 90 days?

The language of Rule 41(b) creates only a presumptive period for the stay, and the period can be shortened or lengthened in any appropriate case. Therefore, the Committee is asked to consider the generally appropriate period, realizing that in any case the court may shorten or lengthen the period as needed.

Attachment A
Amendments presented to
Judicial Conference 9/93

Rule 41. Issuance of Mandate; Stay of Mandate

* * * * *

(b) *Stay of Mandate Pending ~~Application~~ Petition for Certiorari.* ~~--A stay of the mandate pending application to the Supreme Court for a writ of certiorari may be granted upon motion, reasonable notice of which shall be given to all parties.~~ A party who files a motion requesting a stay of mandate pending petition to the Supreme Court for a writ of certiorari must file, at the same time, proof of service on all other parties. The motion must show that a petition for certiorari would present a substantial question and that there is good cause for a stay. The stay ~~shall~~ cannot exceed 30 days unless the period is extended for cause shown ~~.—If~~ or unless during the period of the stay, ~~there is filed with the clerk of the court of appeals~~ a notice from the clerk of the Supreme Court is filed showing that the party who has obtained the stay has filed a petition for the writ ~~in that court~~, in which case the stay ~~shall~~ will continue until final disposition by the Supreme Court. ~~Upon the filing of a copy of an order of the Supreme Court denying the~~

~~petition for writ of certiorari the mandate shall issue immediately. A~~ The court of appeals must issue the mandate immediately when a copy of a Supreme Court order denying the petition for writ of certiorari is filed. The court may require a bond or other security ~~may be required~~ as a condition to the grant or continuance of a stay of the mandate.

AGENDA I-H
Item 93-5
Washington, D.C.
September 22-23, 1993

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

FROM: Carol Ann Mooney, Reporter

DATE: September 13, 1993

SUBJECT: 93-5, amendment of Rule 26.1 re: use of the term affiliates

At the Committee's April 1993 meeting it reviewed Fed. R. App. P. 26.1 and an amendment to it which had been published earlier in the year; the amendment dealt with the number of copies problem. During the discussion, Mr. Spaniol noted that although the language of Rule 26.1 had been patterned after the Supreme Court Rule, the Supreme Court had recently amended its rule to omit references to "affiliates."

The first sentence of Fed. R. App. P. 26.1 provides:

> Any non-governmental corporate party to a civil or bankruptcy case or agency review proceeding and any non-governmental corporate defendant in a criminal case shall file a statement identifying all parent companies, subsidiaries (except wholly-owned subsidiaries), and affiliates that have issued shares to the public.

The Committee briefly discussed the meaning of the term "affiliates." Judge Boggs stated that he thought the term encompassed "brother" and "sister" corporations; *i.e.*, those owned in whole or in part by the same parent. Judge Williams noted that the term "affiliate" is used in virtually every antitrust consent decree.

Nine circuits have local rules supplementing Fed. R. App. P. 26.1. (The local rules are appended to this memorandum.) Of those nine, six use the term affiliate in their rules. Two of the six define "affiliate" for purposes of the rule.

The D.C. rule states: "For purposes of this rule, 'affiliate' shall be a person that directly, or indirectly through one or more intermediaries, controls, is controlled by, or is under common control with, the specified entity . . .."[1] The Sixth Circuit's definition is similar; it states: "A corporation shall be considered an affiliate of a publicly owned corporation for purposes of this rule if it controls, is controlled by, or is under common control with a publicly owned corporation."[2]

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[1] D.C. Cir. R. 6A.

[2] 6th Cir. R. 25.

Because Fed. R. App. P. 26.1 explicitly requires disclosure of parent and subsidiary corporations, it is the "under common control" provisions of the definitions that is helpful, and it appears to require disclosure of "brother" and "sister" corporations. Disclosure of their existence is required under the rule, however, only if they have issued shares to the public. The disclosure, therefore, of the existence of "full brother" or "sister" corporations, those wholly owned by an entity's parent, would not be required. Disclosure of the existence of affiliates that have issued shares to the public would seem appropriate.

The Seventh Circuit's rule does not require the disclosure of subsidiaries or of "brother" or "sister" corporations. It requires the disclosure only of parent corporations and of publicly held companies owning 10% or more of the stock of the party. The underlying assumption apparently is that a decision adverse to the party would harm significantly only those corporations owning at least 10% of the stock of the party and that an adverse decision would not have sufficient impact upon a subsidiary or sister corporation to require recusal of a judge who owned stock in the subsidiary or sister.

Without further guidance from the Committee, I am uncertain how to proceed.

D.C. Cir. R. 6A.[3] Disclosure of Interests of Parties

A corporation, association, joint venture, partnership, syndicate or other similar entity appearing as a party or amicus in any proceeding shall file a disclosure statement identifying all parent companies, subsidiaries (except wholly-owned subsidiaries), and affiliates that have issued shares or debt securities to the public. For purposes of this rule, "affiliate" shall be a person that directly, or indirectly through one or more intermediaries, controls, is controlled by, or is under common control with, the specified entity; "parent" shall be an affiliate controlling such entity directly, or indirectly through intermediaries; and "subsidiary" shall be an affiliate controlled by such entity directly, or indirectly through one or more intermediaries.

* * * * *

Third Cir. R. 25. Disclosure of corporate affiliations and financial interest.

1) All parties to a civil or bankruptcy case and all corporate defendants in a criminal case shall file a corporate affiliate/financial interest disclosure statement. A negative report is also required.

(2) Whenever a corporation which is a party to an appeal, or to a motion or other proceedings relating to an appeal, is a subsidiary or affiliate of any publicly owned corporation not named in the appeal, counsel for the corporation which is a party shall advise the Clerk in writing of the identity of the parent corporation or affiliate and the relationship between it and the corporation which is a party to the appeal.

* * * * *

Fourth Cir. R. 26.1 Disclosure of Corporate Affiliations and Other Entities with a Direct Financial Interest in Litigation.

(a) All parties to a civil or bankruptcy case, and all corporate defendants in a criminal case, whether or not they are covered by the terms of Federal Rule of Appellate Procedure 26.1, shall file a corporate affiliate/financial interest disclosure statement. This rule does not apply to the United States, to state and local governments in cases in which the opposing party is proceeding without counsel, or to parties proceeding in forma pauperis.

(b) The statement shall set forth the information required by Federal Rule of Appellate Procedure 26.1 and the following:

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[3] Proposed D.C. Cir. R. 26.1 may replace this rule. The proposed rule retains the same language.

(1) A trade association shall identify in the disclosure statement all members of the association and their parents, subsidiaries (other than wholly owned subsidiaries), and affiliates that have issued shares to the public.

* * * * *

Fifth Cir. R. 28.2.1. ***Certificate of Interested Persons***

A certificate will be furnished by counsel for all private (non-governmental) parties, both appellants and appellees, which shall be incorporated on the first page of each brief before the table of contents or index, and which shall certify a complete list of all persons, associations of persons, firms, partnerships, corporations, guarantors, insurers, affiliates, parent corporations or other legal entities who or which are financially interested in the outcome of the litigation. . . .

Sixth Cir. R. 25. Disclosure of Corporate Affiliations and Financial Interest.

* * * * *

(b) *Financial interest to be disclosed.*

(1) Whenever a corporation which is a party to an appeal, or which appears as amicus curiae, is a subsidiary or affiliate of any publicly owned corporation not named in the appeal, counsel for the corporation which is a party or amicus shall advise the clerk in the manner provided by subdivision (c) of this rule of the identity of the parent corporation or affiliate and the relationship between it and the corporation which is a party or amicus to the appeal. A corporation shall be considered an affiliate of a publicly owned corporation for purposes of this rule if it controls, is controlled by, or is under common control with a publicly owned corporation.

* * * * *

Seventh Cir. R. 26.1. Certificate of Interest

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or *amicus curiae,* or a private attorney representing a governmental party, must furnish a certificate of interest stating the following information:

* * * * *

(2) If such a party or *amicus* is a corporation:

(i) its parent corporation, if any; and

(ii) a list of stockholders which are publicly held companies owning 10% or more of the stock of the party or *amicus*.

* * * * *

Eighth Cir. R. 26.1A. Certificate of Interested Persons.

Within ten days after receipt of notice that the appeal has been docketed in this court, each nongovernmental party shall certify a complete list of all persons, associations, firms, partnerships, or corporations with a pecuniary interest in the outcome of the case. This certificate enables judges of the court to evaluate possible bases for disqualification or recusal. . . .

Eleventh Cir. R. 26.1-1. Certificate of Interested Persons and Corporate Disclosure Statement; Contents.

A certificate shall be furnished by appellants, appellees, intervenors and amicus curiae which contains a complete list of the trial judge(s), all attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of the particular case, including subsidiaries, conglomerates, affiliates and parent corporations, and other identifiable legal entities related to a party. In criminal and criminal-related cases, the certificate shall also disclose the identity of the victim(s).

Federal Cir. R. 47.4. Certificate of Interest.

(a) *Contents.* To determine whether recusal is necessary or appropriate, an attorney for a party or amicus curiae other than the United States must furnish a certificate of interest (in the form set forth in the appendix of these rules) stating:

(1) The full name of every party or amicus represented by the attorney in the case;

(2) The name of the real party in interest if the party named in the caption is not the real party in interest;

(3) The corporate disclosure statement prescribed in Rule 26.1 of the Federal Rules of Appellate Procedure; and

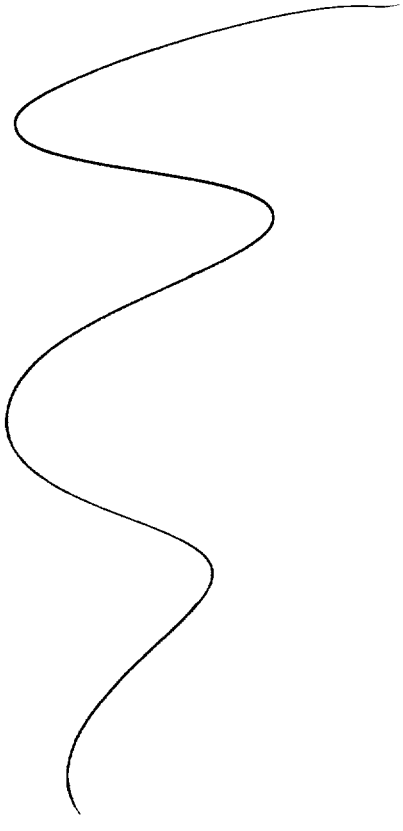
(4) The names of all law firms whose partners of associates have appeared for the party in the lower tribunal or are expected to appear for the party in this court. . . .

Supplemental

Agenda

Book

Materials



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

ROBERT E. KEETON
CHAIRMAN

PETER G. McCABE
SECRETARY

CHAIRMEN OF ADVISORY COMMITTEES
KENNETH F. RIPPLE
APPELLATE RULES

EDWARD LEAVY
BANKRUPTCY RULES

SAM C. POINTER, JR.
CIVIL RULES

WILLIAM TERRELL HODGES
CRIMINAL RULES

RALPH K. WINTER, JR.
EVIDENCE RULES

September 23, 1993

MEMORANDUM TO THE HONORABLE ALICEMARIE H. STOTLER

FROM: ROBERT E. KEETON

SUBJECT: *Judicial Conference Action of 9/20/93 on FAX Filing*

I write to confirm and supplement my oral report to you about the Judicial Conference action of September 20, 1993, on fax filing.

The formal action was adoption of the following motion made by Chief Judge Mikva:

> The Judicial Conference referred to the Committee on Rules of Practice and Procedure, in coordination with the Committees on Automation and Technology and Court Administration and Case Management, for a report to the September 1994 Conference, the question of whether, and under what technical guidelines, filing by facsimile on a routine basis should be permitted.

Judge Mikva's explanation of his motion included a comment that I interpreted as meaning the Rules Committee may need to be exposed to a little heat from the Judicial Conference to get it moving. This comment was made after I had explained that the Rules Enabling Act process would require a minimum of four months - and preferably a longer period - for public comment, as well as consideration by Advisory Committees and the Standing Committee both before and after the period of public comment. Judge Mikva had earlier supported my comment that for the Judicial Conference to bypass the Rules Enabling Act process would be an embarrassment to our continuing efforts to get Congress not to do that in other matters of greater significance than fax filing. Thus, when I put his several comments together, I infer that he, at least, and perhaps many others among those who contributed to the substantial majority voting for Judge Mikva's motion, are pressing the Rules Committees to find a way to expedite the Rules Enabling

Act process so a proposal can be ready for the Judicial Conference to adopt it (or vote to send it on to the Supreme Court and Congress, if rules amendments are required) at the September 1994 meeting of the Judicial Conference.

Is it possible to proceed that rapidly, consistent with the requirements of the Rules Enabling Act? The answer may depend on what the proposal is and how controversial it turns out to be in the Bench and Bar. In any event, however, in order to be well prepared for the September 1994 Conference meeting, you will need to be able to demonstrate that the Rules Committees have done their best to comply with both the letter and spirit of the September 1993 vote.

If you wait for a vote of the Standing Committee (at its January 1994 meeting) to approve publication of a draft for comment, the comment period could not commence before February or March and could not close before May or June. That would be too late for reconsideration by the Advisory Committees in time to have their recommendations before the Standing Committee at its June 1994 meeting, when it would need to act in order to have a recommendation before the Judicial Conference in September 1994.

If you want to consider requesting the Standing Committee to approve publication by telephone vote before the Committee meets in January 1994, the key obstacle is the necessity of stirring the Advisory Committees to prepare almost immediately, for publication, a suitable draft or drafts of proposed rules amendments (it might need to be more than a single draft, because the Bankruptcy Committee strongly believes it has special reasons for not allowing local option for fax filings in bankruptcy clerks' offices).

Judge Boyle from Rhode Island (the district judge member of the Judicial Conference from the First Circuit) made the point both in the meeting and more fully to me outside the meeting that if we have either a rule of procedure, or a Judicial Conference guideline, or both, regarding fax filing, probably it should also deal with fax service by lawyer upon lawyer. Fax service may be less difficult to deal with because of the consensual context - both lawyers must have fax machines and machines that are compatible before it can happen. But problems may nevertheless arise about how quick and reliable the service will be, and we may get a fair amount of public comment about any proposed rule on fax service.

I have two comments as an ex officio member of the Subcommittee on Style (through September 30 only, of course).

First, on the flight down to Washington on September 20, I was reading over the latest draft of "GUIDELINES FOR FILING BY FACSIMILE," Agenda F-7 (Appendix A), which you will note bears a striking similarity to the high-pressure draft done by the conscripts we sent off to a separate room to work while the Standing Committee was meeting in June. In part II (2) you will see a proposed style change I interlined to deal

with what seemed to me an ambiguity. In the Conference session, somebody raised a question about whether II (2) meant the fax machine had to be in the Clerk's office? Before I could answer, "Clearly not," others said, "Yes, of course." For me, this was a clear demonstration of the Standing Committee's point that the current draft is still imperfect.

Second, my other interlineations on the attached draft (changing the title to "Guidelines for Facsimile Transmission" and proposing associated changes) are suggestions I was thinking about, as a means of avoiding conflicts between guidelines and rules, before the discussion this morning (September 23) in the meeting of the Advisory Committee on Appellate Rules. By one or more separate communications, you will receive more information about the very constructive recommendations of that Committee.

I will leave further distribution of this memorandum to your discretion.

Bob

Robert E. Keeton

Attachments

Appendix

III. *Technical requirements:*

For purposes of these guidelines, in order for courts to accept the filing of papers by facsimile on a routine basis, the following technical requirements must be met. [1]

(1) Facsimile Machine Standards:

(a) A facsimile machine must be able to send or receive a facsimile transmission using the international standard for scanning, coding, and transmission established for Group 3 machines by the Consultative Committee of International Telegraphy and Telephone of the International Telecommunications Union (CCITT), in regular resolution.

(b) The receiving unit must be connected to and print through a printer using xerographic technology, or a facsimile modem that is connected to a personal computer that prints through a printer using xerographic technology. Only plain paper (no thermal paper) facsimile machines may be used.

(2) Additional Facsimile Standards for Senders:

(a) Each sender must have the following equipment standards:

(i) CCITT Compatibility - Group 3 [2];

(ii) Modem Speed - 9600-2400 bps (bits per second) with automatic stepdown; and

(iii) Image Resolution - Standard 203 x 98.

(b) A facsimile machine used to send documents to a court must be able to produce a transmission record, as proof of transmission at

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[1] The Administrative Office will monitor technological advances and will recommend modifications to these guidelines when necessary.

[2] Group 3 fax machines are currently the most common, accounting for 97% of the devices on the market. Group 3 compatibility is mandatory for public applications at the present time. Group 3 fax can utilize the public telephone network (voice grade lines) and does not require special data lines. Group 3 fax devices transmit at under 1 minute per page, may have laser printing capability, and use various standard data compression techniques to increase transmission speed.

(2) Unless a local rule or court order in a particular case requires otherwise, the cover sheet must be the first page transmitted. The cover sheet need not be filed in the case and is not counted toward any page limit established by the court.

(3) The facsimile cover sheet does not replace any cover sheet that the court may require. It is for the clerk's use in identifying the document and identifying any applicable fees.

VIII. *Fees:*

(1) Payment of filing fees and any additional charges prescribed or authorized by the Judicial Conference for the use of the facsimile filing option shall be made in a manner determined by the Administrative Office.

(2) If a court authorizes the filing of papers by facsimile on a routine basis, the clerk must ensure that appropriate filing fees and any additional charges are paid.

(3) Other Fees for Filing by Fax [4]

(a) When documents are received on the court's fax equipment, the court shall collect the following fees, in addition to any other filing fees required by law:

For the first ten pages of the document, excluding the cover sheet and special handling instruction sheet . . . . . $ 5.00

For each additional page . . . . . $ .75

Any necessary copies to be reproduced by the court, for each page [5] . . . . . $ .50

(b) No fees are to be charged for services rendered on behalf of the United States.

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[4] These fees may be collected once the Judicial Conference approves amendments to the Miscellaneous Fee Schedules promulgated under 28 U.S.C. §§ 1913, 1914, and 1930.

[5] See Miscellaneous Fee Schedules.

Rule 25. Filing and Service.

(a) Filing.

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

(A) by mail addressed to the clerk;

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

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

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

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

(4) The clerk must not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or by any local rule or practice.

* * * *

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

(d) Proof of Service.

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

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 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 if service was accomplished by mailing, the addresses to which the papers were mailed, certified by the person who made service. Proof of service may

United States District Court
Eastern District of Kentucky

William O. Bertelsman
Chief Judge
Covington, Kentucky 41012

P.O. Box 1012
(606) 655-3800

April 12, 1993

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

Re: Proposed Mandamus Rule

Dear Judge Ripple:

First, I wish to express my thanks to you and the members of your Committee for inviting me to express my comments on the above rule, which was discussed at the Standing Committee meeting in December 1992.

After that meeting, I asked my law clerk to do some background research on the history of mandamus. Since in his youthful exuberance he did an excellent job, I am attaching a copy of his memorandum for your reference. I would like to refer to certain parts thereof which illustrate my points.

First of all, the very filing of a writ of mandamus constitutes an express or implied accusation against the trial judge that he/she has perpetrated a judicial usurpation of power which will justify the invocation of this extraordinary remedy. In re Allied Signal, Inc., 915 F.2d 190 (6th Cir. 1990) (Attached memorandum, p.4).

In some mandamuses, the parties merely seek a review of some issue of law for which there is no adequate remedy by appeal. In these kinds of mandamuses, the integrity or prestige of the trial judge is no more involved than in any proceeding for appellate review.

Other kinds of mandamuses, such as those concerning disqualifications or the implementation by the trial judge of novel procedures, attack the trial judge directly and the dignity of his/her office requires, in my view, a right of reply in those cases.

An excellent example of the latter kind of mandamus is In re Allied Signal, Inc., supra, wherein certain district judges handling asbestos cases created a novel procedure which, in their view, would expedite the handling of such cases. The mandamus was filed to prevent the implementation of this procedure. The eminent Chief Judge Lambros felt so strongly about dealing with this thorny problem that he not only filed a response but appeared in person to argue before the Sixth Circuit.

Such a personal appearance would be extremely rare and the judge's appearance would almost always be by a written submission. But the trial judge should have the right to file such a written submission in cases where his/her integrity or authority has been attacked and not have to approach the Court of Appeals as a supplicant for the right to be heard.

In these kinds of cases, the view of the court as an institution needs to be represented.

Speaking personally, I try not to file a response in mandamus cases and to allow the parties to represent me without my having any contact with them, if it is in some party's interest to support the ruling of the court in the manner that would be involved in any appeal.

There have been cases involving innovative procedures, however, for example, the imposition of trial time limits, where I have been threatened by the parties with mandamus. As it happens, the mandamus was never filed but, if it had been, the interests of the court would not have been represented by the parties.

For instance, in that situation, when one party threatened the mandamus and I asked the other party's position, it was: "Your Honor, I feel that the plaintiff should have as much time as they would like to have and so should we."

In summary, I see no problem with eliminating the trial judge as named party, and thereby reducing conflict of interest problems.

However, I respectfully submit that the trial judge should have a right to file a response and not have to request the leave of court to do so. As noted in the attached memorandum, the proposed rules are also inconsistent with the Supreme Court rules.

I would like to thank the Committee in advance for their consideration of these views.

With kindest regards, I remain

Sincerely yours,

William O. Bertelsman

William O. Bertelsman
Chief Judge

WOB/ptb
Enclosure

M E M O R A N D U M

TO: JUDGE BERTELSMAN
FROM: KEN DREIFACH
RE: PROPOSED CHANGES IN APPELLATE RULE 21 (MANDAMUS)
Date: April 2, 1993

I. Historical Background of Writ of Mandamus

The writ of mandamus is a remedy of great antiquity, which originated in England. It appears to have been used as early as the reign of Edward III,[1] and, at that time, represented the control assumed by the King's judges over the autonomous organs of local government. In time, mandamus was employed "in all cases where there was a legal right to justice, but for which right the law had not provided any specific legal remedy." Thomas Tapping, The Law and Practice of the High Prerogative Writ of Mandamus 3 (1848). Specifically, the writ was often employed to enforce a person's right to perform a service or exercise a function, after dispossession of such right by an overseeing authority. See Tapping at 12. Similarly, the writ was applicable to procure restitution from a party who had committed a criminal act, where indictment would not serve a similar purpose.[2] By contrast, the writ would not lie where any other legal remedy, such as appeal, equity, indictment or execution (as in a debt) would serve the same purpose. See generally, Tapping

[1] See 52 Am Jur. 2d Mandamus § 2.

[2] Tapping at 24 (citing R. v. Severn Railway, 2 B & A 646).

at 9-20.[3]

It appears that the writ was primarily used in 17th century England to remedy the loss of some position or office. See Rapp v. Van Dusen, 350 F.2d 806, 811 (1965) (discussing roots of mandamus). By the time of Blackstone, mandamus had become more widely used in other matters, notably the supervision by the Court of King's Bench over inferior courts, "usually in matters more akin to judicial administration than to judicial review." Id. at 811; see also Sir Carleton Kemp Allen, Law & Orders 250 (1956) (noting that "mandamus more frequently concerns the administrative than the judicial," although it "may also be powerful in the [judicial] sphere").

By the mid-19th Century, mandamus was applied to a wide range of subjects, providing they had interfered with some right (again, most often the right to occupy an office). Among its applications were commanding the admission and swearing in of public officials, such as aldermen (by the Court of Aldermen); the restoration to public office of public servants, such as clerks, comptrollers, constables and ale-tasters (as the ale-taster of Honitan); and the holding of elections (as of burgesses of a borough). Mandamus was also occasionally applied in the less "public" spheres, as to order the swearing in of a director of a chartered company, the removal of a public nuisance, or the payment of alimony. The writ was often employed against inferior

[3] Thus, mandamus would not lie to command the Bank of England to transfer stock, where an action on the case existed. R. v. Bank of England, 1 Doug. 524.

courts, not only to restore persons to positions, but also to command inferior jurisdictions to enter continuances, hear cases and appeals, to make a record. Tapping at 91, 109-112. The writ would not be applied, however, to command discretionary acts, such as commandment of justices to issue an alehouse license, or to rehear an application for an alehouse license. Tapping at 40-41.

Upon application of the writ, the party whose action was demanded was required to respond. Id. at 290. No distinction appears to have been made between a respondent-court and any other respondent party. However, as one American court has pointed out, because the action demanded was usually more administrative than legal, "no difficulty arose [as in conflict of interest] in requiring a judge to make return to the application for the writ." Rapp, 350 F.2d at 811.

II. Rule 21 Currently and Its Proposed Amendment

In American law, the writ of mandamus is, of course, codified at 18 U.S.C. § 1651 (the All Writs Act) and its implementing rule, Fed. R. App. P. 21, as well as at Sup. Ct. R. 20 (1992). As in England, the writ in an American federal court may be employed against a wide array of respondents, to order performance of a non-discretionary act. However, the writ is an extraordinary remedy granted only under exceptional circumstances. See 16 C. Wright & A. Miller, Federal Practice and Procedure: Jurisdiction § 3932 (1977).

Of particular relevance here, mandamus relief is often directed against district courts. The Supreme Court has recognized that the writ is available where a district court, although possessing jurisdiction, has taken actions that were "not mere error but usurpation of power." De Beers Consol. Mines v. United States, 325 U.S. 212, 217 (1945).[4]

Rule 21 itself, titled Writs of Mandamus and Prohibition Directed to a Judge or Judges and Other Extraordinary Writs, was promulgated in 1967, its authority derived from Section 1651. The rule currently provides:

> (a)... Application for a writ of mandamus or of prohibition directed to a judge or judges shall be made by filing a petition therefor with the clerk of the court of appeals with proof of service on the respondent judge or judges and on all parties to the action in the trial court.
> . . . .
>
> (b) If the court is of the opinion that the writ should not be granted, it shall deny the petition. Otherwise, it shall order that 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 .... 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 ....

Thus, by providing that a trial judge be named as a party, and treated as such with respect to service of papers, Rule 21, in its present form, insures the right of a trial judge to

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[4] For common issues addressed by such petitions, see cases cited at infra notes 7-15 and accompanying text.

respond in a mandamus proceeding against him.[5]

The proposed Rule 21, however, will provide that "[t]he petition shall be titled simply, In re _____, Petitioner. All parties below other than the petitioner are respondents for all purposes." It will likewise eliminate the provisions insuring a district judge's right to file a brief,[6] and provide:

> 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.

(Emphasis added.)

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[5] The Supreme Court rules also specifically recognize the right of a judge to oppose a mandamus petition, by means of a brief. Sup.Ct.R. 20 (1992), titled Procedure on a Petition for an Extraordinary Writ, provides:

> .3 (b) The [mandamus] petition shall be served on the judge or judges to whom the writ is sought to be directed and shall also be served on every other party to the proceeding .... The judge or judges and the other parties may ... file 40 printed copies of a brief or briefs in opposition thereto .... If the judge or judges who are named respondents do not desire to respond to the petition, they may so advise the Clerk and all parties by letter. All persons served shall be deemed respondents for all purposes in the proceedings in this Court.

[6] Specifically, the proposed rule will eliminate the sentences reading:

> 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 comments to the proposed rule do, however, note that "[a] judge who wishes to appear may seek an order permitting the judge to appear." Committee Note Subdivision (b).

This proposal reflects the fact that the local rules of nine circuits state that a petition for mandamus should not bear the name of the trial judge. Minutes of Meeting of Advisory Committee on Appellate Rules, Oct. 20 & 21, 1992, at 10. Six of those local rules further provide that, unless otherwise ordered, the trial judge shall be represented pro forma by counsel for the party opposing the relief. Id. The proposal is thus an attempt to codify those local rules.

Similarly, while Rule 21 requires that a judge advise a clerk by letter if he does not wish to appear, six of the local rules reverse this presumption, and require that a judge who wishes to appear seek an order permitting him to. Id.

Supporters of the proposed rule changes might well observe that the current rule is somewhat anomalous, given these contrary local rules and the simple fact that, as the Committee notes, "a judge may not wish to appear in the proceeding." No doubt true, this assertion nonetheless ignores an important minority of mandamus cases in which judges have not only made appearances, but also filed briefs. In addition to the cases discussed above, district judges have put forth the effort to file briefs -- often lengthy ones -- in cases addressing a wide range of legal issues. Thus, district judges have answered writs addressing their

denials of motions for jury trial;[7] orders vacating verdict[8] or dismissing indictment[9], or granting new trial[10]; their findings of fact and conclusions;[11] their reference to magistrate and denial of jury trial;[12] their innovative sentencing techniques;[13] their transfer of cases to another district;[14] or their denial of transfer.[15]

The remainder of this memorandum attempts to reconcile the tension between the notion that judges should best avoid the mandamus arena, and the countervailing, long-recognized interest that district judges have in appearing in that arena. It analyzes the breadth and scope of the policies cited by courts which have discouraged judicial participation in mandamus

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[7] See, e.g., In re Zweibon, 565 F.2d 742 (D.C.Cir. 1977).

[8] United States v. Smith, 156 F.2d 642 (3d Cir. 1946), rev'd, 331 U.S. 469.

[9] United States v. Weinstein, 452 F.2d 704 (2d Cir. 1971), cert. denied sub nom. Grunberger v. United States, 406 U.S. 917 (1972).

[10] FDIC v. Alker, 234 F.2d 113 (3d Cir. 1956); United States v. Smith, 156 F.2d 642 (3d Cir. 1946).

[11] Madden v. Perry, 264 F.2d 169 (7th Cir.), cert. denied, 360 U.S. 931 (1959).

[12] William Goldman Theatres v. Kirkpatrick, 154 F.2d 66 (3d. Cir. 1946).

[13] United States v. Regan, 503 F.2d 234 (8th Cir. 1974), cert. denied sub nom. 420 U.S. 1006 (1975).

[14] Swindell-Dressler Corp. v. Dumbauld, 308 F.2d 267 (3d Cir. 1962).

[15] Minnesota Mining and Mfg. Co. v. Platt, 314 F.2d 369 (1963), rev'd, 376 U.S. 240 (1964).

proceedings, and which presumably have spurred the proposed changes.

III. Analysis of Proposed Changes

1. Removal of Long-Recognized Right to File

It is not an overstatement to say that the proposed Rule 21 strips district judges of a long-recognized right -- the right to answer a mandamus petition filed against them. The current Rule 21 merely implemented what was previously recognized as the right of a district judge to file an answer to a writ of mandamus against him (although judges rarely exercised that right). For a sampling of such pre-Rule 21 cases in which the district judge filed a brief, see Swindell-Dressler Corp. v. Dumbauld, 308 F.2d 267 (3d Cir. 1962); Nelson v. Grooms, 307 F.2d 76 (5th Cir. 1962); Madden v. Perry, 264 F.2d 169 (7th Cir.), cert. denied, 360 U.S. 931 (1959); FDIC v. Alker, 234 F.2d 113 (3d Cir. 1956); United States v. Smith, 156 F.2d 642 (3d Cir. 1946); William Goldman Theatres v. Kirkpatrick, 154 F.2d 66 (3d Cir. 1946).

In fact, both before and since promulgation of the rule, Courts of Appeals have, pursuant to Rule 21, generally ordered district judges to file an answer to a mandamus petition. See Yagman v. Republic Ins., 137 F.R.D. 310, 313 (C.D. Cal. 1991) ("Pursuant to Rule 21 of the Federal Rules of Appellate Procedure, unless the Circuit Court denies a petition for mandamus, the appellate court must order the district judge to answer the petition."), vacated, ____ F.2d _____, No. 91-55871,

1993 WL 54583 (9th Cir. March 4, 1993). This has taken the form of a "show cause" order directed to the district court. See, e.g., United States v. Weinstein, 452 F.2d 704 (2d Cir.), cert. denied sub nom. Grunberger v. United States, 406 U.S. 917 (1972); Rapp v. Van Dusen, 350 F.2d 806 (3d Cir. 1965); Minnesota Mining and Mfg. Co. v. Platt, 314 F.2d 369 (1963); Swindell-Dressler, 308 F.2d at 272.

The proposed changes are thus quite significant, in that they completely shift the nature and focus of a judge's answer to a mandamus petition. Filing an answer, always a matter of right which Courts of Appeals have requested district courts to exercise (despite their myriad other duties), will now be a matter left to the discretion of the Courts of Appeals.[16]

2. Policies Reflected by Proposed Changes: Van Dusen Rule and Its Progeny

The policy change probably represents the view that an aura of impropriety, even partiality, attaches when a judge files a brief in an action that is before him. The Supreme Court has noted that a writ of mandamus has "the unfortunate consequence of making the judge a litigant, obliged to obtain personal counsel or to leave his defense to one of the litigants before him." Ex Parte Fahey, 332 F.2d 258, 260 (1947). Some commentators, as

[16] An interesting question, incidentally, is whether, as in the cases cited supra, Courts of Appeals may, under the changes, still order a district judge to file an answer, as they might for any other respondent. Given the changes, I would assume that they cannot.

well, have opined that a judge's direct involvement is to be discouraged. See, e.g., Fullerton, Exploring the Far Reaches of Mandamus, 49 Bklyn L. Rev. 1131, 1140 (1983) (suggesting that making a judge a respondent may have "the appearance of judicial partiality").

This view has its legal roots in caselaw dating from the mid-1960's -- before the promulgation of the present Rule 21 -- when the Third Circuit adopted the practice of deeming district judges mere nominal respondents, rather than parties to the action. As stated above, nine circuits now require that a mandamus petition not bear the name of the district judge.

The seminal case representing this viewpoint is Rapp v. Van Dusen, 350 F.2d 806 (3d Cir. 1965). There, District Judge Van Dusen granted a motion to transfer to another district a series of personal injury suits. Plaintiffs, wishing to overturn his order, sought mandamus review, naming as respondents the defendants and the Judge. After eventual disposition and remand of the case by the Supreme Court,[17] plaintiffs moved to disqualify Judge Van Dusen, arguing that in complying with the Third Circuit's order to file an answer to the petition for mandamus, the Judge had consulted with defense counsel. The Third Circuit ruled that Judge Van Dusen's conduct disqualified him from further presiding over the litigation. The court reasoned that "the proper administration of justice requires of a judge not only actual impartiality, but also the appearance of a

[17] Van Dusen v. Barrack, 376 U.S. 612 (1964).

detached impartiality." 350 F.2d at 812. Such an appearance was sullied not only because Judge Van Dusen had met with opposing counsel to file his brief, but also for the more general reason that he had become a "litigant" to the action.

The Third Circuit thus set forth a new rule:

> [W]here mandamus [is] sought to review an order of transfer, the judge below, although named as a respondent, shall be deemed a nominal party only and the prevailing parties in the challenged decision shall be deemed to be respondents and permitted to answer the petition.

350 F.2d at 812-13.

The court reasoned that its new rule would have several beneficial effects. First, it would "keep [a judge] from becoming entangled as an active party to litigation in which his role is judicial and in which he has no personal interest." 350 F.2d at 813. Second, it would ease the burdens of the trial bench by making it "unnecessary for a judge to retain counsel and thus ... avoid burdening him with the undesirable alternatives of acting as his own counsel, or seeking outside counsel ... or obtaining the services of counsel for the successful parties ...." Id. Finally, it would enhance judicial integrity and the appearance of propriety, by "guard[ing a judge] from engaging in ex parte discussions with counsel or aligning himself even temporarily with one side in pending litigation." Id. The Third Circuit also implicitly disapproved of the proposed Fed.R.App.P. Rule 20, now Rule 21, which would continue to make the judge a respondent. See 350 F.2d at 812-13.

Despite the subsequent passage of Rule 21, deeming the judge a respondent who shall be ordered to file an answer, several Circuits have instead followed the "Van Dusen rule," discouraging district judges from filing briefs. Those Circuits have done so either through caselaw,[18] or by promulgating local rules[19] directing that a district judge be named as nominal respondent and represented pro forma by the party opposing the relief.

3. "Van Dusen" Rule Discouraging Participation of District Judges Contemplates Exceptions

The Van Dusen court itself expressly contemplated at least one category of exceptions to the rule discouraging participation of District Judges in mandamus proceedings, drawing a distinction between "those cases where an attack is made on the merits of a judicial act and those rare instances where the claim is directed against the judge himself." 350 F.2d at 812. The court noted

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[18] See, e.g., United States v. King, 482 F.2d 768, 772 & n.24 (D.C.Cir. 1973) (following Van Dusen, court held that district judge need not be joined in mandamus action, as that was a "dispensable bit of formalism"); Walker v. Columbia Broadcasting System, Inc., 443 F.2d 33, 34 (7th Cir. 1971) (recognizing that "mandamus proceeding seeking, in effect, a review of the intrinsic merits of [judge's] action [regarding transfer of case] was in reality an adversary proceeding between the parties to the underlying ... suit"); General Tire & Rubber Co. v. Watkins, 363 F.2d 87 (4th Cir.) (adopting Van Dusen rule prospectively), cert. denied 385 U.S. 899 (1966); see also In re Justices of Supreme Court of Puerto Rico, 695 F.2d 17, 23 (1st Cir. 1982) (usually, where judge is named as defendant in mandamus case, he is merely "a formal participant").

[19] See, e.g., 1st Cir.Loc.R. 21 (to the extent that a mandamus petition seeks relief referable to judicial act, "unless otherwise ordered the judge shall be represented pro forma by counsel for the party opposing the relief").

that in those latter such cases, i.e. "the rare occasion in which the ground for the application is extrinsic to the merits of a decision," it would be appropriate for the court to file an answer and contest the petition. Id. at 813. As examples, the court noted one case in which a judge was required to rule promptly on a motion for preliminary injunction[20] and another in which a "recalcitrant" judge was ordered to proceed with a desegregation case.[21] Id.

Similarly, courts following Van Dusen have been careful to specify that the "Van Dusen rule" applied to mandamus petitions seeking review of "the intrinsic merits" of a judge's action. See, e.g., United States v. Haldemann, 559 F.2d 31, 138 (D.C.Cir. 1976) (where sole purpose of mandamus petition is to obtain "determination on the intrinsic merits of a judicial act," -- there regarding release of evidence to Congress - judge is at most a nominal party), cert. denied sub nom. Ehrlichman v. United States and Mitchell v. United States, 431 U.S. 933 (1977); Walker v. Columbia Broadcasting System, Inc., 443 F.2d 33, 34 (7th Cir. 1971) (judge was a nominal party where petition sought review of "intrinsic merits," of judicial action -- there, regarding transfer to another district).

Precedent does not offer guidance as to what mandamus issues are "extrinsic to the merits of a decision," and thus exempted

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[20] Davis v. Board of School Comm'rs of Mobile County, Ala., 318 F.2d 63 (5th Cir. 1963).

[21] Hall v. West, 335 F.2d 481 (5th Cir. 1964).

from the "Van Dusen rule." See Van Dusen 350 F.2d at 813. At a minimum, though, this definition would probably include petitions addressing docketing matters, unnecessary delay, conduct of or cessation of proceedings, and administrative matters. See, e.g., id. (citing cases); see also In re IBM, 687 F.2d 591 (2d Cir. 1982) (Judge Edelstein filed 66 page brief opposing writ of mandamus to compel him to cease further proceedings, based on asserted termination of case and lack of jurisdiction); Nelson v. Grooms, 307 F.2d 76 (5th Cir. 1962) (district judge filed answer to petition explaining that time, effort, and expense would be saved by his action postponing a hearing, pending the outcome of an identical case filed by other plaintiffs).

The proposed rule would violate the spirit of the Van Dusen exceptions in several other types of cases in which no other party can competently express the judge's viewpoint. For instance, a common "instance[] where the claim is directed against the judge himself," as Van Dusen put it,[22] occurs upon petition for recusal or disqualification. Although that situation, like a transfer, probably falls under the category of "intrinsically legal" acts, it is nonetheless true that a judge can best argue against his own disqualification. Over the years, several judges have done so, raising factual or legal arguments against disqualification which might otherwise have gone unaddressed. See, e.g., City of Pittsburgh v. Simmons, 729 F.2d 953, 955 n.2 (3d Cir. 1984) (judge "categorically denied" certain

[22] Van Dusen, 350 F.2d at 812.

charges raised by petition seeking recusal);[23] Rosen v. Sugarman, 357 F.2d 794 (1966), (writ denied where district judge responded, through U.S. Attorney's Office, to charges that he "had a personal bias and prejudice against [the petitioner]"); cf. Moody v. Simmons, 858 F.2d 137, 141 (3d Cir. 1988) (judge filed 75-page brief in answer to writ seeking vacation of his comments and actions after recusal from case), cert. denied, 489 U.S. 1078 (1989); Brown v. Baden, 815 F.2d 575 (9th Cir.) (judge opposed, through counsel, petition demanding his reassignment of case (discussed in Yagman v. Republic Ins., 137 F.R.D. 310, 313 (C.D. Cal. 1991)), cert. denied sub nom., Real v. Yagman, 484 U.S. 963 (1987).

Other situations arise in which a trial judge stands in a uniquely appropriate position to answer a mandamus petition. For instance, where a judge seeks to employ innovative trial or settlement techniques he might find himself standing alone against one or more parties. In In re Allied-Signal, Inc., 915 F.2d 190 (6th Cir. 1990), Judge Thomas D. Lambros faced a mandamus petition contesting assertedly ultra-jurisdictional acts which he took to facilitate a consistent resolution for thousands of asbestos cases, both within and beyond the borders of his district. Judge Lambros had attempted to certify a nationwide, mandatory class action, to ensure that the defendants' limited resources were fairly allocated. Upon mandamus review, Judge

[23] Simmons, a Third Circuit case, suggests that an exception to Van Dusen lies when recusal is sought.

Lambros took the unusual step of appearing at oral argument to defend his actions. After hearing Lambros' arguments, the Sixth Circuit offered him guidance as to class certification, in lieu of issuing a mandamus order.

A judge against whom mandamus review is sought might have other public policy concerns, very specific to a particular case. In Smith v. Phillips, 881 F.2d 902 (10th Cir. 1989), representatives of prisoners who had died of strychnine poisoning while in custody brought suit against various officials. The case was settled before trial and confidentiality agreements were signed. Judge Lyn R. Phillips signed the dismissal order, but denied the confidentiality order. After an appeal on another issue, Judge Phillips ordered the settlement terms made available to the public, and the petitioners refused, and filed a petition for mandamus. Plaintiffs were not represented, their interests having presumably been satisfied. Thus, Judge Phillips alone was left to file a brief favoring the disclosure, in opposition to petitioners' application.

In all of the cases cited above, the district judges were either the best persons to address the mandamus petition, or had specific concerns unaddressable by the other parties. It would concededly be difficult to set forth a rule distinguishing such cases from those in which, as contemplated by the "Van Dusen rule," district judges should refrain from participation. The best solution, then, might well be to leave the judges' rights intact, to the extent that the Appellate Rules may do so.

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

CHAMBERS OF
DANNY J. BOGGS
CIRCUIT JUDGE
220 GENE SNYDER U.S. COURTHOUSE
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April 19, 1993

Professor Carol Mooney
Notre Dame Law School
Notre Dame, IN 46556

Dear Professor Mooney:

I am writing to convey the general results of our Sub-Committee's consideration of the question of revisions to the apparatus of sanctions that may be imposed by the courts of appeals for various types of misconduct by lawyers. The conclusion of the Committee was that further consideration of the topic would not be fruitful at this time, though there was a sense that the area does bear watching, and may be revisited in the future.

In particular, the following points, I believe, were generally agreed to by the members of the subcommittee:

(1) The current apparatus, including FRAP 38 and 46(c), and the statutes 28 USC § § 1912 and 1927, is not a model of clarity;

(2) However, the bench and bar are generally familiar with it, and major problems have not arisen from its use;

(3) The apparatus is probably sufficient to permit courts who have appropriate occasion to do so to sanction improper behavior;

(4) With the consideration of the Committee's draft rule on notice and opportunity to be heard (Item 86 - 89) additional comment and experience may be generated that will be useful for future consideration.

In our deliberations, several approaches were suggested and considered. Mr. Mumford felt that the Appellate Rules should simply adopt Rule 11 of the Civil Rules by reference, primarily for the virtue of having a single form of words to guide the bench and bar, and a growing body of experience and precedent to guide it.

Judge Hall was quite opposed to this, seeing Rule 11 as a source of ever-expanding litigation and contention, and one that should certainly not be expanded into the appellate area. Mr. Froeb felt that, ideally, the area of explicitly sanctionable activity should be somewhat expanded, to provide protection against unwarranted and vexatious conduct.

We discussed the approach of the draft model rule of March 14, 1991 (Item 86-24) which would impose sanctions in three areas

-- frivolous appeals

-- appeals taken for delay or other improper purpose and

-- activities that needlessly multiply proceedings and increase the cost of litigation.

While the Sub-Committee was generally in agreement that these were appropriate areas for sanction, we ultimately tended in the direction that while adopting a new (albeit clearer and more rational) form of words had some advantages, it was not clear that there would be a net benefit from going to a new set of words and abandoning ones which the participants had become familiar.

The Sub-Committee was generally of the view that, if the matter were to be pursued, sanctions probably should be explicitly limited to lawyers, or certainly not explicitly permitted to be levied on parties. Given the nature of appellate practice, the situations that arise under Civil Rule 11 where parties are the sanctionable actors are very unlikely to arise in the appellate courts.

Therefore, the Sub-Committee would recommend that it be discharged from consideration of this matter and there be no further consideration of it by the Appellate Rules Committee.

Sincerely yours,

Danny J. Boggs

DJB:rc

cc: Donald F. Froeb
Luther T. Munford
Cynthia H. Hall

United States Court of Appeals
For The Seventh Circuit
219 South Dearborn Street
Chicago, Illinois 60604

Thomas F. Strubbe
Clerk
312-435-5850

April 15, 1993

Hon. Kenneth F. Ripple
United States Court of Appeals
for the Seventh Circuit
208 Federal Building
204 S. Main Street
South Bend, IN 46601

Re: Survey of USCA Clerks Regarding Agenda Items for April Advisory Committee Meeting

Dear Judge Ripple:

At the last meeting of the Advisory Committee, at Notre Dame last October, I was directed to obtain clerks' input on a few matters being considered by the committee. They were: (1) type size; (2) Mr. Kopp's proposals regarding Rule 32; and (3) the allocation of costs between originals and copies for recovery purposes. On November 10, 1992, I wrote to all the other court of appeals' clerks requesting their comments on those subjects, and also on the proposition that clerks no longer be allowed to act as screening agents regarding tendered documents having format deficiencies. Since that time, you asked that I solicit comments from court of appeals' clerks concerning the possibility of adopting a uniform date for the effectiveness of local rules and, again, regarding the allocation of word processing costs between originals and copies. I wrote to my colleagues on February 22, 1993. In that letter I also requested comment upon agenda item 86-23 regarding timeliness of mail delivery to incarcerated persons. On that day I also wrote to Mr. Duane Lee, Chief of the A.O.'s Court Administration Division, regarding on the issue of the allocation of copying costs between originals and copies.

I have received written responses from most of the individuals from whom I solicited comments. I did not receive written responses from everyone, but a couple of clerks have called me with their oral comments. I am enclosing herewith the responses I've received, including that from Duane Lee at the Administrative Office. (I am keeping a copy of each for myself, but am sending you the originals because they are more readable; please excuse my highlighting and marginal notes.) If I could briefly summarize the respondents' views, I think a fair characterization would be as follows:

amortization of equipment and software was something that we took into account when we set our hourly rate". That rationale has convinced me that courts can do without a formal rule on this topic. Additionally, almost all clerks indicate that this subject has not been a problem in their courts. Mr. Lee's response for the Administrative Office indicates that Mr. Steve Mora, the printing officer, thinks a "bright line" rule could be developed, but it appears that he is speaking only as to the recovery of costs for producing copies, not as to the costs of creating the original. We talked on the phone last week and he said nothing to change my impression in that regard.

Consensus: There is no need for a national rule concerning the allocation of costs between originals and copies.

4. **Agenda Item 91-15.** All of the other clerks are unanimous in their view that adoption of a "day certain" for the effectiveness of local rules would create more problems than it would solve. Their primary objection involved the delay such a procedure would cause, particularly if an important local rule were adopted months before the pre-designated effective date. I personally like the practice because it minimizes the number of times we are required to send out local rule amendments to the current 280 or so recipients. Obviously, if a rule change of great significance, for example, regarding death penalty procedures, should be enacted, its effective date could be set as soon as possible, without awaiting the annual effective date.

Consensus: There is no need for a uniform effective date for local rules.

5. **Agenda Item 86-23.** It appears that changes to Rules 25(c) and 26(c) and (d) are already under serious consideration; nevertheless, the clerks are agreed that this is really not a problem demanding a change in the Federal Rules of Appellate Procedure. As their letters reflect, problems with mail going to prisons are difficult to pinpoint. Such delays may effectively, in turn, delay the prisoner's response to a document delivered to him after what may be deemed a reasonable delivery interval. But it might prove impossible to ascertain when a particular piece of mail actually gets into the prisoner's hands. Amending Rule 25(c) to hold that service on one confined in an institution is complete only on delivery to the inmate is going to make for difficulty in ascertaining the "delivery date". Not all prison systems keep track of such real delivery dates. Many courts, it appears, simply get around this by allowing some leeway for the late arrival of prisoner mail. These practices concern documents which, unlike notices of appeal, are not jurisdictional in nature. As with most rules, clerks are concerned that involved, complex rules might be adopted to meet special situations engendered by peculiar circumstances. We all feel the rules should be kept as simple, as understandable, and as workable as possible.

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

Judge Kenneth F. Ripple called the meeting to order in the fourth floor conference room of the Federal Judiciary Building in Washington, D.C. In addition to Judge Ripple, the Committee Chair, the following Committee members were present: Judge Danny Boggs, Mr. Donald Froeb, Judge Grady Jolly, Judge James Logan, Mr. Luther Munford, and Judge Stephen Williams. Mr. Robert Kopp attended on behalf of the Acting Solicitor General. Judge Robert Keeton, Chair of the Standing Committee was present. Mr. Strubbe, the Clerk of the Seventh Circuit, attended on behalf of the clerks. Professor Mooney, the Reporter, was present. Mr. Peter McCabe - the Secretary, Mr. John Rabiej - Chief of the Rules Support Office, Mr. Paul Zingg - Mr. McCabe's assistant, and Mr. Joseph Spaniol were present along with Mr. Joseph Cecil of the Federal Judicial Center.

Judge Ripple began the meeting by greeting and introducing Mr. Munford, the newest member of the Committee.

Judge Ripple then turned the Committee's attention to the first item on the agenda a review and assessment of the comments submitted concerning the proposed amendments published in January 1993.

I. GAP Report

General Comments

The Reporter noted that in addition to the comments concerning specific rules, two comments were received that were general in nature.

First, one commentator opposed the change from "shall" to "must." He pointed out that unless Congress also makes the same changes, the rules and statutes will use different terminology to refer to the same thing. Professor Mooney stated that the change from shall to must is supported by the Style Subcommittee of the Standing Committee. Indeed the Style Subcommittee has decided to use "must" with both active and passive voice. Because some of the published rules were drafted when the Style Subcommittee continued to use "shall" with the active voice, the Reporter changed every remaining "shall" in the published rules to "must" except in those instances where it is used to indicate the future tense. The Committee agreed that the change is appropriate.

Second, Mr. Munford had written asking whether it would be preferable to omit citations to specific circuit rules in the Committee Note accompanying a rule amendment. He pointed out that local rules change frequently and that in some instances the purpose of an amendment is to supplant a local rule. He suggested that it might be better to simply refer to "local rules of the X & Y Circuits" rather than to cite to specific rules. Mr. Munford further pointed out that citation to specific local rules has not been consistent in the past.

Judge Ripple noted that one reason for citing the local rules is that a significant portion of the amendments originate with local rules, and citation to the local rules becomes a part of the legislative history. He added further that if the Committee thought it would avoid confusion, the Committee Notes could state that citations are to local rules effective as of a certain date. Judge Jolly remarked that the exact citation facilitates historical research. Judge Ripple suggested that we should be conscious of the problem and be careful in writing notes that readers are not mislead, but that we should also try to provide an accurate and complete legislative history. The Committee concurred.

The Committee then turned its attention to the specific comments submitted concerning the proposed amendments.

Item 86-10

The proposed amendment to Rule 38 requires a court to give an appellant notice and opportunity to respond before damages or costs are assessed for filing a frivolous appeal. The published rule states:

> 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.

Two comments were received. The National Association of Criminal Defense Lawyers supports the proposal. The NLRB suggests deleting the requirement that the notice come "from the court."

Mr. Froeb asked whether a statement by a court in its order that the court intends to sanction is sufficient? Judge Logan responded that he believes a show cause order should be entered.

Judge Jolly noted that the rule allows the court to award single or double costs. He asked whether notice must be given before a court may award single costs. The consensus was that Rule 38 applies only to "frivolous appeals" and that single costs may always be awarded under Rule 39 without notice. To omit single costs from Rule 38 might imply that only double costs could be awarded. The Reporter stated that the Committee had long discussed more radical amendments of Rule 38 but had finally decided to leave the rule basically unchanged but to add the notice requirement. Mr. Froeb suggested leaving the wording of the underlying rule unchanged. Rule 11 is currently undergoing changes and he believes that there will be evolutionary changes in Rule 38.

Mr. Munford questioned whether the new language requiring the court to give notice and opportunity to respond should be moved after "court of appeals" in the first line of the rule. The consensus was that the new language was properly placed. A court may decide whether an appeal is frivolous first, but it must give notice and opportunity to respond before

imposing sanctions.

Mr. Munford asked whether the last sentence should be retained in the Committee Note. The last sentence reads: "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." Mr. Munford was concerned that retention of that language might be read as condoning such conduct. Judge Ripple pointed out that the sentence accurately reflects a fundamental concern that motivated the Committee's decision to require notice from the court. He further stated that after the Advisory Committee completes its work, the amendment will be carefully scrutinized by both the Standing Committee and the Judicial Conference. Deletion of the sentence would in effect remove supporting documentation from the papers.

Judge Boggs moved approval of Rule 38 as published. Judge Williams seconded the motion; it passed unanimously.

Item 91-2

The proposed amendments to Rules 40 and 41 lengthen the time for filing a petition for rehearing in civil cases involving the United States.

Two public comments were submitted. Judge Newman, the immediate past Chair of the Advisory Committee, states that the additional time for requesting a rehearing under Rule 40 should be extended only to the United States and not to other parties in a civil appeal involving the United States. Judge Newman also states that he sees no need for Rule 41 to delay the issuance of the mandate until 7 days after the time for seeking rehearing has expired. He suggests that the court should be able to issue the mandate "within 7 days." The NLRB opposes the amendment because it may delay the effectiveness of enforcement orders. Although the law is not clear, the NLRB believes that an enforcement order becomes effective only upon issuance of the mandate and that the amendment would delay the effectiveness of enforcement orders.

Judge Boggs expressed disagreement with both Judge Newman and the NLRB concerning the time for issuing the mandate. He noted that when it is appropriate there are procedures authorizing the issuance of the mandate forthwith. Mr. Kopp agreed that when necessary the court can direct that the mandate issue forthwith. Mr. Kopp stated a preference for a day certain for issuance of the mandate and, therefore, he opposed, the "within 7 days" formulation.

With regard to whether the extension of time should be given only to the government, Mr. Munford pointed out that it would doubtlessly be easier for the clerk's office to administer an even handed rule. A rule giving an extension only to the government would leave the clerk's office in the position of trying to guess whether the government might want to petition for rehearing or whether the mandate should issue. Mr. Kopp pointed out that the

published draft was based on D.C. Cir. R. 15 and 10th Cir. R. 40, both of which extend the time for all parties, not just the United States. While the government would probably not oppose an amendment that extended the time only for the government, he stated that it had never occurred to the Solicitor's Office to suggest that the government operate by one time frame while opposing parties use different time limits.

Judge Logan expressed agreement with Mr. Munford that an unbalanced rule would make it difficult for the clerk's office to know whether to issue the mandate before the government's time expired. He stated his preference for an evenhanded rule and one that fixed a day certain for issuance of the mandate.

Mr. Munford also favored a fixed time period but questioned whether 7 days is the right amount of time. He noted that 7 days is the time period currently provided but that amendments of Rule 41(b) under Item 91-13 will change what a party must show in order to obtain a stay of the mandate. Judge Logan responded that a party has the period for filing the petition for rehearing to consider the reasons why a stay should be entered if rehearing is not granted. In fact, he pointed out, that the same reasons are often part of the petition for rehearing.

Judge Williams expressed his opposition to Judge Newman's suggestions that time be extended only for the government and that the court could issue the mandate within 7 days. Judge Williams said, however, that changing the time in Rule 41 for issuing the mandate from 7 to 14 days might be useful.

Mr. Kopp stated that he thinks 7 days is not a problem or that it is a separate problem from the one under consideration. He noted that as a practical matter ordinarily there is no problem because if a mandate issues and a stay is subsequently granted, the court recalls the mandate. He suggested that if there is a problem, a better approach would be to provide that if an application for a stay is filed, the mandate should not issue until the court acts on the application for stay.

Judge Ripple agreed that the question of whether a mandate should issue within 7 days after the expiration of the time for petitioning for rehearing, or after denial of such a petition is a separate question. The issue under consideration is the amendment extending the time for petitioning when the United States is a party. He suggested that the 7 day time period be treated as a separate suggestion and be placed on the table of agenda items as Item 93-3. The committee concurred and Judge Ripple stated that he would form a subcommittee including Mr. Strubbe, practitioners, and judges.

Judge Logan moved adoption of Rules 40 and 41 as published except that the word "shall" should be changed to "must" and the word "application" to "petition" for certiorari. Mr. Kopp seconded the motion and it was approved unanimously.

Item 91-4

Several amendments to Rule 32, governing the form of documents, were published. Four public comments were received. The Reporter summarized the comments.

One commentator, Judge Newman, supports the effort to standardize type styles but disagrees with the approach taken in the draft. He suggests that the committee consult the new Second Circuit rule. He also disagrees with the suggestion that footnotes be double spaced. Judge Newman also opposes the binding requirement.

One commentator favors the binding requirement but suggests that the use of spiral binding should be specifically mandated.

Two other commentators also oppose double spaced footnotes and made miscellaneous minor objections.

After the Reporter summarized the comments, Judge Ripple suggested considering them one at a time. The Committee began with the type style question. The published rule said that unless a brief is commercially printed, it must be prepared with no more than "11 characters per inch." Mr. Strubbe reported that the clerks' committee had discussed the proposal and thought that 65 characters per line would be preferable because such a standard would permit proportional type.

Mr. Kopp suggested that a better way to permit proportional type would be to require a typeface of 12 point or larger. It was pointed out that with 12 point type it would be necessary to prohibit compaction or compressed type. Mr. Strubbe noted that if the rule sets a limit of 65 characters per line, compacted type would simply result in shorter lines.

Judge Logan stated that he likes printed briefs and would like the rule to permit production of similar briefs on computers. He pointed out that a 65 characters per line standard allows proportional fonts and may improve readability. He noted that the Committee's basic aim has been to prevent people from cheating on the page limits.

Mr. Munford expressed concern about a standard that will not make it clear to a practitioner which button should be pressed on a computer to achieve compliance.

Judge Keeton stated that changing the standard from a number of characters per inch to a number of characters per line simply eliminates the notion that looking at any one inch will determine whether a brief is in compliance. Beyond the fact that such a change would force one to look at a larger unit, he thought that there would be no real difference between the two.

Judge Ripple suggested a straw vote. Four members voted to retain the 11 characters per inch standard. Three members voted to change to 65 characters per line; and no one

voted to send the rule back for further study.

After a short break Judge Ripple resumed the discussion by noting that Supreme Court Rule 33.1(b) prohibits any ". . . attempt to reduce or condense typeface." He inquired whether using similar language either in the text of the rule or in the Committee Note would be useful.

Judge Jolly suggested leaving the rule as published. Judge Logan expressed preference for a standard that would allow use of proportional type. The Committee members discussed the possibility of changing to a number of characters per page or per brief.

Judge Ripple appointed a subgroup, chaired by Judge Jolly, to continue the discussion and return to the Committee with a suggestion. Judge Ripple then asked the Committee to discuss the other comments.

The Committee discussed the issue of double spaced footnotes. Judge Logan moved that the rule be amended to permit single spaced footnotes. Judge Williams seconded the motion. After a brief discussion the motion was amended to add the Supreme Court's language concerning compressed type at the end of line 16 and to add a reference therein to footnotes. The motion passed unanimously.

The Committee then discussed the proposal that a brief or appendix be bound to permit it to lie flat when open. Judge Jolly moved that the provision remain unchanged; the motion was seconded by Mr. Munford. The motion was approved unanimously. The requirement that the case number appear at the top center of the cover and that the attorney's phone number be placed on the front cover were also unanimously approved.

The published proposal stated that the title of the document should "includ[e] the name of the party or parties for whom the document is filed (e.g., Brief for Appellant, J.Doe)." Judge Logan asked whether naming the parties is necessary when a brief is filed for all appellants or all appellees. Mr. Munford suggested that the rule could refer to Civil Rule 10(c). Judge Logan moved that the provision be amended by deleting the words "including the name of" and substituting the word "identifying;" he also suggested deleting all examples. Judge Williams seconded the motion and it was approved by a vote of six in favor and one opposed.

Mr. Spaniol had written prior to the meeting and asked whether the rule should continue to refer to carbon paper. The Committee had discussed that issue at the October meeting and decided to make no changes. Mr. Spaniol had also noted that the rule refers to "parties" proceeding in forma pauperis whereas the statute refers to "persons" proceeding in formal pauperis. Judge Logan and Judge Boggs moved that all such references to parties should be changed to persons. The change was approved unanimously.

One of the commentators noted that the proposed amendment requires a petition for rehearing, a suggestion for rehearing in banc, and any response to such petition or suggestion to be produced in the same manner as a brief, but that the rule did not prescribe the cover color. Judge Ripple moved, and Judge Boggs seconded the motion, that line 58 be amended by inserting the words: "with a cover the same color as the party's principal brief." The motion was approved unanimously.

Judge Ripple noted that the Committee Note makes specific reference to local rules but unless someone objected to the references they would be retained. There were no objections.

That concluded the discussion of Item 91-4 except that the Committee would return later to the discussion of type style.

Item 91-5

Proposed Rule 49 authorizes the use of special masters in the court of appeals. One comment was submitted; the NLRB expresses support for the proposal.

Mr. Munford questioned the numbering of the rule. He asked whether it should come at the end of the rules (and thus after Rule 48, the "Title" rule) or whether it should follow Rule 33. He suggested placement after Rule 33 because in both rules someone other than a judge presides. Judge Ripple thought that placement after Rule 33 would be inappropriate because he would like to avoid any suggestion that the rule on special masters is connected to the rule on appeal conferences. Because the use of appeal conferences for settlement purposes is new and the amended Rule 33 is trying to promote a level of informality, he would like to keep the two concepts separate.

Judge Williams suggested moving Rule 48 to Rule 1(c). Judge Keeton questioned whether such a change could be treated as a technical change and decided that it probably could be so characterized. Mr. McCabe noted that Bankruptcy Rule 1 combines the topics currently covered by Fed. R. App. P. 1 and 48.

Judge Ripple moved the approval in substance of the special master rule. Judge Williams seconded the motion; it was approved unanimously.

Judge Boggs moved that Rule 48 be moved to Rule 1 and made subpart (c) and captioned "Title." Mr. Munford seconded the motion. It was approved unanimously.

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 have been mailed. No public comments were submitted.

Prior to the meeting, Mr. Munford wrote and inquired why an address is required only when service is accomplished by mail. He noted that when a document is hand delivered, the document is usually delivered to office personnel rather than to the party or the party's counsel personally. Therefore, questions about service can arise even when a document has been hand delivered. In light of that comment, the Reporter had amended the draft to require that a certificate of service include not only the addresses to which papers have been mailed, but also the addresses at which papers have been delivered.

The Committee unanimously approved the change and the Committee consensus was that it was not a "substantial" change and that republication would not be necessary.

Mr. Munford noted that in cases involving many parties inclusion of all the addresses could result in a lengthy certificate of service and that the certificate of service should not count against the page limit for a brief. He suggested that Rule 28(g) should be amended to so provide. He made a motion that the words "proof of service" be inserted in Rule 28(g) following "table of citations." Judge Logan seconded the motion and it was approved unanimously. It was decided that the change could be treated as a technical and conforming amendment.

At 12:00 noon the Committee broke for lunch.

The meeting resumed at 1:00 p.m.

Judge Ripple suggested that the Committee pass a resolution thanking Mr. James Macklin, Jr., the Deputy Director of the Administrative Office who served as the Secretary to the Rules Committees for several years. Mr. Macklin will soon retire and it would be appropriate to thank him for his many years of dedicated service and assistance to the Committee. A motion was made and seconded and unanimously approved.

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 submitted but the clerks through Mr. Strubbe registered their opposition to the rule.

Mr. Munford questioned whether the proposed amendment to Rule 25 is consistent with amended Rule 32 which provides that carbon copies may not be filed except by persons proceeding in forma pauperis.

Judge Keeton suggested changing the word "submitted" to "used" at line 7 of the amended draft of Rule 32. Judge Boggs suggested using the word "submitted" rather than "filed" at line 64 of the amended draft of Rule 32. Those changes were approved unanimously.

Judge Boggs then moved approval of Rule 25(a) as published. Judge Jolly seconded the motion and it passed unanimously.

Item 91-12

The proposed Rule 33, published in January, differs substantially from the existing Rule 33. The Reporter summarized the two comments received. Judge Newman suggests that the language of the rule be amended to make it clear that the choice of an in-person or telephone conference is the court's and not the parties'. The Solicitor General's office suggests amending the third paragraph of the Committee Note to make it clear that suits against government officials should be treated like suits against government agencies and to state that attendance of an employee with authority "regarding" the matter at issue is sufficient.

In response to Judge Newman's suggestion the Reporter had inserted the words "as the court directs" at line 19 of the amended draft. Judge Ripple expressed his disapproval of that change. He noted that the rule serves dual purposes. It governs the usual prehearing conference that delineates issues, etc. but it also governs settlement conferences. Those circuits that currently use settlement conferences have adopted measures aimed at keeping the judges distanced from the conference. The language "as the court directs" could give the impression that judges are involved in the process. Judge Logan moved approval of line 19 as published (*i.e.*, without the new language). Mr. Froeb seconded the motion. It was approved unanimously.

With regard to the amendment of the third paragraph of the Committee Note, Mr. Kopp stated that many suits against government agencies also name government officials individually. As published, the Committee Note could give rise to an inference that suits against government officials should be treated differently than suits against agencies. The redrafting was intended to make it clear that a government official may also be represented at an appeal conference by an employee. Second, the Committee Note was changed to provide that when a party is required to attend the conference the court may determine that an employee with authority "regarding" the issue is sufficient rather than requiring attendance of an employee with authority "over" the matter.

The changes to the Committee Notes were moved by Judges Boggs and Logan and approved unanimously.

Item 91-13

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

A comment was submitted by the National Association of Criminal Defense Lawyers.

The Association argues that the 30 day period for a stay is anachronistic because the period for filing a petition for certiorari is now 90 days in both civil and criminal suits.

Judge Boggs and Ripple both stated that in their circuits the practice is to grant 90 day stays and that even if the rule were changed to permit a 90 day stay, it would not be necessary to grant a stay for the full period.

Mr. Munford focused the Committee's attention on lines 21 & 22 which require a motion for a stay to show that the petition for certiorari would present a substantial question and that there is good cause for a stay. He stated that those standards are stricter than they need to be. In many circuits the standard is that the petition would not be frivolous. He pointed out that Fed. R. Civ. P. 62(d) & (e) provide for an automatic stay upon posting a supersedeas bond. He said that he would except stays under Rule 62(d) & (e) from the showing required in the proposed amendment. Judge Ripple responded that a stay pending appeal to the court of appeals (the first appeal and an appeal as of right) is different than a stay after judgment by the court of appeals pending petition for certiorari to the Supreme Court.

Judge Logan questioned whether the standard should be substantial question and good cause (as published) or whether it should be substantial question or good cause. Judge Williams stated that "cause shown" has long been interpreted as involving a balancing of the equities. The greater the irreparable injury, the less substantial the question must be in order for a stay to be appropriate.

Mr. Kopp noted that at the Committee's meeting in October 1992, the consensus was that the proposed amendments did not create a substantive standard that the circuits are bound to follow, rather the intent of the proposed amendments was simply to put counsel on notice regarding the issues that a petition should address. Judge Ripple suggested removing the "see, e.g.," citation from the Committee Note in an effort to make it clear that the rule does not establish a substantive standard. The Committee voted to eliminate the Barnes citation in the Note.

With regard to the suggested change from 30 to 90 days, Mr. Kopp suggested that such a change would need to be published for comment. It was agreed to make that suggestion Item Number 93-4 on the table of agenda items.

Judge Logan moved adoption of the text of Rule 41 as drafted. Mr. Froeb seconded the motion; it passed by a vote of six in favor and one opposed. Mr. Munford stated that his opposition was based upon his belief that the "and" should be changed to "or."

91-22

Rule 9 governing review of a release decision in a criminal case was completely rewritten and published for comment. Two public comments were received. A United

States District Judge suggests that subdivision (c) should refer to 18 U.S.C. § 3145(c) in addition to the sections already cited. The National Association of Criminal Defense Lawyers (NACDL) made several suggestions. First, it suggests that the captions of subdivisions (a) and (b) should be coordinated to clarify whether (a) or (b) applies after a finding of guilt but before sentencing. Second, it suggests that the rule should be amended to make it clear whether a motion for release must be filed first in the district court even after filing a notice of appeal. Third, it suggests omitting the statutory references in subdivision (c) and, if necessary, moving them to the Committee Note. Fourth, it suggests amending the rule to allow a party to supplement the district court's bail record with evidentiary material.

In light of NACDL's first comment the Committee approved several changes:

1. it amended the caption of subdivision (a) to read: "Appeal from an Order Regarding Release Before Judgment of Conviction";
2. on line 24 of the draft prepared for the meeting, the Committee inserted a period after the word "conviction" and deleted the words "or the terms of the sentence";
3. it amended the first paragraph of the Committee Note; in line three after the word "before" the Committee inserted "the judgment of conviction is entered at the time of";
4. following the first sentence of the second paragraph of the Committee Note, the Committee added citations to Fed. R. Crim. P. 32(b); and
5. in the second paragraph of the Committee Note accompanying subdivision (b), the Committee inserted a period at line 4 after the word conviction and deleted the words "or from the terms of the sentence".

In response to NACDL's second suggestion the Committee decided to omit the second sentence (beginning with the word "implicit") of the Committee Note accompanying subdivision (b). The intent of that deletion was to remove any inference that a motion for release must in all instances be made first in the district court. The rule deals only with review of a release decision made by a district court and not with release decisions that may be sought initially in a court of appeals. Therefore, the Committee decided that it would be inappropriate to include any language stating categorically either that a motion must be made, or need not be made, in the district court after the filing of a notice of appeal.

Because the statutory references in subdivision (c) had been added by Congress, the Committee decided that it should not delete them but should add the reference to § 3145(c).

The Committee decided that it would ordinarily be inappropriate to allow a party to supplement the bail record in the court of appeals.

Judge Boggs moved the approval of the published rule with the amendments to the text and notes described above. The motion was seconded by Judge Williams and passed unanimously.

Following a short break, Ms. Sharon Marsh, a printing expert from the Administrative Office joined the Committee briefly to discuss the Rule 32 typeface issues. She suggested that the rule should specify the size of type, amount of spacing, size of paper, and the size of margins.

Item 91-13

The discussion then returned briefly to Item 91-13. The Committee had discussed deleting the citation to Justice Scalia's chambers opinion in the Barnes case. That change was intended to remove the inference that the rule establishes the substantive standard for granting a stay pending the filing of a petition for certiorari to the Supreme Court. Judge Ripple suggested that rather than simply delete the citation, it be replaced with a reference to § 17.19 of Stern & Gressman's treatise on Supreme Court Practice. Judge Williams asked whether it is clear that the standards for the courts of appeals are the same as those used by the Supreme Court. Judge Ripple replied that Stern & Gressman, at page 690, suggests that they are. Judge Logan moved to substitute the cite to Stern and Gressman for the Barnes citation. Mr. Kopp seconded the motion. It passed unanimously.

Item 91-26

The proposed amendment to Rule 28 requires a brief to contain a summary of argument. Three comments were received. One person suggests that the decision should be left to each court and, in those courts that decide not to require a summary, to the parties. Another person suggests that the choice be left to the judgment of individual lawyers. The third commentator suggests that a summary is needed only when a brief exceeds 25 pages.

Judge Logan stated that he did not feel strongly about the issue either way. Judge Boggs expressed his support of the requirement. He pointed out that Supreme Court Rule 24.1(h) requires a summary and he stated that he thinks it would be useful for judges. Mr. Kopp observed that the Committee has been trying to minimize the need for a pressure to have local rules. Because several circuits have local rules requiring a summary of argument, Mr. Kopp favors including the requirement in the national rule. Judge Jolly agreed with Mr. Kopp and additionally stated that a summary is helpful in deciding whether to grant oral argument. Judge Ripple stated that he uses a summary in a variety of ways and finds it very helpful.

Judges Logan and Williams moved adoption of the rule as published. The motion was approved unanimously.

Item 91-27

This item involves amendment of all appellate rules requiring the filing of copies of documents with a court of appeals. The amendments make it clear that a court may require a different number of copies than the number specified in the national rule either by local

rule or by order in an individual case. No comments were submitted and the Committee approved the drafts as published.

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 noted that the Supreme Court dropped "affiliates" from its list because no one understood what it meant. The Committee briefly discussed the possible meanings of the term "affiliates." Judge Boggs asked whether that change would mean that a litigant would not need to disclose "full brothers or full sisters" by which he means companies that are wholly owned, or virtually wholly owned, by the same parent? Judge Williams noted that the term "affiliate" is used in virtually every antitrust consent decree. Judge Ripple stated that a memorandum would be circulated concerning that subject after the meeting.

Discussion of Item 91-27 concluded the reconsideration of the materials published for comment.

Chief Judge Sloviter, the liaison member from the Standing Committee, joined the Committee during the last discussion. The meeting adjourned for the day at 4:50 p.m. to allow time for the subcommittee on Rule 32 to meet.

The meeting reconvened at 8:30 a.m. on April 21.

II. Items Remanded by the Standing Committee

The Standing Committee had requested that the Advisory Committee reconsider a number of items.

Items 89-5 and 90-1

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. That draft made no substantive changes in Rule 35. It simply included within the text of the rule a warning that the pendency of a suggestion for rehearing in banc does not extend the time for filing a petition for certiorari.

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 short, the proposal had been remanded because it only made the trap obvious rather than eliminating it.

The Reporter reviewed the earlier drafts. A December 1991 draft had taken the approach favored by the Standing Committee. That draft did not win Advisory Committee approval. 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 prevailing practice, 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. The Committee had concluded that requiring any sort of action within a time certain (whether it be 30, 60, or 90 days) was undesirable.

After the Reporter concluded her summary of past discussions, Judge Williams asked whether it really would be necessary to require action on a suggestion within a time certain. There is no time limit in the rules within which a court must act on a petition for panel rehearing. A court knows that a petition for panel rehearing must be acted upon and does so in due course. Judge Williams thought that the same approach would work with suggestions for rehearing in banc. Judges Sloviter, Boggs, and Logan all indicated that suggestions for rehearing in banc are decided by their courts as routine matters. A consensus developed that if a change were made so that the pendency of a suggestion for rehearing in banc stayed the mandate and tolled the time for filing a petition for certiorari, the courts would develop a mechanism for disposing of the suggestions.

At that point the December 1991 draft became the focus of discussion. Judge Logan moved that lines 13 through 16 of the draft be omitted. The effect of that deletion would be to allow the circuits to determine how they would handle the internal voting procedures. The motion was seconded by Judge Williams and approved unanimously.

The Committee then discussed lines 24 through 26 and whether a petition for rehearing in banc should be included with a petition for panel rehearing. The existing rule states that a suggestion for rehearing in banc may be combined with a petition for panel rehearing. The draft would have required the two to be combined if both are filed. Judge Logan made a motion to excise that requirement. Judge Jolly seconded the motion and expressed his preference for separate documents. Mr. Munford noted that in the Fifth Circuit, a suggestion for rehearing in banc may be treated as a petition for panel rehearing. Judge Sloviter responded that the suggested change would not preclude that; the change simply means that the rule does not require that the two petitions be combined. The motion carried by a vote of five to three. Judge Williams made a motion that was seconded by Judge Logan to amend the Committee Note to state that a circuit has the option of requiring a separate document. The motion passed unanimously.

Judge Logan then moved approval of the drafts of Rule 35(b) & (c) and Rule 41 as amended by the preceding motions. Judge Williams seconded the motion. Judge Jolly stated that he believes the term "suggestion for rehearing in banc" should be retained to distinguish it from a petition for panel rehearing. Judge Logan responded that calling it a "petition for

rehearing in banc" makes it clear that a response is required from the court. Judge Keeton noted that with the omission of lines 13 through 16, there is no certainty as to what may happen, the petition may languish and the mandate is stayed until disposition of the petition. Judge Jolly pointed out that the problem is more theoretical than actual because whenever a judge is seriously considering voting in favor of rehearing in banc, the judge stays the mandate. Mr. Kopp suggested that the Committee Note point out that Rule 41 provides that the filing of a petition for rehearing in banc stays the mandate and that the court of appeals will need to take final action on the petition but the procedure for doing so is left to local practice. The motion passed by a vote of six to two.

Mr. Munford pointed out that Rule 32(b) uses the term "suggestion for rehearing in banc." Because the amendments just approved changes that term to "petition for rehearing in banc" that reference plus all other cross-references in the rules to "suggestions" for rehearing in banc must be amended.

Item 91-14

This item arose from a Local Rules Project suggestion to amend 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. 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 was concerned about two issues. First, some members of the Committee felt strongly that a trial judge should have the option to appear to oppose the relief sought in a petition for mandamus. Second, in many instances a mandamus action is actually adversarial in nature and further changes in the rule might be desirable to emphasize the similarity of mandamus to an interlocutory appeal.

The Reporter summarized the three drafts that were prepared for the meeting. The first draft differed from the one submitted to the Standing Committee in that it would permit the trial judge to respond whenever the court of appeals requires a response. The second draft amends the rule so that the trial judge is not treated as a party but it allows the trial judge to respond and authorizes the court of appeals to order the judge to respond. The third draft was prepared by Judge Easterbrook. The third draft also amends the rule so that the trial judge is not treated as a party but unlike the second draft it permits the trial court judge to participate only if ordered to do so by the court of appeals. The third draft also authorizes a court of appeals to invite an amicus curiae to defend the order in question.

Judge Ripple invited Judge Keeton to add any comments about the Standing Committee discussion. Judge Keeton reported that there are deep divisions of thought on the issue of a trial court judge's appearing before a court of appeals and arguing. But there are also instances in which neither party may want the order to stand and that the position of the court may go unrepresented.

Judge Logan stated that in most instances one party supports the judges action but there are instances in which that is not true. For example, if a district judge refuses to act on a remand from a court of appeals, it is not likely that either party would support the judge's position. In some cases the judge is the proper person to respond to a petition for mandamus and the judge wants to respond.

Judge Williams expressed support for Judge Easterbrook's position in which a judge participates only upon court order. If a judge does not have the option to participate, the judge has a greater incentive to give a written explanation for the judge's conduct at the time he or she acts.

Judge Boggs noted that mandamus cases are of two different types. In some instances the issue is fundamentally substantive and in such instances there is no greater need for the judge's participation than in an appeal. In other instances, the issue involves a question of delay, of the judge's conduct, or of control of the court. In such instances the judge often wants to provide an explanation. The trouble with the judge's participation is that it calls into question the judge's impartial position.

Mr. Froeb favored allowing a judge to appear whenever the judge wishes to do so. He states that sometimes the outcome of a mandamus petition can have a serious effects on the administration of justice. When he served as the chief judge of a trial court, he had occasion to present the trial court's position in writing to a court of appeals. He did not agree that an amicus curiae would be able to adequately represent the court in all instances, and may not be willing to do so for little or no compensation.

Chief Judge Sloviter agreed that are cases where the parties do not have any interest in the outcome of the mandamus. For example, there was a case in her circuit in which the district judge assessed the cost of empaneling jury against the lawyer who failed to give notice that the case had been settled. Because the case had been settled, there was no appeal. But the question of the judge's authority to so assess the cost of the jury was called into question on mandamus. In that case, she asked a law professor to represent the judge's position as an amicus. She observed that the fundamental question is whether the district judge has a right to be a party to the action.

Mr. Munford stated that in his opinion it is unseemly for a judge to be a party in a case. Typically a court will not grant mandamus unless the party has asked for relief in the trial court. At the time that the trial court judge responds to that request, the judge has the opportunity to give reasons for the response. Mr. Munford stated that he thinks that participation by the trial court judge is proper only upon invitation of the appellate court.

Judge Ripple pointed out that if the parties have mutual self-interest, it is possible for them to frame the petition for mandamus so that the court of appeals is not aware of the real issue. It may be important to leave open the possibility of the district judge appearing to clarify the situation.

Judge Williams agreed that a case may be framed before a court of appeals so that a certain angle is obscured but that can happen on appeal as well as on mandamus. Therefore, he said that he does not see anything distinctive about the problem in mandamus cases.

Judge Ripple agreed that in mandamus cases involving substantive matters there is little or no distinction. But when a mandamus case involves case management or procedural issues, only the district court has a global viewpoint and the ability to explain certain actions to the court of appeals.

Chief Judge Sloviter suggested that after the filing of a mandamus petition, it might be appropriate to allow a district court to enter a supplementary opinion explaining its conduct. Allowing the court to file such an opinion would not constitute participation as a litigant.

Judges Jolly and Ripple both expressed the opinion that mandamus is an unusual writ and is not to be considered a substitute for an appeal. It is an action against the judge or against the judge's ruling. It is important that the judge have the opportunity to defend himself or herself.

Mr. Kopp observed that the problem is that mandamus occurs in many different contexts and the context determines the appropriateness of a judge's participation. As a general practice one does not want to encourage a judge to act as a litigant. The difficulty in drafting a rule, is that it cannot cover all the various situations.

Judge Logan expressed a preference for draft two because it neither names nor blames the trial court judge but gives the court the option of responding to the petition for mandamus.

Judge Ripple outlined the various options before the committee and asked for a straw vote. First, the Committee could take no action; Judge Jolly favored that approach. Second, the Committee could work with draft one; no member voted in favor of that approach but Judge Jolly indicated that it would be his second preference. Third, the Committee could work with draft two; five members voted to do so. Fourth, the Committee could work with draft three, the Easterbrook draft; two members voted to do so.

Following the straw vote, the Committee focused upon draft two found at pages 6 and 7 of the memorandum.

With regard to lines 18 through 20 of the draft, it was suggested that the two sentences could be made one by deleting the words "[o]therwise, it must" and substituting the word "or." Upon reflection, however, the Committee concluded that the change would alter the rule substantively. As written, unless the court denies a petition, it must order respondents to answer. If rewritten as suggested, the rule would say, "[t]he court may deny the petition without an answer or order that the respondents answer . . .." That formulation

omits the idea that the court must order a response unless it denies the petition. It was decided to leave the sentences as written.

Judge Jolly noted that lines 15 and 16 require the clerk of the court of appeals to send a copy of a petition for mandamus to the clerk of the trial court. He suggested moving that idea to line 6 and requiring the petitioner to serve the clerk of the district court. Judge Ripple noted that such a change might reintroduce the idea that the judge is a party. But he further, noted that the document would come to the trial court's attention earlier if it were sent to the trial court by the party at the time of filing rather than being sent by the court of appeals after filing. Judge Logan responded that mandamus cannot be granted without ordering a response, so delay is inevitable and the delay involved under the latter approach should not be problematic.

As an alternative, Judge Ripple suggested that a new sentence be inserted in line 7 following the word "court." He suggested that it state: "The party shall also transmit a copy to the clerk of the trial court for the information of the trial judge and certify to the court of appeals that such transmission has been made." A motion was made to delete the underlined language at line 16 and 17 and to add Judge Ripple's sentence at line 7. The motion was seconded and passed unanimously.

Two minor amendments were also approved unanimously. At line 5 the word "therefor" was deleted. At line 19 the word "respondents" was changed to singular.

Finally, the Committee unanimously approved the entire rule as amended with a request that the Standing Committee publish it for comment. Two members of the committee, however, wanted it recorded that they preferred the Easterbrook draft.

Item 91-4

The Committee returned once more to the discussion of the typeface problem in Rule 32. The Committee began by considering a draft prepared by Judge Jolly and his subcommittee. That draft read as follows:

> A brief or appendix produced by the standard typographic process must be printed in 11 point or larger type; ~~those~~ briefs produced by any other process must ~~be printed with~~ not exceed ~~more than~~ an average of 2000 ~~11~~ characters per ~~inch~~ page 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. At the end of the non standard typographic brief, there must be an attorney's certification of the number of characters produced in the total brief (excluding the table of contents and the lists of cases and authorities).

Judge Jolly also provided a suggested Committee Note.

> Further, it is important that all briefs contain approximately the same average content per page so that no brief achieves an advantage in content based on the method or style of production. At the same time the rule seeks to allow a broad range of easily readable type, including proportional and non proportional fonts. To achieve this end the Committee concluded that a per page character average, including quotes and footnotes, was the most appropriate measurement to apply. Thus, following the close of the brief an attorney will certify the total number of characters produced (excluding the table of contents and the lists of cases and authorities). The Committee wishes to make plain that any typeface used must be easily readable and that no attempt should be made to reduce or condense the typeface in a manner that would increase the content of the document.

The Committee discussion focused upon whether computer programs can provide character counts and how a person using a typewriter rather than a computer would be able to certify the number of characters per page. The Committee also realized that further study would be needed to determine whether 2000 characters per page is the correct number. To easily accommodate the person using a typewriter, the Committee considered using the 11 character per inch standard as an alternative to the number of characters per page.

Judge Keeton indicated that he had been working on an alternative draft. He read his draft, which provided that a brief produced by any means other than standard typographic printing must not exceed on average the same content per page and must include a certification of compliance with this requirement. He suggested that the Committee Note could explain the standard and give examples from different software programs. His intent to avoid the need to change the text of the rule as technology changes.

Judge Keeton agreed to have his proposal typed for consideration by the Committee after the lunch break.

At 12:10 p.m. the Committee broke for lunch.

The meeting resumed at 12:55 p.m.

Item 92-10

At the December 1992 meeting of the Standing Committee, the Advisory Committee on Bankruptcy Rules submitted 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 in both 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 Advisory Committee was asked whether, at line 87 of Rule 4(a)(4), the rule should require a party to file "a notice, or amended notice, of appeal" rather than simply an "amended notice of appeal." Judge Logan moved approval of the change; the motion was seconded by Judge Ripple. It was approved unanimously.

Item 91-4

The discussion returned to Judge Keeton's draft of Rule 32. The draft read as follows:

(a) Form of a Briefs and ~~the~~ an Appendix.

(1) 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.

(2) A brief produced by the standard typographic process must be in 11-point or larger type. Quotations and footnotes must be in the same size type as the text.

(3) A brief produced by any other process must not exceed on the average the same content per page and must include a certification of compliance with this requirement. Lines of text must be separated by double spacing. Quotations more than two lines long may be indented and single spaced. Headings and footnotes may be single spaced. Quotations and footnotes must be in the same size type as the text.

(4) All printed matter must ~~appear in at least 11 point type~~ ....

The Committee decided that it would be clearer if the word "process" on line 10 of the draft were changed to the word "printing."

Mr. Munford suggested moving all the requirements for a brief produced by standard typographic printing into paragraph 2, which would mean including page and margin sizes for a printed brief in that paragraph. The Committee agreed and suggested that after the meeting the reporter reorganize the material in subdivision (a).

Judge Sloviter asked whether line 14 is clear enough; specifically, she wondered whether it is clear that one must count footnotes and block quotes in the content per page. Judge Williams suggested that the rule be amended to state that a brief must not exceed on average the same content per page "(including footnotes and quotations)" and the Committee agreed.

Judge Ripple commented that substantively, subpart (a)(3) is still ambiguous. The person preparing a non-printed brief is given a broad standard but does not have detailed instructions. Judge Jolly stated that a practitioner would need to obtain a printed brief and use it for comparison. Judge Keeton stated that he had hoped that the notes would be able to provide concrete illustrations. Judge Ripple continued to believe that the standard in the draft is so broad that the circuits would inevitably adopt local rules to provide guidance to practitioners and, therefore, there is a great risk that there would not be uniform application of the rule.

In light of the difficulty the Committee had during the meeting with the technical aspects of the rule, Judge Ripple asked the Committee to reconsider the approach considered some time ago under which the Administrative Office would publish a list of acceptable typefaces. There was discussion about whether that approach would violate the Rules Enabling Act as well as the question of accessibility to such a list.

Judge Logan made a motion to approve the draft as amended with the understanding that the Reporter would reorganize some of the material. The motion was seconded by Judge Ripple. Judge Jolly asked if the vote could be taken subject to the understanding that if it is possible to count characters per page, that a standard based upon characters per page would be used. With those understandings, the Committee voted unanimously to approve the draft. The Committee believed that the rule should be republished for a period of comment.

Item 92-2

At the Advisory Committee's October 1992 meeting it approved a draft rule that would permit technical amendment of the rules without the need for Supreme Court and Congressional review. At the Standing Committee's December meeting, the chairs and reporters of all of the advisory committees met, compared their various drafts, and agreed upon uniform language. The Reporter for the Standing Committee prepared uniform committee notes.

The Reporter reminded the Committee that the uniform draft is very similar to the October draft and that when the new draft was circulated to the Committee for a mail vote, it was approved unanimously. For informational purposes, the Reporter related that the Advisory Committee on Bankruptcy Rules met recently and failed to approve the technical amendments rule.

In light of the fact that the mail vote unanimously approved the new draft, Judge Ripple stated that unless some member of the Committee called for reconsideration in light of the Bankruptcy Committee's action, there was nothing further for the Committee to do. No member called for reconsideration so the rule was approved.

Because the Committee was awaiting photocopies of the materials for Item 92-1,

Judge Ripple proceeded to consider the next portion of the agenda with a promise to return to Item 92-1 when possible.

III. ACTION ITEMS

Item 92-4

In spring 1992, then Solicitor General Starr requested that the Committee consider amending Rule 35 to make the existence of an intercircuit conflict a ground for seeking a rehearing in banc. Acting Solicitor Bryson wrote to Judge Ripple shortly before this meeting and requested that the Committee take no final action on the suggestion until the new Solicitor General has an opportunity to consider the proposal.

Judge Ripple, however, had invited Mr. Cecil of the Federal Judicial Center to report on the Center's findings from its recent survey. Mr. Cecil reported that the survey of appellate judges revealed that intercircuit conflicts are not at the forefront of the judges' concerns. He further reported that four circuits have local rules that permit the courts to consider inter-circuit conflict as a basis for granting a rehearing in banc. The Ninth is one of those circuits but Professor Hellman's empirical research on the Ninth Circuit indicates that intercircuit conflict is not a prominent factor in granting a rehearing in banc in that circuit. Concerning alternatives to a full in banc that provide some check on the proliferation of intercircuit conflicts, nine circuits circulate opinions to all the judges of the circuit for their comment prior to publication. Some of those circuits require the circulating judge to note intercircuit conflicts so that the existence of the conflict is brought to the attention of the other judges.

Judge Ripple thanked Mr. Cecil and the other researchers at the FJC for their assistance. Judge Ripple also indicated that this item would be considered at the Committee's next meeting.

Item 92-1

This draft, like Item 92-2 dealing with technical amendments, is a uniform draft resulting from the December meeting of chairs and reporters. This draft deals with local rules.

When the draft was circulated by mail for a vote prior to the meeting, one member of the Committee did not approve the draft. Mr. Munford objected to that portion of the new draft that would allow a court to impose sanctions for non-compliance with a directive not found in either a national or local rule, but concerning which the person sanctioned had actual notice. Mr. Munford stated that if a matter is important enough to be sanctionable, it should be placed in a local rule.

Mr. Munford stated that he would prefer to end the rule on line 25 with the words

"local circuit rules." His suggestion would mean that sanctions could only be imposed for noncompliance with a federal statute or rule, or a local circuit rule. In contrast, the draft would permit sanctions for violation of other requirements so long as the violator had actual notice of the requirements.

Judge Ripple noted that the uniform draft does not deal with internal operating procedures. The Advisory Committee's earlier draft stated that any provision regulating practice before a circuit should be placed in a local rule rather than in an internal operating procedure. Internal operating procedures are abused in that way in some circuits. Judge Ripple suggested that the real issue is whether uniformity is sufficiently important to forego tailoring a rule to the particular differences between a court of first instance and an appellate court.

Judge Ripple invited Judge Keeton to speak about the uniformity issue. Judge Keeton stated that from the perspective of both the courts and the bar when the rules committees address the same problem, it is desirable that they use the same language. If the committees intend different things, they should use different language only when they mean to be different. He stated, however, that the Committee should feel free to make whatever recommendation it sees fit.

Judge Logan expressed support for the draft with the possible exception of making the two word changes made by the Bankruptcy Committee so that the two rules would be identical. He noted, however, that internal operating procedures are problematic in many circuits. Several circuits use i.o.p.'s like local rules but are not required to publish or circulate them like local rules.

Mr. Munford expressed disapproval of the final sentence of the Committee Note, lines 38-42. That sentence states: "Furnishing litigants with a copy outlining the court's practices -- or attaching instructions to a notice setting a case for conference or oral argument -- would suffice to give actual notice, as would an order in a case specifically adopting by reference a court's standing order and indicating how copies can be obtained." He pointed out that the last phrase would force a lawyer to somehow obtain a copy of the cross referenced standing orders. The last phrase, in fact, treats what is normally considered constructive notice as actual notice. Judge Jolly and Mr. Kopp moved that the entire sentence be deleted. The motion was approved unanimously.

Because the mail vote approved the draft and no member called for reconsideration of that vote, the draft was approved.

Item 86-23

The Committee was asked to address the problem a prisoner may have in filing timely objections to a magistrate judge's report. The problem is the converse of the one addressed

by the Committee in response to Houston v. Lack. Houston addressed the problem that a *pro se* prisoner has in timely filing documents because a prisoner has no control over when prison officials place the prisoner's mail in the United States mail -- a problem with outgoing mail. The focus of this item is that an incarcerated person also does not have control over when mail is delivered to him or her -- a problem with incoming mail.

The drafts prepared for this meeting provide that service upon institutionalized persons is complete only upon receipt of the document by the inmate.

Following a brief discussion about whether there is any need for such a change, Judge Ripple suggested that the drafts be circulated to the Chief Judges of the circuits and to the Committee of Staff Attorneys, who deal with motions for leave to file out of time, to get their reactions. It was further suggested that the Advisory Committee of Defenders be consulted. The Committee concurred.

Items 86-24 and 92-8

A suggestion was submitted to the Committee that it reexamine the operation of Rule 38 just as the Civil Rules Committee had reexamined Rule 11. Judge Ripple had appointed a subcommittee consisting of Judge Boggs, Mr. Froeb, Judge Hall, and Mr. Munford to consider the suggestion and to lead the discussion.

Judge Boggs reported that subcommittee concluded that further consideration of the topic would not be fruitful at this time. He did state, however, that the subcommittee believed that the area does bear watching and may need to be revisited in the future.

Judge Ripple stated that he would keep the subcommittee in place and ask it to monitor, with the help of the Reporter, the developments in the area of sanctions. That subcommittee would be charged with informing the Committee when, and if, it should address the topic in a more formal way. Judge Boggs agreed to continue to serve as subcommittee chair.

Item 91-28

At the December 1991 meeting Mr. Kopp suggested that Rule 27, which governs motions, needed updating. Mr. Kopp prepared a proposal and supporting memorandum. Because of the complexity of the topic and the lateness of the hour, Judge Ripple suggested that the Committee was not in a position to take up the topic during the meeting. But Judge Ripple appointed a subcommittee to examine the proposal. He asked Judge Williams to chair the subcommittee and Mr. Froeb and Mr. Munford to serve on it; they all agreed. He further requested that the subcommittee circulate the draft to the Chief Judges of the circuits, if the subcommittee thought that was appropriate.

Item 92-3

This item concerns the possible conflict between Rule 4(b) and 18 U.S.C. § 3731. The matter was brought to the attention of the Committee by Judge Logan. The former Solicitor General wrote to the Committee suggesting that the Committee take no further action and allow case law to resolve any remaining problems.

Judge Ripple noted that Rule 4(b) was amended by Congress. The conflicting provision was not a product of the committee process but a direct expression of Congressional intent. Therefore, Judge Ripple stated one could argue that because 4(b) was enacted after § 3731, 4(b) is the most recent expression of Congressional intent and the conflict is more apparent than real.

Mr. Munford observed that the only party that could be injured by the conflict is the government and the government does not want the Committee to act.

Judges Jolly and Boggs moved that the Committee take no further action. The motion was approved unanimously.

Item 92-5

At the Advisory Committee's April 1992 meeting, the Committee reviewed proposed amendments to Rule 25 drafted in response to the Houston v. Lack case. At that time one member of the Committee noted that in order to file a brief using the mailbox rule, Rule 25 requires a party to use "the most expeditious form of delivery by mail, excepting special delivery." Now that the postal service offers overnight mail service, the Committee questioned whether the rule requires the use of that service.

The Reporter prepared a draft amendment to Rule 25 requiring the use of first class mail, which is what the current Supreme Court Rule requires. Mr. Froeb and Mr. Kopp moved that the Committee approve the draft; it was approved unanimously.

Item 92-6

Mr. Greacen, the Clerk of the Fourth Circuit, asked that the Advisory Committee consider eliminating the mailbox rule in Rule 25 for filing a brief or appendix. Following the Reporter's review of the issue, no motion was made; therefore, Judge Ripple stated that the item would be treated as one for which no further action is deemed appropriate.

Item 92-7

Judge 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. Judge Newman's letter stated that the notice often needs to be examined to determine the timeliness and scope of the appeal.

Mr. Munford observed that those circuits that want a copy of the notice require it by local rule. The issue, therefore, is whether the requirement should be national.

No member making a motion to adopt the suggestion, Judge Ripple stated that the item would be treated as one for which no further action is deemed appropriate.

Item 92-9

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 has published such an amendment. The Reporter prepared draft amendments to Fed. R. App. P. 10(b)(1) using the Bankruptcy Rule as a model. The draft provides that if a notice of appeal is suspended because of the filing of a post trial motion, the appellant is not required to order a transcript until after disposition of the last post trial motion.

Mr. Froeb made a motion to approve the draft. The motion was seconded by Judge Williams and approved unanimously.

Item 93-2

The Acting Solicitor General wrote to Judge Ripple noting a technical problem with Rule 8(c). Rule 8(c) provides that a stay in a criminal case shall be had in accordance with the provisions of Rule 38(a) of the Federal Rules of Criminal Procedure. When Rule 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, fine, or probation. Criminal Rule 38 was later amended to address those subjects in separate subsections. Subsection (a) now only covers the death penalty; subsection (b) imprisonment; subsection (c) fines; and subsection (d) probation. Mr. Bryson suggested that the specific cross reference to subdivision (a) be dropped and that Rule 8(c) refer simply to Criminal Rule 38.

Judge Williams made a motion to approve the suggestion; the motion was seconded by Mr. Kopp. The motion was approved unanimously.

Miscellaneous

Judge Ripple reminded the Committee that in late January he had circulated a list of agenda items to determine whether there was any continuing interest in the topics. In response to that memorandum, none of the Committee members wanted to take any further action with regard to Items 91-18 (content of a petition to review a magistrate judge's judgment); 91-19 (uniform docketing statement); 91-20 (amendment of FRAP 26.1); and 91-21 (uniform appendix). However, two members requested further action with regard to Items 91-23 (consolidated brief for each side); 91-24 (page limits or other changes re: amicus

briefs); and 91-25 (contents of a suggestion for rehearing in banc). Judge Ripple stated that the last three items will be placed on the agenda for the Advisory Committee's fall meeting. The first four items will be listed as "no further action deemed appropriate."

IV. DISCUSSION ITEMS

Item 91-3 deals with implementing the authority to define a final decision by rule and to expand by rule the instances in which an interlocutory decision may be appealed. Judge Ripple informed the Committee that he had written to the Chief Judges of the Courts of Appeals asking their advice and that responses from them have begun to arrive. He also had written to the chairs of the AALS Sections on Federal Courts and Civil Procedure asking their advice and requesting that through their newsletters they make their members aware of the Committee's interest in hearing from the academic bar. Judge Ripple also reminded the Committee that the former Solicitor General had conveyed his hope that the Committee would not take an activist role simply because the authority had been granted.

With regard to Items 91-6, concerning the allocation of word processing equipment costs between producing originals and producing copies, and 91-15, concerning a uniform effective date for local rules, Judge Ripple informed the Committee that he would write to the Committee to ascertain if the members wish to keep those items on the docket.

Item 91-17, involving unpublished opinions, will be discussed at the fall meeting to determine whether the Committee wishes to pursue the topic.

Item 92-11 originated with a request from the Solicitor General to examine those local rules that do not exempt government attorneys from joining a court bar or from paying admission fees. Judge Ripple informed the Committee that the Acting Solicitor General has asked that the Committee defer acting on the item until the new Solicitor General has an opportunity to address the issue.

Judge Ripple suggested that the Committee try to meet next September before the Chair of the Committee changes. Such a meeting would give the Committee the opportunity to try to clear a number of remaining items off the docket before the new Chair assumes his or her duties.

The meeting adjourned at 3:00 p.m.

Respectfully submitted,

Carol Ann Mooney /tw

Carol Ann Mooney
Reporter

Rule 27. Motions

(a) *Form and Content of Motions; Response*. -- ~~Unless 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.~~

(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 ~~a specific~~ any relevant provision of these rules, ~~governing such a motion,~~ and shall state with particularity the grounds upon which ~~it is~~ the motion is based~~, and shall set forth the order or~~ and the relief sought. If a motion is supported by ~~briefs,~~ 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 may not exceed twenty pages. A reply to a response may 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 the 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 motions, and 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~~. 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) ~~*Form of Papers;*~~ *Number of Copies*. ~~All papers relating to motions may be typewritten. Three copies shall be filed with the original, but the court may require that additional copies be furnished.~~ 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 rules, 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.

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

TO: Members of the Advisory Committee on Appellate Rules

FROM: Kenneth F. Ripple

DATE: February 25, 1993

RE: Agenda Items 92-1 and 92-2

Dear Colleagues:

At our meeting last October we approved a draft rule that would permit technical amendment of the rules without the need for Supreme Court and Congressional review and draft language to be added to Rule 47 governing local rules. Copies of the drafts approved by the Advisory Committee are attached and labeled Appendix A.

It was understood that the Standing Committee planned to use the drafts prepared by each of the Advisory Committees to develop uniform language. In my January 14, 1993 memorandum summarizing the actions taken by the Standing Committee at its December meeting, I noted that the chairs and reporters of all of the committees met, compared language, and agreed upon uniform language. The reporter for the Standing Committee was asked to prepare uniform committee notes.

It is now the task of each Advisory Committee to integrate the agreed upon language into each set of rules and return to the Standing Committee with specific rule amendments.

Enclosed are draft rules that incorporate the uniform language. The committee notes are those drafted by the Reporter for the Standing Committee.

Our agenda for the April meeting is rather full. We have had discussions about several earlier drafts of these rules; therefore, I believe that we should be able to settle these items by mail vote. Ballot sheets are enclosed for each item. If all of the members approve both drafts, we can dispense with discussion of them at the April meeting.

Item 92-1.

If you have any questions, please do not hesitate to contact Professor Mooney. Her phone number is (219) 631-5866 and her fax number is (219) 631-6371.

The draft rule differs from the draft approved by the committee in October in two principal ways:

1. The October draft included a sentence (lines 10-13) stating that "[a]ll generally applicable directions to parties or their lawyers regarding practice must be in local rules rather than internal operating procedures or standing orders." The current draft does not include that sentence.

   The current draft provides, however, that "[n]o sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal statutes, rules, or the local circuit rules unless the alleged violator has actual notice of the requirements." That provision provides a strong incentive for including general directives in local rules whenever possible. It does, however, give the courts of appeals the ability to issue directives on minor matters, such as courtroom protocol, that may be so trivial that the court may prefer not to clutter the rules with them.

   The Committee Note accompanying subdivision (b) also makes it clear that inclusion of general directions in places other than local rules is problematic.

2. The October draft required the circuits to number their local rules to correspond to the related federal rule (lines 13-15). The current draft requires local rules to conform to any uniform numbering system prescribed by the Judicial Conference of the United States. That language is acceptable in each set of rules and it is anticipated that the Judicial Conference will require circuits rules to conform to the Federal Rules of Appellate Procedure.

Rule 47. Rules ~~by~~ of a Courts~~s~~ of Appeals

(a) Local Rules. -- Each court of appeals ~~by action of~~ acting by a majority of ~~the circuit~~ its judges in regular active service may, after giving appropriate public notice and opportunity to comment, ~~from time to time~~ make and amend

rules governing its practice. A local rule must be ~~not~~ ~~in~~consistent with, but not duplicative of, Acts of Congress and ~~these~~ rules adopted under 28 U.S.C. § 2072. Local rules must conform to any uniform numbering system prescribed by the Judicial Conference of the United States. The clerk of each court of appeals must send the Administrative Office of the United States Courts a copy of each local rule and internal operating procedure when it is promulgated or amended. ~~In all cases not provided for by rule, the courts of appeals may regulate their practice in any manner not inconsistent with these rules. Copies of all rules made by a court of appeals shall upon their promulgation be furnished to the Administrative Office of the United States Courts.~~

(b) Procedure When There Is No Controlling Law. -- A court of appeals may regulate practice in any manner consistent with federal ~~statutes~~ laws, rules, and ~~with~~ local rules of the circuit. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal statutes, rules, or the local circuit rules unless the alleged violator has actual notice of the requirements.

Bankruptcy change

Committee Note

Subdivision (a). The amendment requires that local rules be consistent not only with the national rules but also with Acts of Congress. The amendment also states that local rules should not repeat national rules. Repetition of a national rule in the text

of a local rule makes the additional local requirement or variation less apparent.

The amendment also requires that the numbering of local rules conform with any uniform numbering system that may be prescribed by the Judicial Conference. Lack of uniform numbering might create unnecessary traps for counsel and litigants. A uniform numbering system would make it easier for an increasingly national bar and for litigants to locate a local rule that applies to a particular procedural issue.

Subdivision (b). The rule provides flexibility to the court in regulating practice when there is no controlling law. Specifically, it permits the court to regulate practice in any manner consistent with Acts of Congress, with rules adopted under 28 U.S.C. § 2072, and with the circuit's local rules.

This rule recognizes that courts rely on multiple directives to control practice. Some courts regulate practice through the published Federal Rules and the local rules of the court. In the past, some courts have also used internal operating procedures, standing orders, and other internal directives. Failure to include directives in local rules can result in lack of notice. Counsel or litigants may be unaware of various directives. In addition, the sheer volume of directives may impose an unreasonable barrier. For example, it may be difficult to obtain copies of the directives. Finally counsel or litigants may be unfairly sanctioned for failing to comply with a directive. For these reasons, this Rule disapproves imposing any sanction or other disadvantage on a person for noncompliance with such an internal directive, unless the alleged violator has actual notice of the requirement.

There should be no adverse consequence to a party or attorney for violating special requirements relating to practice before a particular court unless the party or attorney has actual notice of those requirements. Furnishing litigants with a copy outlining the court's practices -- or attaching instructions to a notice setting a case for conference or oral argument -- would suffice to give actual notice, as would an order in a case specifically adopting by reference a court's standing order and indicating how copies can be obtained.

Item 92-2.

The current draft is very similar to the October draft. The October draft provided that the Judicial Conference could make "nonsubstantive changes essential to conforming these rules with statutory amendments." The current draft substitutes the word "technical" for "nonsubstantive" on the assumption that it is better understood.

Rule 50. Technical and Conforming Amendments

The Judicial Conference of the United States may amend these rules to correct errors in spelling, cross-references, or typography, or to make technical changes needed to conform these rules to statutory amendments.

Committee Note

This rule is added to enable the Judicial Conference to make minor technical amendments to these rules without having to burden the Supreme Court and Congress with reviewing such changes. This delegation of authority will relate only to uncontroversial, nonsubstantive matters.

Re: Item 92-1, the amendment to Rule 47 regarding local rules

I approve the current "uniform" draft. _____

I do not approve the current "uniform" draft. _____

_____

member's signature

Re: Item 92-2, the new technical amendments rule

I approve the current uniform draft. _____

I do not approve the current uniform draft. _____

_____

member's signature

Rule 47. Rules ~~by~~ of a Courts of Appeals

After giving appropriate public notice and opportunity for comment, ~~E~~ each court of appeals by action of a majority of the circuit judges in regular active service may ~~from time to time~~ make and amend rules governing its practice ~~not in~~ that are consistent with, but not duplicative of, ~~these~~ rules adopted under 28 U.S.C. § 2072. ~~In all cases not provided for by rule, the courts of appeals may regulate their practice in any manner not inconsistent with these rules.~~ All generally applicable directions to parties or their lawyers regarding practice before a court must be in local rules rather than internal operating procedures or standing orders. Any local rule that relates to a topic covered by the Federal Rules of Appellate Procedure must be numbered to correspond to the related federal rule. ~~Copies of all rules made by a court of appeals shall upon their promulgation be furnished to the Administrative Office of the United States Courts.~~ The clerk of each court of appeals shall send the Administrative Office of the United States Courts a copy of each local rule and internal operating procedure when it is promulgated or amended. In all matters not provided for by rule, a court of appeals may regulate its practice in any manner consistent with rules adopted under 28 U.S.C. § 2072 and under this rule.

Rule 50. Technical and Conforming Amendments

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