ADVISORY COMMITTEE
ON
APPELLATE RULES

Washington, D.C.
October 27-29, 1994

TENTATIVE AGENDA
ADVISORY COMMITTEE ON APPELLATE RULES
MEETING - OCTOBER 27-29

I. ACTION ITEMS

A. Approval of the minutes of the April 25 & 26, 1994, meeting.

B. Review of action taken by the Standing Committee regarding proposed amendments to the Fed. R. App. P.

C. Item 91-24, page limits for and contents of amicus briefs.
Materials: Reporter's memorandum dated March 11, 1994

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

At the April 1994 meeting, the F.J.C. undertook to study the kind and number of petitions for rehearing in the four circuits that have local rules or I.O.P.'s stating that the existence of an intercircuit conflict is grounds for granting an in banc hearing. The F.J.C. representative stated that it would provide a report at the Advisory Committee's next meeting.

Materials: Reporter's memorandum dated March 11, 1994

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

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

G. Item 93-5, amendment of Rule 26.1 re: use of the term affiliates
Item 93-10, applicability of Rule 26.1 to trade associations

H. Item 94-1, amendment of Rule 26(c) re: length of time for responding when service is by mail

I. Consideration of the Style Subcommittee's proposed rewriting of the Fed. R. App. P.

II. DISCUSSION ITEMS

A. Item 92-8, new chair of subcommittee on sanctions.

B. Item 93-11, permitting a party to submit draft opinions as an appendix to a brief.

C. Item 94-2, prohibiting citation of appellate decisions that lack a clear recitation of jurisdiction.

Table of Agenda Items -- Revised September 1994

FRAP Item	Proposal	Source	Current Status
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 Approved by Judicial Conference 9/93 Forwarded to Congress by Supreme Court 4/94
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 No further action deemed appropriate 4/94
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 C.J. Breyer's suggestion submitted to sub-committee 9/93, see item 93-9 Response provided to C.J. Breyer 5/94; no further action deemed appropriate at this time 4/94

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 Publication delayed pending completion of Items 91-25 and 92-4, 9/93
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
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 Approved by Judicial Conference 9/93 Forwarded to Congress by Supreme Court 4/94

FRAP Item	Proposal	Source	Current Status
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 Consideration of interlocutory review of rulings on class certification. Referral from Civil Rules Committee 6/93
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 republication 5/93 Standing Committee approved new draft for republication 6/93 Published 11/93 Advisory Committee approved new draft for submission to Standing Committee for republication 4/94 Approved by Standing Committee for republication 6/94
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 Approved by Judicial Conference 9/93 Forwarded to Congress by Supreme Court 4/94

FRAP Item	Proposal	Source	Current Status
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 Approved by Judicial Conference 9/93 Forwarded to Congress by Supreme Court 4/94
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 Approved by Judicial Conference 9/93 Forwarded to Congress by Supreme Court 4/94
91-11	Amendment of Rule 25 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 Approved by Judicial Conference 9/93 Forwarded to Congress by Supreme Court 4/94

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 Approved by Judicial Conference 9/93 Forwarded to Congress by Supreme Court 4/94
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 Approved by Judicial Conference 9/93 Forwarded to Congress by Supreme Court 4/94

FRAP Item	Proposal	Source	Current Status
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 Published 11/93 Advisory Committee approved new draft for submission to Standing Committee for republication 4/94 Approved by Standing Committee for republication 6/94
91-17	Uniform plan for publication of opinions.	Local Rules Project & Federal Courts Study Committee	Further study recommended 12/91
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 Approved by Judicial Conference 9/93 Forwarded to Congress by Supreme Court 4/94

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 Approved in substance; Reporter to prepare new draft 9/93 Discussion of new draft postponed until fall meeting 4/94
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 Approved in substance; Reporter to prepare new draft 9/93 Discussion of new draft postponed until fall meeting 4/94
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 Approved by Judicial Conference 9/93 Forwarded to Congress by Supreme Court 4/94

FRAP Item	Proposal	Source	Current Status
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 Approved by Judicial Conference 9/93 Forwarded to Congress by Supreme Court 4/94
91-28	Updating Rule 27.	Advisory Committee	Mr. Kopp asked to prepare memo 12/91 Held over 10/92 Subcommittee appointed 4/93 Approved in substance; subcommittee to prepare new draft 9/93 Approved for submission to Standing Committee 4/94 Approved by Standing Committee for publication 6/94

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 6/93 Published 11/93 Approved for resubmission to Standing Committee 4/94 Approved by Standing Committee for submission to Judicial Conference 6/94
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 Published 11/93 Approved for resubmission to Standing Committee 4/94 Standing Committee determined that no further action is appropriate 6/94

FRAP Item	Proposal	Source	Current Status
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 Approved in substance; subcommittee to prepare new draft 9/93 Discussion of new draft postponed until fall meeting 4/94
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 Published 11/93 Advisory Committee approved new draft for submission to Standing Committee for republication 4/94 Approved by Standing Committee for republication 6/94
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

FRAP Item	Proposal	Source	Current Status
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 Published 11/93 Approved for resubmission to Standing Committee 4/94 Approved by Standing Committee for submission to Judicial Conference 6/94
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 Published 11/93 Approved for resubmission to Standing Committee 4/94 Approved by Standing Committee for submission to Judicial Conference 6/94
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
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 Referred to Advisory Committee on Civil Rules 4/94

FRAP Item	Proposal	Source	Current Status
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 Published 11/93 Approved for resubmission to Standing Committee 4/94 Approved by Standing Committee for submission to Judicial Conference 6/94
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 discussion
93-5	Amend Rule 26.1 to delete use of term "affiliate."	Mr. Joseph Spaniol	Awaiting initial Committee discussion
93-6	Amend Rule 41 re: effective date of mandate.	Solicitor General Days	Awaiting initial Committee discussion
93-7	The Houston v. Lack problem in the context of a petition for review of an agency decision.	Mr. Munford	Awaiting initial Committee discussion No further action deemed appropriate 4/94
93-8	Fax Filing.	Judicial Conference	Initial discussion 9/93 Amendment of Rule 25(c) published 11/93 Subcommittee appointed to draft model local rules 9/93 No further action needed

FRAP Item	Proposal	Source	Current Status
93-9	Means short of sanctions to reprimand attorneys.	Hon. S. Breyer (CA-1)	Referred to Judge Boggs subcommittee on sanctions 9/93 Subcommittee reported 4/94 Response provided to C.J. Breyer 5/94 No further action deemed appropriate at this time 4/94
93-10	Applicability of Rule 26.1 to trade assoc.	Advisory Committee	Awaiting initial Committee discussion
93-11	Rule permitting party to submit draft opinions as appendix to brief.	Hon. E. Peterson (Sup. Ct. OR)	Awaiting initial Committee discussion
94-1	Amend Rule 26(c) re: length of time for responding when service is by mail.	Standing Committee	Awaiting initial Committee discussion
94-2	Amend Rule 28(a) to prohibit citation of appellate decisions without clear recitation of jurisdiction.	Wm. Leighton, Esq.	Awaiting initial Committee discussion

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Agenda Item 4

MINUTES OF THE MEETING
OF THE ADVISORY COMMITTEE ON APPELLATE RULES
APRIL 25 & 26, 1994

Having been preceded by testimony regarding the proposed amendments to Rule 32, the meeting was called to order by Judge Logan at 10:40 a.m. in the Hyatt Regency Hotel in Denver, Colorado. In addition to Judge Logan, the Committee Chair, the following Committee members were present: Judge Danny Boggs, Judge Cynthia Hall, Judge Grady Jolly, Chief Justice Arthur McGiverin, Mr. Michael Meehan, Mr. Luther Munford, and Judge Stephen Williams. Mr. Robert Kopp attended on behalf of Solicitor General Days. Judge Kenneth Ripple, the former chair of the Committee, and Judge Alicemarie Stotler, Chair of the Standing Committee, were present. Mr. Robert Hoecker, the Clerk of the Tenth Circuit, attended on behalf of the clerks. Professor Mooney, the Reporter, was present. Mr. Bryan Garner, the consultant to the Style Subcommittee of the Standing Committee, 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 Ms. Judith McKenna of the Federal Judicial Center.

Rule 32

The witnesses who had just completed their testimony, Mr. Paul Stack who is General Counsel of Monotype Typography, Inc., Mr. William Davis who also is from Monotype Typography, and Ms. Sarah Leary of Microsoft Corporation, were present. So that the Committee would be able to take advantage of the speakers expertise, Judge Logan began the meeting with discussion of Rule 32. Judge Logan stated that his goal for the morning was to have the Committee make substantive decisions about the direction of Rule 32 rather than to approve precise language. Judge Logan indicated that following the initial discussion, he would appoint a drafting subcommittee to prepare a new draft for the Committee's consideration the following morning.

The Reporter summarized two additional comments on Rule 32 that had been received since the preparation of the materials for the meeting.

The speakers, during their earlier testimony, had presented an alternative draft for the Committee's consideration. Judge Logan called for a vote on whether the Committee preferred to work with the published draft or with the new draft. The Committee preferred the new draft by a vote of six to one. A copy of the draft is attached to these minutes.

Subdivision (a) of the draft contained definitions. Paragraph (a)(1) defined a "monospaced typeface" as one in which "(i) all characters, including spaces, have the same advance width, (ii) there are no more than 11 characters to an inch, and

(iii) the weight of the typeface design is regular or its equivalent." One member of the Committee asked whether justifying the right margin would make the advance width nonuniform since justification adds white space. Another member of the Committee responded that the spacing added to justify the right margin is not technically "advance width."

The definition of a "proportionately spaced typeface" in paragraph (a)(2) stated that it is a typeface in which "(i) individual characters have individual advance widths, (ii) the x-height (the height of the lower case 'x') is equal to or greater than 2 millimeters, (iii) the em-width (the width of the upper case "M") is equal to or greater than 3.7 millimeters, (iv) the design is of a serifed, text, roman style, and (v) the weight of the typeface design is regular or its equivalent."

Some members of the Committee initially reacted negatively to including that level of detail in the national rule. Judge Logan reminded the Committee that it decided to address the typeface issue because of the proliferating local rules. The Committee concluded, however, that the draft rule seemed to address not only lawyers who prepare briefs, but also people who design typefaces and software. The Committee hoped to simplify the draft so that it would be readily understandable by both audiences.

A suggestion developed that it might be possible to eliminate the "x" height and "em" width if the rule did three things:

1. required 1-1/4 inch side margins and 1 inch top and bottom margins;
2. limited a brief to a total of 14,000 words; and
3. limited each page to no more than 280 words.

If the text extended to the margins specified, each page contained no more than 280, and the brief as a whole were limited to no more than 14,000 words regardless of the total number of pages, the "x" height and "em" width would likely be met by default. This would permit the use of proportionately spaced typefaces and ensure that the typefaces were of sufficient size to be easily legible.

The Committee concluded that it wanted to permit both monospaced and proportionately spaced typefaces but that the rule should state a preference for proportionately spaced typefaces. Because of concern about the technical nature of the definitions, it was suggested that examples might be added to the definitions.

The Committee conceptually approved paragraphs (a)(3) and (a)(4) of the definitions.

Subdivision (b) of the draft dealt with the form of a brief and an appendix. The Committee conceptually approved paragraphs (b)(1), (b)(2), (b)(4), (b)(9)

and (b)(10).

Paragraph (b)(3) established different margins for briefs using proportionately spaced typefaces and for those using monospaced typefaces. The draft suggested wider side margins (resulting in shorter lines of text) for proportionately spaced typeface. A proportionately spaced typeface fits more material in the same amount of space than a monospaced typeface of the same size. If the same line length is used for both typefaces, there is not only more text in the lines produced with a proportionately spaced typeface but the comprehensibility of the proportionately spaced document also declines. Therefore, the Committee approved different margins dependent upon the typeface used. Paragraph (b)(3) also authorized the use of pamphlet sized briefs. Technology is developing to the point that law firms soon will be able to produce the pamphlet sized briefs in-house. The consensus was that the pamphlet sized briefs are preferred and the rule should continue to permit them.

Paragraph (b)(7) of the draft provided that "[a]ll case citations in a brief must be underlined. A brief typeset in a proportionately spaced typeface accompanied by a true italic typeface may use the italic in lieu of underlining." A member of the Committee noted that the current rule is silent about the treatment of citations and there may be no need to include such a provision. Other members of the Committee expressed preference for the use of italic rather than underlining and stated that if the rule deals with the issue, it should state a preference for italics. The Committee did not reach a consensus about the appropriateness of a provision such as (b)(7).

The Committee agreed that all references to the "appendix" should be removed from paragraphs (b)(1) through (5). An appendix is typically produced by photocopying existing documents. Paragraph (b)(8) provided that if photocopies of documents are included in the appendix "such pages may be informally renumbered if necessary." The Committee agreed that the pages must be renumbered in order of their appearance in the appendix. It was further suggested that it would be helpful if an appendix had a table of contents.

Subdivision (c) of the draft dealt with the length of a brief. It suggested that a principal brief should not exceed 14,000 words and that a reply brief should not exceed 7,000 words. The draft further required that a brief be accompanied by a declaration that it complies with the rule.

The Committee asked the printing experts how those limits compare to the current 50 page limitation. The printing experts responded that in 1970 using an office typewriter, a 50 page brief would have contained approximately 12,500 words; but today, using a proportionately spaced typeface, a 50 page brief can greatly exceed 14,000 words without abusive use of footnotes or compacting the

print, etc.

The Committee expressed a desire to create safe harbors for briefs using either monospaced or proportionately spaced typefaces so that certification of compliance would be unnecessary. The draft suggested that a 50 page brief set in monospaced typeface should be conclusively presumed to be within the 14,000 word limit. The Committee concurred that such a safe harbor is necessary so that a person producing a brief with a typewriter would not need to manually count the words in the brief. The Committee expressed a hope that it could develop a similar sort of safe harbor for a brief set in a proportionately spaced typeface.

One member mentioned the desirability of including a provision preempting any local rules concerning length.

Paragraph (d) of the draft dealt with the form of other papers such as petitions for rehearing, suggestions for rehearing in banc, etc. The draft contained the same provision as the published rule stating that such documents must have a cover the same color as the party's principal brief. Some of the commentators on the published rule objected to requiring a cover at all, others wanted the rule to require the colors required by their local rules. One member of the Committee stated that the inclusion of such detail in the published rule was tied to the preemption issue. The details had been included in the rule to eliminate the pitfalls created by varying local rules on such issues.

At the conclusion of the discussion of Rule 32, Judge Logan asked Mr. Munford and the Reporter to join him that evening to work on a new draft. Judge Logan thanked those persons who had testified both for their informative testimony and for their answers to the Committee's technical inquiries.

The minutes of the preceding meeting were unanimously approved with only one correction, on line 11, page 24, the word "advice" should be changed to "advise."

Judge Logan then informed the Committee that he would take up the remaining proposed amendments that had been published for comment.

Rule 4(a)(4)

There were no comments on the proposed amendments to Rule 4(a)(4). The Committee unanimously approved submission to the Standing Committee of the rule as published.

Rule 8

There were no comments on the proposed amendment to Rule 8. The Committee unanimously approved submission to the Standing Committee of the rule as published.

Rule 10

The proposed amendment to Rule 10 suspends the 10-day period for ordering a transcript if a timely postjudgment motion is made that suspends a notice of appeal under Rule 4(a)(4). One comment was received. It suggested that counsel be required to notify the court reporter when there is no need to proceed with preparation of the transcript because of a pending postjudgment motion. The Committee agreed that the party paying for preparation of the transcript would have a strong incentive to notify the court reporter that preparation should be halted until disposition of the motion and, therefore, that an additional rule change was unnecessary.

The Committee unanimously approved submission to the Standing Committee of the rule as published.

Rule 21

The proposed amendments to Rule 21 provide that the trial judge is not named in a petition for mandamus and is not treated as a respondent. The published rule, however, permits the judge to appear to oppose issuance of the writ if the judge chooses to do so, or if the court of appeals orders the judge to do so.

Three of the commentators on the rule opposed the provision giving the judge the option to file a response if the judge wishes to do so. The primary reason for the opposition was that the judge's participation puts the judge in an adversarial posture with a litigant.

Several members of the Committee agreed that having the judge in the posture of a litigant is a serious matter. One member of the Committee pointed out that in many instances, however, only the judge can give a thorough response to the petition. Another member responded that if the court of appeals has the authority to ask a judge for a response whenever appropriate, that should be sufficient and there should be no need to give the trial judge discretion to respond. Another member made the point that the court of appeals may not always be aware that the trial court judge possesses information that could make a crucial difference in deciding the petition.

Judge Logan called for a vote on the trial judge's right to respond absent a request from the court of appeals for a response. Four members supported the trial judge's right to respond, and five members felt that the trial judge should respond only when ordered to do so.

Given that vote, it was pointed out that the Committee did not need to address Judge Weinstein's concern about a court of appeal's *sua sponte* conversion of an interlocutory appeal into a petition for mandamus. Judge Weinstein was concerned that in such instances the trial judge would not be served with a copy of the petition by the appellant/petitioner and would not have notice of the commencement of the proceedings and, therefore, might miss the opportunity to respond. If, however, the trial judge may respond only when ordered to do so, the judge obviously will be aware of the need to respond.

The Committee then turned its attention to the Reporter's draft two on page 33 of the GAP materials.

The first question the Committee discussed was whether the Rule should continue to refer specifically to writs of mandamus or prohibition or should simply refer generically to extraordinary writs. The Committee voted unanimously to continue the reference to the writs of mandamus and prohibition.

One member asked the Committee to consider lines 37-40, which provided:

> (1) The court may deny the petition without an answer. Otherwise, it must order the respondent -- or if there is no respondent, the trial court judge -- to answer within a fixed time. Even when there is a respondent, the court of appeals may order the trial court judge to respond or may invite an amicus curiae to do so.

The member questioned the wisdom of making it obligatory for the trial court judge to respond when there is no respondent. The provision was rewritten as follows:

> (1) The court may deny the petition without an answer. Otherwise, it must order the respondent, if any, to answer within a fixed timed.
> (2) The court of appeals may order the trial court judge to respond or may invite an amicus curiae to do so.

Another member questioned the role of the amicus curiae; should the amicus assume the traditional "neutral" role or should the amicus be in communication with the trial court judge and essentially represent the judge's position? The consensus was that the rule need not specify the role, that it either

would evolve or the amicus could ask the court of appeals for instructions concerning its proper role.

The Committee next discussed the necessity of subdivision (c). It was decided that subdivision (c) governs applications for extraordinary writs when there is no on-going trial court proceeding. For example, it covers an application to an individual circuit judge for an original writ of habeas corpus or a petition for mandamus directed to an administrative agency. The procedures under 21(a) exist when there is an on-going trial court proceeding. The last sentence of subdivision (c) ("Proceedings on such applications shall conform, so far as is practicable, to the procedure prescribed in subdivision (a) and (b) of this rule.") makes allowance for the fact that there will be differences, for example, between the procedures for an original petition for habeas corpus filed with circuit judge and those for a petition for mandamus or prohibition directed to a court because in the former there is no on-going trial court proceeding. For example, subdivision (a) requires service on all other parties to the trial court proceeding; that requirement would be inapplicable in the context of an original writ of habeas corpus.

Given that subdivision (c) governs applications for extraordinary writs when there is no trial court involvement, it was unanimously decided to leave subdivision (c) in its present form. To make the distinction between (a) and (c) clear, however, it was decided that lines 1, 4, and 5 of draft two should be amended to make it clear that subdivision (a) applies only to a petition for mandamus or prohibition directed to a court.

Line 17 was amended by making the "relief sought" the first item that must be contained in a petition.

With the changes noted above, draft two of Rule 21 was approved. It was suggested that the Committee Note should provide some example of instances in which a court of appeals may ask a judge to respond to a petition for mandamus as, for example, when a judge's inaction is challenged.

The Committee decided that republication might be necessary because of the change eliminating the trial court judge's ability to participate when there is no court of appeals order to do so.

Rule 25

The proposed amendment to Rule 25(a) provided that in order to file a brief using the mailbox rule, the brief must be mailed by first-class mail. The current rule requires a party to use "the most expeditious form of delivery by mail excepting special delivery," which, given the advent of express mail and other

special services, is no longer a clear directive.

The commentators on the published rule objected to the requirement that the postmark indicate mailing on or before the filing date and to the failure to extend the mailbox rule to private overnight courier services.

The Committee unanimously decided that the rule should make the mailbox rule applicable to a brief sent by first-class mail or by other "equally reliable commercial carrier."

Having decided to extend the mailbox rule to private carriers, the postmark requirement either must be eliminated or extended to include the alternate carrier's record of receipt of the brief. The postmark requirement was eliminated by a vote of 5 to 4. In its place the Committee unanimously decided to require a certification by the filing party that "on or before the last day for filing" the brief "was mailed to the clerk by first-class mail, postage prepaid, or dispatched to the clerk by equally reliable commercial carrier."

Regarding 25(c) the Committee decided to delete the provision permitting service by facsimile. This decision was in accord with the action of the Standing Committee at its January meeting deleting the provision in the model local rule for facsimile service.

Subdivision (c) was amended to permit service by equally reliable commercial carrier and to state that service by commercial carrier is complete upon delivery to the carrier.

The Committee decided, however, to delete lines 49 through 52 providing that when a brief or appendix is filed by delivery to a private carrier, copies must be served on the other parties in the same manner. It was pointed out that there would be instances in which a brief is filed with the court by delivery to a private carrier but the opposing party's counsel resides across the street and service could be accomplished more quickly by personal delivery. It was further noted that the desire for expeditious service is at least as strong in motions practice as it is with regard to briefing.

To eliminate the problem of lawyers filing documents with the court but manipulating service so that the opposing party does not have notice of the filing until much later, an additional sentence was added to subdivision (c). It states, "When feasible, service on a party must be by a manner at least as expeditious as the manner of filing with the court." One member pointed out that although the gamesmanship that is the motivation for the change is real, the change might impose economic hardship because it could be expensive to serve a large number of parties by private carrier. It was felt, however, that the "when feasible"

language would be broad enough to encompass such difficulties unless there is evidence of manipulation of the service. The "when feasible" language expresses a policy that service should be performed in a manner "at least as expeditious" as the manner of filing, but the rule does not require it. The amendment was passed by a vote of 7 in favor and 1 opposed.

Rule 26(c) provides 3 additional days for filing a response to a document served by mail. The Committee unanimously decided to make the extension applicable whenever service is by mail or "commercial carrier." Both the caption and the text of 26(c) must be so amended.

The Committee concluded that because of the changes making the mailbox rule applicable to a brief entrusted to a commercial carrier, and permitting service by commercial carrier, both Rules 25 and 26 should be republished.

Rule 47

The proposed amendments to Rule 47 require that local rules be consistent not only with the national rules but also with Acts of Congress and that local rules be numbered according to a uniform numbering system. The amendments also allow a court to regulate practice in a variety of ways but prohibit a court from causing a party to lose rights because of a negligent failure to comply with a local rule imposing a requirement of form, or from imposing sanctions or any other disadvantage for failure to follow a court directive not contained in a rule unless the violator has actual notice of the requirement.

One of the commentators stated that in some circuits internal operating procedures (I.O.P.'s) are used like local rules and that I.O.P.'s should be required to be consistent with federal law and that sanctions for violation of I.O.P.'s should be subject to the same constraints applicable to sanctions for violation of local rules.

Because directions concerning practice and procedure should be in local rules and not I.O.P.'s, the Committee unanimously approved the addition of a sentence to 47(a)(1) providing: "A generally applicable direction to a party or a lawyer regarding practice before a court must be in a local rule rather than an internal operating procedure or standing order."

At its February meeting, the Advisory Committee on Bankruptcy Rules voted to recommend to the Standing Committee a change in the provision parallelling subdivision (a)(2). The change approved by the Bankruptcy Committee is as follows:

A local rule imposing a requirement of form must not be enforced in a manner that causes a party to lose rights because of a ~~negligent~~ nonwillful failure to comply with the requirement.

One member stated that he preferred "negligent" to "nonwillful" because the higher standard might raise the level of practice. Another member expressed a preference for "nonwillful" because the provision applies to the party's rights. The change to "nonwillful" was approved by a vote of 5 to 3.

Judge Logan noted that the ABA's comment urged the Committee to prohibit local experimentation. Prior Committee discussion had rejected any such limitation except in those instances when a national rule governs the question. Many of the changes in the national rules have their source in successful local innovations. The Committee did not wish to revisit its prior discussions on the issue.

In light of the ABA comment, however, a motion was made to add the following sentence to the Committee Note: "It is the intent of this rule that a local rule may not bar any practice that these rules explicitly or implicitly permit." For example, if the national rules permit a brief that contains 14,000 words, any local rule that limits a brief to less than 14,000 words is inconsistent with the national rules. The motion passed with no opposition, but one abstention.

Subdivision (b) was amended, by a vote of 7 to 1, to make it applicable only to a "particular case." If subdivision (a) is amended to require that all generally applicable directions regarding practice or procedure be contained in local rules, the only sort of regulation that could be authorized by (b) is the issuance of an order in a particular case.

The Committee was of the opinion that it would not be necessary to republish the rule because the changes approved by the Committee simply memorialize the statutory distinction between local rules and I.O.P.'s and that the local rules project had discussed the problem as well.

Rule 49

Proposed Rule 49 allows the Judicial Conference to make technical amendments to the rules without the need for Supreme Court or Congressional review of the amendments.

The only commentator expressed no opposition to the amendment but suggested that the change might be better made by amending the Rules Enabling Act.

The Committee unanimously approved submission to the Standing Committee of the rule as published.

The Committee adjourned for the day at 5:10 p.m.

The Committee reconvened at 8:30 a.m. on April 26.

Ninth Circuit Rule 22

Five Attorneys General from capital states in the ninth circuit wrote to Chief Justice Rehnquist claiming that the new ninth circuit procedures for death penalty cases conflict with federal law. The Attorneys General requested that the Judicial Conference use its statutory authority to modify or abrogate circuit rules that are inconsistent with federal law.

Before discussing the substance of the allegations, the Committee considered the standard it would use to formulate a recommendation to the Judicial Conference concerning the modification or abrogation of local circuit rules. Title 28 of the United States Code, § 331 states:

> The Judicial Conference shall review rules prescribed under section 2071 of this title by the courts, other than the Supreme Court and the district courts, for consistency with Federal Law. The Judicial Conference may modify or abrogate any such rule so reviewed found inconsistent in the course of such review.

Judge Logan asked the Committee to consider the sort of recommendation it would make to the Judicial Conference in the following situations:

1. the local rule under consideration is not inconsistent with existing federal law;
2. the local rule is clearly inconsistent with federal law; and
3. the local rule is arguably inconsistent with federal law.

As to the first situation, the statute appears to make it inappropriate for an Advisory Committee to recommend abrogation of a rule that is not inconsistent with federal law even if the Committee believes the rule is very ill-advised. One member pointed out, however, that the issue is not quite so straight forward. The Judicial Conference can promulgate a rule of federal procedure which itself becomes federal law. Through adoption of a national rule, the Judicial Conference can preclude adoption of a contrary local rule. There is, therefore, a basis -- the normal rulemaking process -- upon which the Judicial Conference can

preclude local rules that it finds troublesome but not inconsistent with existing federal law.

One member suggested that there might be an extreme case in which a local rule is not inconsistent with federal law but is so troubling that the Committee might wish to make a recommendation to modify or abrogate the rule without utilizing the normal rulemaking process to bar the rule.

Judge Logan then asked the Committee whether it would recommend abrogation or modification when it finds that a local rule clearly violates federal law. While it may appear self-evident that the Committee should make such a recommendation, one member suggested that judging a rule invalid is an adjudicatory function. Others pointed out, however, that Section 331 clearly seems to contemplate making a decision to invalidate a rule in a non-adjudicatory setting.

One member asked whether the Attorneys General are challenging the ninth circuit rules in court. No one was aware of any such challenge. Although the local rules became effective on February 14, 1994, the rules were operative on an interim basis for some time before the official effective date. One member commented that the apparent reason for adoption of the ninth circuit rules was to bring order to the eleventh hour litigation that seems to be inevitable in death penalty cases. Raising the legitimacy of the rules during that time would only add to the existing frenzy and chaos; it makes sense, therefore, to examine the rule in a calmer context.

Judge Logan next asked the Committee to consider how it would handle a rule that is arguably inconsistent. One member pointed out that the language of § 331 is not mandatory; it says that the Judicial Conference "may modify or abrogate" inconsistent rules. Another member commented that there should be some discretion not to intervene when the inconsistency is doubtful. Another member noted that § 331 authorizes modification or abrogation of a rule "found inconsistent." He further commented that the language seems to require a degree of firm and settled opinion, arguably requiring a bit more certainty than an individual judge would need to vote on an issue in a case.

Another member commented that the ninth circuit rules have been attacked in 2-1/2 pages. The level of detail and scrutiny that the challengers have brought to bear is minuscule in comparison with what would be presented in litigation.

Another member stated that in his opinion, all the Committee really could address at this time is the question being pursued, the "standard of review" question; that there is insufficient information to make a decision on the merits of

the ninth circuit rules.

Another member indicated that two major bodies, the courts and the Judicial Conference, have the duty to determine the consistency of local rules with federal law. Courts have that job when a rule is challenged during litigation. Section 331, however, also gives the Judicial Conference authority to modify or abrogate a rule based on its facial inconsistency with federal law. When a rule may or may not be consistent depending upon its particular application during the course of litigation, the issue should be decided by a court as part of the litigation. But as to an issue such as permitting a second en banc hearing, a committee is as capable of resolving the legitimacy of such a procedure as a court. He further stated that Congress clearly expected that the Judicial Conference committees would do something about inconsistent local rules and that the Committee should be careful not to be too deferential. If the judiciary does not make use of the statutory authority given in § 331, other action may be necessary to take care of inconsistent local rules.

As to whether the Attorneys General should litigate this issue rather than seek relief from the Judicial Conference, another member pointed out that the litigation would take place in the same court that adopted the rule. He stated, therefore, that the Committee must step forward and take action when warranted and the brevity of the challenge put forward should not be treated as a factor disabling the Committee from taking action.

Another member suggested that in order to reach a decision about the validity of these rules it may be necessary to convene special hearings and to take testimony about the rules

Judge Logan summarized the Committee discussion as follows: first, the Committee would not recommend modification or abrogation of a local that is not inconsistent with federal law except in extraordinary circumstances; and second, when determining whether a local rule is inconsistent some members believe that the Committee should be reluctant to make such a finding but others believe that it is the Committee's duty to do so. In other words, there was a division of opinion as to how quick the Committee should be to condemn a local rule.

Judge Logan then directed the discussion to the substance of the ninth circuit rules. Judge Logan stated that Chief Judge Wallace's response indicated that the ninth circuit adopted its rules in response to criticism of their former procedures and in an attempt to speed up the process while still providing a full and fair hearing. Judge Logan outlined the questions he felt the Committee should consider.

1. Are two level in banc hearings appropriate?
2. Should a single judge be able to cause a case to be heard in banc?

3. Is it appropriate for the local rules to authorize single judge stays?
4. Is it appropriate to automatically grant a certificate of probable cause and a stay of execution on appeal from a first habeas petition.
5. Is it appropriate for the rule to apply to related civil proceedings as well as to habeas proceedings?
6. Does the rule countenance inappropriate ex parte communications with a single judge of the circuit?

1. Are two level in banc hearings appropriate?

As to the first issue, Ninth Circuit Rule 22-4(e)(4) permits a limited in banc review followed by a full in banc review if full in banc review is requested by an active judge. The Attorneys General state that when Congress authorized limited in banc review, authority was not given for two levels of in banc review.

Chief Judge Wallace responded that the two level in banc review is not limited to capital cases and is within the broad authority of 28 U.S.C. § 46(c) to establish procedures for in banc hearings. To date, the ninth circuit is the only circuit that has accepted Congress's invitation to "perform its en banc function by such number of members of its en banc courts as may be prescribed by rule of the court of appeals." 92 Stat 1633. Chief Judge Wallace asserts that the language of the statute is broad enough to authorize both limited and full court in banc review of a single case.

A member of the Committee argued that dual in banc hearings are not authorized by the language of the statute. The language of the statute is singular; a court "may perform its en banc function by such number of members of its en banc courts as may be prescribed by rules of the court. . ."

Another member asked whether the circuits permit the filing of a petition for rehearing of a case heard in banc or whether it would be lawful to have a rule permitting a petition for rehearing in banc after an in banc hearing. The member thought that permitting such a petition would be analogous to the dual in banc review authorized by the ninth circuit.

Another member asked whether the statutory language permitting a court to perform its in banc function with a limited in banc court should be read to imply a negation of the existing power to convene a full in banc court. That member stated that the burden should be on those persons claiming the negation of the preexisting power. He further stated that to the extent the Committee is looking for clear conflict with federal law, there is no such conflict arising from the dual in banc provisions.

Another member noted that the double in banc review procedure did not

originate in the death penalty setting and has existed since the ninth circuit began using limited in banc courts. The full in banc court should be able to delegate its authority to a limited in banc court, but if the full court is displeased with the action taken by the limited court, the full court should be able to convene to rehear the case. Another member noted that the existence of such a back-up procedure may be necessary to get a circuit to agree to use a limited in banc court.

Another member stated that upon reading the statute, his reaction was that a court could either hear a case with a limited in banc court or with a full in banc court but that the court could not do both.

Judge Logan asked the members of the Committee if they felt able to make a recommendation to the Judicial Conference about the lawfulness of the dual in banc review procedure. Some members had said that if they were deciding, they would say that there can be only one in banc hearing; whereas other members had said that they probably would permit the double in banc hearings. In short, reasonable minds differed over whether the procedure is inconsistent with federal law. Judge Logan asked the Committee to consider what it should say to the Judicial Conference in such a situation.

One member made a motion to recommend that the Judicial Conference should find the dual in banc provisions inconsistent with federal law. The movant stated that the Committee had been asked for its advice and it would be inappropriate for the Committee to conclude that it could not find a rule inconsistent with federal law whenever one reasonable person disagrees. On the basis of the statutory language, the movant concluded that the dual in banc procedure is unauthorized. He stated that if there were legislative history indicating that such proceedings had been contemplated, he might be persuaded to change his mind; but, absent any such evidence, he would vote against the validity of the procedure. Concerning the argument that the grant of an additional power does not ordinarily negate the pre-existing power, the movant argued that it is not applicable here. The new authority is not self-executing and becomes operative only at the option of the circuit. That means that the pre-existing power is not automatically displaced by the grant of additional authority but that it is displaced when a circuit exercises the option to use the alternate procedure. In other words when a circuit adopts the limited in banc procedure, it gives up the authority to conduct a full in banc hearing.

In response, another member agreed that the committee should be able to conclude that a local rule is inconsistent with federal law even though reasonable minds can differ about that conclusion. That member indicated, however, that he would vote against the motion not because he had concluded that the procedure is valid, but because it hadn't been shown to be invalid.

The motion was defeated by a vote of 3 to 4 with two abstentions. Judge Hall, from the ninth circuit, and Mr. Kopp, representing the Department of Justice, abstained on this vote and all subsequent votes on the validity of the ninth circuit rules.

2. Should a single judge be able to cause a case to be heard in banc?

Judge Logan asked the Committee to consider the challenge to the provision in the ninth circuit rules permitting a single judge to convene an in banc court. The charge is that such a provision is inconsistent with the requirement that a majority of the active judges must approve an in banc hearing. Chief Judge Wallace responded by saying that "[t]he statute does not specify, however, that the ordering of an en banc hearing always must be by majority vote taken separately in each individual case." Because a majority of the circuit judges have voted to approve the local rule which says a single judge may call for an in banc hearing in a death penalty case, Judge Wallace contends that the rule is not inconsistent with the statute. In addition, he points out that the rule actually may save time because a stay of execution often would be necessary to permit a vote on whether the case should be heard in banc.

One member expressed his agreement with Chief Judge Wallace's argument. The member believes that having a majority of the members of the circuit leave their standing votes that a certain class of cases should be heard in banc is an arguable way to comply with the statute. He noted one important qualification, however, to his approval of the process. The validity of the provision depends, in his opinion, upon the support of a persistent current active majority of the members of the court. The local rule is likely to remain on the books for many years and should be periodically reaffirmed as the composition of the court changes. The 1994 majority should not be used to support an in banc hearing in the year 2000. One member noted that a majority of the court can repeal a local rule at any time and asked whether the failure to repeal a rule should be seen as providing continuing support for the existing rule. The original speaker responded negatively; he believes that the rule requires continuing active support.

One member noted that the D.C. Circuit had taken a similar step when it had ordered that all Watergate cases be initially heard in banc. Another member expressed strong disapproval of the ninth circuit rules. In his opinion, the ninth circuit rules, like the D.C. Circuit's earlier action, give special treatment to politically sensitive cases. In his opinion, sound jurisprudence requires that all cases be governed by the same procedural rules.

Another member noted that pragmatically, the rule saves time and often can eliminate the need to issue a stay of execution. Death penalty challenges

often are filed very close to the time of execution. A single circuit judge may call for a vote on a petition for an in banc review. Under local procedures, the other judges of the circuit have 14 days in which to vote. A stay of execution ordinarily would be needed to provide the opportunity to vote. The provision authorizing in banc review upon request of a single judge eliminates the delay caused by the voting process. Further, under the ninth circuit rules, the in banc panel is pre-selected and has been furnished all the materials in the case. The panel may be able, therefore, to vote within a day or two of the request for in banc review without the need to issue a stay of execution. Given the likelihood that some ninth circuit judge would call for a vote on a request for in banc review in every death penalty case, the local rule provides expeditious review.

Another member noted that interpreting the statute in light of the limited nature of federal jurisdiction, he could only conclude that the ninth circuit provision is inconsistent with the statute. The statute says that each judge is supposed to be able to vote on whether an appeal is heard in banc. In addition Fed. R. App. P. 35 says "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." To expand upon the "dead hand" notion introduced earlier, the local rule creates not only a situation in which the members of the court may change so that a majority of the existing court has not approved the in banc hearing, but the rule also means that in an individual case a judge is deprived of the ability to vote against hearing the case in banc.

A motion was made and seconded to recommend that the Judicial Conference abrogate the rule as inconsistent with both 28 U.S.C. § 46(c) and Fed. R. App. P. 35(a). The motion was defeated by a vote of 2 to 4, with 2 abstentions (Hall and Kopp).

A motion was then made to recommend that the Judicial Conference permit the rule to stand but that the Judicial Conference should be made aware of and consider the complication that in the future a majority of the active judges of the circuit may not have authorized a single judge to convene an in banc court. The motion passed by a vote of 4 to 2, with 2 abstentions (Hall and Kopp).

3. Is it appropriate for the local rules to authorize a single judge to grant a temporary stay?

One member said that he did not consider this a problem because the rules allow a single circuit judge to grant a temporary stay in almost any kind of case.

4. Is it appropriate to automatically grant a certificate of probable cause and a stay of execution on appeal from a first habeas petition.

Ninth Circuit Rule 22-3(c) provides:

> On a first petition, if a certificate of probable cause and a stay of execution have not been entered by the district court or if the district court has issued a stay of execution that will not continue in effect pending the issuance of this court's mandate, upon application of the petitioner a certificate of probable cause will be issued and a stay of execution will be granted by the death penalty panel pending the issuance of its mandate. (emphasis added)

One member said that he did not consider this a problem because the Supreme Court has said that in a first petition case a court of appeals should almost always grant a stay but should be reluctant to do so on subsequent petitions.

Another member stated that the automatic issuance of a certificate of probable cause seems inconsistent with federal law as enunciated by the Supreme Court in Barefoot v. Estelle.

Another member questioned why the automatic issuance was thought necessary since it was his impression that there are members of the ninth circuit who are always willing to issue the certificate of probable cause and the rule removes the discretion that is supposed to exist.

One judge responded that if a certificate will inevitably be granted on a first petition, why shouldn't the rules make it automatic.

Another member stated that although a single judge can grant a certificate of probable cause, if all the issues raised by the petition are frivolous, the certificate should be denied at every level.

A motion was made to recommend to the Judicial Conference that automatic issuance of a certificate of probable cause on a first petition is inconsistent with federal law as enunciated by the Supreme Court in Barefoot and with Fed. R. App. P. 22(b).

A member stated that in view of the fact that a single judge may issue a certificate of probable cause, a rule providing for automatic issuance of such a certificate is not cutting off any judge's right to vote against issuance since a majority is not needed. So, although the rule is inconsistent, in view of the discretion he sees implicit in § 331 and for pragmatic reasons, the member would not recommend voiding the provision.

The motion lost by a vote of 1 to 3, with four members abstaining (Boggs,

Hall, Kopp, and Munford).

A motion was then made to recognize the inconsistency of the rule with federal law but to recommend that the Judicial Conference refrain from invalidating the rule because of the lack of actual impact on cases. A friendly amendment was accepted to recognize that in effect the local rule is a standing order by a single judge to grant a certificate of probable cause in every first petition in a death penalty case and, as such, the rule is subject to the same "dead hand" problem noted in conjunction with the provision permitting the convening of an in banc court on request of a single judge. The motion passed by a vote of 5 to 0 with three abstentions (Hall, Kopp, and Williams).

5. Is it appropriate to apply the local rules to related civil proceedings as well as to habeas proceedings?

A related civil proceeding might be a § 1983 challenge to the method of execution as being cruel and unusual. One member stated that he did not consider the application of the local rules to related civil proceedings a problem except with regard to the granting of a stay of execution. There are very limited circumstances in which a federal court may stay a state court proceeding in a civil case.

One member pointed out that although stays do frequently occur in habeas cases even though they are civil cases, such stays are specifically authorized by statute. 28 U.S.C.§ 2251. The Attorneys General are challenging the lawfulness of a local rule that permits stays in non-habeas civil cases. The member pointed out that the Supreme Court is currently considering the McFarland case in which the State of Texas is challenging a stay granted by a federal district court judge before whom no habeas petition was pending. It is possible that the Supreme Court may resolve the issue in its decision on the McFarland case.

A motion was made to make no recommendation to the Standing Committee because the question of the authority of a federal judge to grant a stay of execution when there is not a pending habeas petition is currently before the Supreme Court. The Committee agreed unanimously.

6. Does the rule countenance inappropriate ex parte communication with a single judge of the circuit?

One member stated that in the Harris case the ACLU went to a judge who was not a member of the panel and ostensibly presented new evidence to the judge causing the judge to issue a stay. The new rules are aimed at reducing such "ex parte" communication.

The new rules require the parties to file a motion for a stay with the clerk of the court who is directed to refer the motion to the panel. If a motion is presented directly to a judge not on the panel, the rules require the judge to refer the motion to the clerk for determination by the panel. Ninth Cir. R. 22-4(d)(5). A single judge may grant a temporary stay only if execution is imminent and the panel has not determined whether to grant a stay pending final disposition of the appeal, and that judge must immediately notify the clerk and the panel of the action. By majority vote the panel may vacate the stay. Id.

No motions having been offered as to items 3 and 6, Judge Logan undertook to summarize the Committee's discussion for purposes of reporting to the Standing Committee.

The Committee had decided the following:

1. Local rules that do not violate federal law should not be voided by the Judicial Conference. However, the Judicial Conference should remain mindful of the fact that it can recommend adoption of a national rule that would have the effect of voiding or preempting a local rule that it finds troublesome.
2. The Advisory Committee was asked to present the Standing Committee with the Advisory Committee's best judgment about the consistency of the local rules with federal law. The Advisory Committee decided that in those instances in which it has questions about the consistency of the rules, it is the Advisory Committee's responsibility to report its views to the Standing Committee.
3. The Advisory Committee took a vote on each of the issues raised by the Attorneys General which in the opinion of the Advisory Committee raised serious consistency questions.
   a. A motion to recommend abrogation of the dual in banc procedure was defeated by a vote of 3 to 4 with 2 abstentions.
   b. A motion to recommend abrogation of the rule permitting a single judge to convene an in banc court was defeated by a vote of 2 to 4 with 2 abstentions.
      A motion to recommend that the rule be permitted to stand but that the Judicial Conference should be informed about the "dead hand" implications passed by a vote of 4 to 2 with 2 abstentions.
   c. A motion to recommend abrogation of the rule providing for automatic issuance of a certificate of probable cause and stay of execution in first petition cases was defeated by a vote of 1 to 3 with four abstentions.
      A motion to recommend no action with respect to that rule but to recognize the inconsistency and the existence of "dead hand" implications passed by a vote of 5 to 0 with 3 abstentions.

Two members wished to make it clear that in their opinion the materials presented to the Advisory Committee by both the Attorneys General and the ninth circuit were not adequate to reach the merits of the issues. Therefore, their votes not to invalidate a local rule were based upon the fact that they did not have enough information to declare them invalid. The recommendations to the Standing Committee were based upon the information available. It was suggested that the Judicial Conference might want to ask the complainants to file complete briefs on the issues raised and perhaps even to ask for responses either from the ninth circuit or the public. The consensus was that the Committee was being asked to perform a function that was much more adjudicatory than its usual "legislative" function.

Style

Mr. Bryan Garner, consultant to the Style Subcommittee of the Standing Committee had prepared initial revisions of several appellate rules for the Advisory Committee's consideration. He asked the Committee for reactions to the drafts in order to give him guidance as he proceeded to work on the entire set of appellate rules. The discussion examined some of the drafting conventions developed by the style subcommittee when working on the civil rules and some specific phraseology questions likely to arise when working with the appellate rules.

Mr. Garner said that he would try to have a draft of the FRAP rules completed by himself and the other members of the style subcommittee by July 31. The Advisory Committee could then review the rules in preparation for its fall meeting. Mr. Garner said that the chief function of the review by the Advisory Committee is to make certain that the changes recommended by the style subcommittee do not substantively change the rule. Judge Logan said that he probably would divide the redrafted rules and assign them to subcommittees of the Advisory Committee hoping that the subcommittees could work with Mr. Garner prior to the meeting to iron out any obvious difficulties. In that way it might be possible with a three day meeting to review the entire set of restylized rules in the fall.

Rule 32

On the basis of the discussion the preceding day, a new draft of the first part of the Rule 32 had been prepared for the Committee's discussion. The new draft read as follows:

(a) Form of a Brief, an Appendix, and Other Papers
(1) A brief may be produced by typing, printing, or by any

duplicating or copying process that produces a clear black image on white paper with a resolution of 300 dots per inch or more. The paper must be opaque, unglazed paper, both sides of the paper may be used if the resulting document is clear and legible. Carbon copies of a brief or appendix must not be used without the court's permission, except by pro se persons proceeding in forma pauperis.

(2) Either proportionately spaced typeface or monospaced typeface may be used in a brief but proportionately spaced typeface is preferred.

(A) "A proportionately spaced typeface" is one in which the individual characters have individual advance widths. The design must be of a serifed, text, in roman style. For example, Dutch Roman, Times Roman, and Times New Roman are all proportionately spaced typefaces.

(B) "A monospaced typeface" is a typeface in which all characters have the same advance width and there are no more than 11 characters to an inch. For example, both a typewriter with Pica type, and Courier font in 12 point are both monospaced typefaces.

(3) A brief must be on either 8-1/2 by 11 inch paper or 6-1/8 by 9-1/4 inch paper.

(A) A brief on 8-1/2 by 11 inch paper

(i) using a proportionately spaced typeface must have margins of 1-1/4 inch on the sides and 1 inch on the top and bottom;

(ii) using a monospaced typeface must have margins of 1 inch on the sides and 1-1/4 inch on the top and bottom; and

(iii) must be double spaced, but quotations more than two lines long may be indented and single-spaced; headings and footnotes may be single-spaced.

(B) A brief on 6-1/8 by 9-1/4 inch paper

(i) must use proportionately spaced typeface;

(ii) must have typeface not exceeding 4-1/6 by 7-1/6 inches; and

(iii) must be single spaced or its equivalent in leading.

(4) A brief may use bold typeface only for covers, headings and captions. Case citations must be underlined unless a distinct italic typeface is used.

(5) Except by permission of the court, a principal brief must not

exceed 14,000 words and a reply brief must not exceed 7,000 words, and in either case there must be on average no more than 280 words per page including footnotes and quotations. The word count shall not include the corporate disclosure statement, table of contents, table of citations, certificate of service and any addendum containing statutes, rules, regulations, etc. The brief must be accompanied by a certification of compliance with the word limits of this paragraph. In preparing this certificate, a party may rely upon the word count of the word processing system used to prepare the brief. No certificate is required if the brief is

(A) in at least 12 point proportionately spaced typeface and does not exceed
  (i) 40 pages for a principal brief, or
  (ii) 20 pages for a reply brief; or

(B) in monospaced typeface and does not exceed
  (i) 50 pages for a principal brief, or
  (ii) 25 pages for a reply brief.

(6) An appendix must be in the same form as a brief but when an appendix is bound in volumes having pages 8-1/2 by 11 inches, a legible photocopy of any document found in the record may be included. The pages of the appendix must be separated by tabs, one for each document, or consecutively numbered.

In paragraph (a)(1), the draft provided that brief may be produced using both sides of the paper as long as the brief is clear and legible. This was responsive to one of the comments on the published rule. Two members of the Committee noted their circuits had affirmatively rejected a suggestion that briefs be double sided. A motion was made that the rule be left silent on the issue of single or double-sided briefs, leaving determination of the issue to local rule. The motion was defeated by a vote of 3 to 5 so the double-sided provision remains in the draft.

Paragraph (a)(2) defined proportionately spaced and monospaced typefaces. The second and third sentences of (a)(2)(A) were amended to read as follows: "The design must be of a serifed, roman, text style. Examples are the Roman family of typefaces, Garamond, and Palatino." The second sentence of (a)(2)(B) was amended to read as follows: "Examples are Pica type and Courier font in 12 point."

In paragraph (a)(4) the words "bold typeface" were replaced by "boldface," and "[c]ase citations" was changed to "[c]ase names."

In paragraph (a)(5) the word limitation for a principal brief was reduced from 14,000 to 12,500, and for a reply brief, from 7,000 to 6,250. The 12,500 word limit corresponds to the new D.C. circuit rule. Also the charts presented during the testimony the preceding day indicated that courier font in 12 point produces approximately 250 words per page, so that a 50 page brief in courier font in 12 point would have approximately 12,500 words.

The page limits in the safe-harbor provisions in (a)(5) were lowered to 30 pages for a principal brief and 15 pages for a reply brief using a proportionately spaced typeface and to 40 pages for a principal brief and 20 pages for a reply brief using a monospaced type face. With regard to a brief prepared with a typewriter rather than a computer, it was recognized that such a person should be able to file a 50 page brief. But it was further recognized that unless such a brief was larded with footnotes, the certification could honestly be made without counting every word. If a typed brief is heavily footnoted, several members of the Committee felt that it would be appropriate to require the preparer to count all the words in order to make the certification.

The first sentence of paragraph (a)(6), regarding preparation of the appendix was amended to state: "An appendix must be in the same form as a brief but when an appendix is bound in volumes having pages 8-1/2 by 11 inches, a legible photocopy of any document found in the record or of a published court or agency decision may be included." The sentence requiring the pages of an appendix to be tabulated or consecutively numbered was omitted.

The remainder of the Rule was taken from the draft prepared prior to the meeting beginning at page 71 of the GAP materials.

On page 73, paragraph (b)(1) was omitted and paragraph (b)(3) was amended by making it applicable to a petition for rehearing, a suggestion for rehearing in banc, and any response to either. The effect of those changes was to omit any cover requirements for those documents.

The Reporter was asked to consider all of subdivision (b) in light of the redrafting of subdivision (a) and to make the word limitation and certification requirements inapplicable to papers other than briefs.

Rule 27

Fed. R. App. P. 27 governs the filing of motions in the courts of appeals. At the September 1993 meeting the Committee had considered a redraft of the rule prepared by the Department of Justice. After that initial discussion, a subcommittee had been charged with preparing a new draft. The new draft was before the committee.

The new draft was approved unanimously with the following changes:

1. Paragraph (a)(3) was amended by striking subparagraph (C) and by rewriting the second sentence of the paragraph to state: "The response must be filed within 7 days after service of the motion, unless the court shorten or extends the time, but . . ."
2. Subdivision (c) was rewritten to read as follows:

   > A single judge of a court of appeals may act on any request for relief that under these rules may properly be sought by motion, but a single judge must not dismiss or otherwise determine an appeal or other proceeding. A court of appeals may provide by rule or by order in a particular case 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.

3. Paragraph (d)(2) dealing with the format of a motion must be rewritten to be consistent with the changes made in Rule 32. The general consensus was that there was no need for the same level of detail as in Rule 32. Several members favored retaining the 20 page limit in (d)(3) but eliminating any word limit per page, etc.

Sanctions

Chief Judge Breyer placed the proposed amendments to Rule 38 on the discussion calendar for the Judicial Conference last fall. He was concerned that requiring notice and opportunity to respond before a court can assess costs and sanctions for filing a frivolous appeal would stifle the ability of the courts to sanction minor delicts of counsel. Chief Judge Breyer asked the Advisory Committee to consider a procedure that would permit a court to appropriately note such an infraction.

The subcommittee chaired by Judge Boggs reported that it had considered Chief Judge Breyer's concerns. The subcommittee stated that there have been historically and remain, without hindrance from the revised Rule 38, a number of methods to deal with matters not warranting invocation of Rule 38. These include:

1. admonition from the bench;
2. letters to counsel subsequent to decision, transmitted either by the clerk, the presiding judge, or the entire panel;
3. criticism in an opinion; and
4. referral to the bar association.

The subcommittee believes that such methods can adequately address minor delicts that do not warrant the significant sanctions envisioned by Rule 38 or that are not cost effective to address through that rule.

The subcommittee could not think of any matters that would fall outside of Rule 38 that could not be adequately addressed by the alternative methods enumerated above.

A member of the Committee noted that some of the alternatives mentioned can be more serious than any sanction under Rule 38. Criticism of a lawyer in a judicial opinion, for example, can ruin a lawyer's career; and yet the lawyer is not entitled to due process.

Judge Logan said that he would relay the response to Judge Breyer.

Item 86-23, Service on an Inmate

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

The Committee decided that it could not cure the time problem with regard to a magistrate judge's report because trial court rules are involved. There was some thought, however, that the Committee should address the general problem of service on institutionalized persons. Draft amendments were circulated to the Chief Judges of the circuits, to the Committee of Staff Attorneys, and to the Advisory Committee of Defenders. The draft amendments generally provided that service on an inmate would not be complete until the inmate receives the document.

After consideration of the comments, many of which pointed out the complications that would arise from the proposed amendments, a motion was made to drop the proposed amendments. The motion passed unanimously.

Item 93-7, Houston v. Lack and Administrative Agencies

The Reporter's memorandum illustrated that changes to Rule 4(c) and Rule 25(a), which became effective on December 1, 1993, have cured the Houston v. Lack problem for persons confined by an administrative agency such as the INS. The Committee decided that it need not take any further action on this item.

Item 91-24, Amicus Brief

The Fifth Circuit's response to the Local Rules Project suggested that the Advisory Committee consider amending Rule 29, governing amicus briefs. At its

September 1993 meeting, the Committee considered two draft rules prepared by the Reporter. In light of the September discussion, a new draft was prepared for the Committee's consideration.

One member voiced doubts about a decision made by the Committee at the preceding meeting. The Committee had decided that a motion for leave to file an amicus brief must state that the amicus will present material that will not be adequately presented by the parties. Although that requirement was drawn from the Supreme Court Rule, the member noted that it will be a difficult burden for an amicus to shoulder at the time of the first appeal especially because the Committee also decided that an amicus must file its brief at the same time as the party it supports. At the time of Supreme Court review, the parties have already prepared briefs for consideration by the court of appeals and, therefore, an amicus knows the line of argument the party will use. An amicus does not have the same sort of information at the time of review by a court of appeals.

In view of the hour, it was decided that discussion of the new draft should be postponed until the next meeting.

Items 91-25 and 92-4, In Banc Proceedings

Item 92-4 involves a suggestion from the Solicitor General that intercircuit conflict should be made an explicit ground for granting an in banc hearing. At its September 1993 meeting, the Committee preliminarily approved such a change but did not decide whether intercircuit conflict should constitute a separate category of cases as to which in banc review is appropriate, or whether to treat intercircuit conflict as grounds for determining that a proceeding involves a question of "exceptional importance."

The representative from the Federal Judicial Center indicated that four circuits have local rules or I.O.P's stating that intercircuit conflict is grounds for granting an in banc hearing. The Federal Judicial Center volunteered to study the kind and number of petitions in those circuits and report to the Committee at its next meeting.

Judge Logan postponed discussion of the two in banc items until the next meeting.

Item 93-1

Judge Becker wrote to Judge Ripple, in his capacity as Chair of the Committee, about the 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. Section 1292(a)(3) authorizes interlocutory appeal

from a decree in an admiralty case, as distinguished from an admiralty claim. As such, § 1292 apparently permits interlocutory appeal of a non-admiralty claim that is part of a larger admiralty case. Fed. R. Civ. P. 9(h), however, can be read to limit the broad grant in § 1292(a)(3) of interlocutory appeal in admiralty cases to one that allows only interlocutory appeal of admiralty claims.

The Committee decided to refer the matter to the Advisory Committee on Civil Rules for whatever action that Committee thinks appropriate.

Because the hour set for adjourning had arrived, the remainder of the discussion items were postponed until the fall meeting, by which time Judge Logan asked the Reporter to prepare discussion drafts.

The meeting adjourned at 3:00 p.m.

Respectfully submitted,

Carol Ann Mooney
Reporter

Agenda F-19 (Summary)
Rules
September 1994

Agenda Item F-19

SUMMARY OF THE

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

The Committee on Rules of Practice and Procedure recommends that the Judicial Conference:

1. Approve the proposed amendments to Appellate Rules 4, 8, 10, and 47 and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.....pp. 2-4

2. Approve the proposed amendments to Bankruptcy Rules 8018 and 9029 and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.....pp. 5-6

3. Approve proposed amendments to Civil Rules 50, 52, 59, and 83 and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the court and transmitted to Congress in accordance with the law.....pp. 9-10

4. Approve the proposed amendments to Criminal Rules 5, 40, 43, 46, 49, 53, and 57 and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.....pp. 11-14

5. Refer the proposal in the Report on the Federal Defender Program (March 1993) to allocate certain discovery costs between the government and the defense in criminal cases to the Committee on Defender Services for further consideration.....pp. 14-15

6. Continue the existing policy on facsimile filing and take no action to permit facsimile filing on a routine basis.....pp. 18-20

The remainder of the report is for information and the record.

Agenda F-19
Rules
September 1994

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES:

Your Committee on Rules of Practice and Procedure met on June 23-24, 1994. All members of the Committee attended the meeting, except Chief Justice E. Norman Veasey, who was ill. Ms. Jamie S. Gorelick, Deputy Attorney General, attended part of the meeting, with Messrs. Roger A. Pauley and Robert E. Kopp and Ms. Mary Harkenrider representing the Deputy Attorney General in her absence.

Representing the advisory committees were: Judge James K. Logan, Chair, and Professor Carol Ann Mooney, Reporter, of the Advisory Committee on Appellate Rules; Judge Paul Mannes, Chair, and Professor Alan N. Resnick, Reporter, of the Advisory Committee on Bankruptcy Rules; Judge Patrick E. Higginbotham, Chair, and Dean Edward H. Cooper, Reporter, of the Advisory Committee on Civil Rules; Judge D. Lowell Jensen, Chair, and Professor David A. Schlueter, Reporter, of the Advisory Committee on Criminal Rules; Judge Ralph K. Winter, Jr., Chair, and Dean Margaret A. Berger, Reporter, of the Advisory Committee on Evidence Rules.

Participating in the meeting were Peter G. McCabe, the Secretary to the

Committee; Professor Daniel R. Coquillette, Reporter to the Committee; John K. Rabiej, Chief of the Rules Committee Support Office; Professor Mary P. Squiers, Director of the Local Rules Project; and Bryan A. Garner and Joseph F. Spaniol, consultants to the Committee. Judith A. McKenna of the Federal Judicial Center attended the meeting. Other staff from the Administrative Office and various members of the public also attended the meeting as observers.

I. Amendments to the Federal Rules of Appellate Procedure.

A. **Recommended for Approval and Transmission**

The Advisory Committee on Appellate Rules of Procedure submitted proposed amendments to Appellate Rules 4, 8, 10, 47, and 49 together with Committee Notes explaining their purpose and intent. The proposed amendments were circulated to the bench and bar for comment in October 1993, and a public hearing was held immediately before the committee's meeting in April 1994.

The proposed amendment to Rule 4 (Appeal as of right - When taken) is one of a series of proposed amendments to the Appellate Rules and Bankruptcy Rules that conform the rules to proposed changes to the Civil Rules, which establish a uniform time within which to file certain postjudgment motions. The amendment to Rule 4 would extend the time for filing an appeal until after disposition of a postjudgment motion that is filed no later than 10 days after entry of judgment.

The proposed change to Rule 8 (Stay or injunction pending appeal) amends the cross-reference to Criminal Rule 38 to account for a later reorganization of that rule. The proposed amendments to Rule 10 (The record on appeal) conforms the rule to

recent changes in Appellate Rule 4(a)(4). When a postjudgment motion suspends a previously filed notice of appeal, the 10-day period for ordering a transcript begins to run upon entry of the order disposing of the motion.

The amendments to Rule 47 (Rules by courts of appeal) are part of a package of proposed uniform amendments to the Appellate Rules, Bankruptcy Rules, Civil Rules, and Criminal Rules. The changes would provide that: (a) local rules must be numbered consistent with any uniform numbering system prescribed by the Judicial Conference, and (b) a nonwillful violation of a local rule imposing a requirement of form may not be sanctioned in any way that would cause the party to lose rights. The amendments to the rule would also require that all general directions regarding practice before the court be set out in local rules rather than in internal operating procedures or standing orders.

All the advisory committees were asked by your committee to collaborate on drafting a uniform provision in each set of rules that would authorize the Judicial Conference to make purely technical corrections and conforming amendments to the rules directly, without submitting them to the Supreme Court and the Congress. Serious reservations and concerns were expressed by some of the advisory committees regarding the need and validity of this proposed authority. In light of those concerns, your committee decided not to approve the relevant uniform amendments, including proposed amendments to Rule 49 (Technical amendments).

The proposed amendments to the Federal Rules of Appellate Procedure, as recommended by your committee, appear in *Appendix A* together with an excerpt from the advisory committee report.

Recommendation: That the Judicial Conference approve proposed amendments to Appellate Rules 4, 8, 10, and 47 and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

B. **Rules Approved for Publication and Comment**

The Advisory Committee also submitted proposed amendments to Appellate Rules 21, 25, 26, 27, 28, and 32 and recommended that they be published for public comment.

Rule 21 (Writs of mandamus and prohibition directed to a judge or judges and other extraordinary writs) would be revised to eliminate the naming of the trial judge in the petition for a writ of mandamus. The trial judge would be allowed to appear to oppose the writ only if the court of appeals ordered the judge to do so. The "mailbox rule" under Rule 25 (Filing and service), which deems the transmission of a brief or appendix timely if mailed to the clerk by first-class mail on or before the last day for filing, would be amended to include delivery of a brief or an appendix to a "reliable commercial carrier."

Rule 26 (Computation and extension of time) would be amended to conform the rule to the proposed amendment to Rule 25 to permit service on a party by a commercial carrier. Rule 27 (Motions) would be entirely rewritten. It would set page limits on motions and responses. Conforming to Supreme Court policy, it would also

require that any legal argument necessary to support a motion be contained in the motion without a separate brief. No oral arguments would be permitted unless ordered by the court.

The proposed amendments to Rule 28 (Briefs) would delete references to length limitations that are included in proposed changes in Rule 32. Proposed amendments to Rule 32 (Form of Briefs, the appendix and other papers) would set length limitations on briefs, which are necessary to accommodate the widespread availability of computer fonts and styles.

Proposed amendments to Rules 21, 25, and 32 had been published for public comment in October 1993. In light of the comments, the committee decided to revise the amendments and publish the proposals anew for public comment.

Your committee voted to circulate the proposed amendments to the bench and bar for comment.

II. Amendments to the Federal Rules of Bankruptcy Procedure.

A. Recommended for Approval and Transmission

The Advisory Committee on Bankruptcy Procedure submitted to your committee proposed amendments to Bankruptcy Rules 8018, 9029, and 9037. The proposed amendments were circulated to bench and bar for comment in October 1993. The scheduled public hearing on the amendments was canceled, because no request to appear was received by the committee.

The proposed amendments to Rule 8018 (Rules by Circuit Councils and District Courts) dealing with local rules by circuit councils and district courts conform the rule

to the proposed amendments to Rule 9029 (Local Bankruptcy Rules) dealing with local bankruptcy rules. The proposed amendments to both rules are counterparts to the proposed amendments to the other sets of rules, and would: (a) require that local court rules be numbered in accordance with any uniform numbering system prescribed by the Judicial Conference, (b) provide that a nonwillful violation of a local rule imposing a requirement of form may not be sanctioned in any way that would cause the party to lose rights, and (c) permit the imposition of a sanction for noncompliance with a local court procedure not contained in a local rule only if a party has had actual notice of the requirement.

The proposed amendment to Rule 9037 (Technical Amendments) would have authorized the Judicial Conference to make technical amendments to the rules. Your committee decided not to approve it and its counterparts in the other sets of rules for the reasons previously stated regarding the proposed changes to Appellate Rule 49.

The proposed amendments to the Federal Rules of Bankruptcy Procedure, as recommended by your committee, are in *Appendix B* together with an excerpt from the advisory committee report.

RECOMMENDATION: That the Judicial Conference approve the proposed amendments to Bankruptcy Rules 8018 and 9029 and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

B. Rules Approved for Publication and Comment

The advisory committee also submitted proposed amendments to Rules 1006, 1007, 1019, 2002, 2015, 3002, 3016, 4004, 5005, 7004, 8008, and 9006, and recommended that they be published for public comment.

The proposed amendments to Rule 1006 (Filing Fee) would include any fee prescribed by the Judicial Conference under the definition of a filing fee, and thus would permit payment in installments of a Conference-set fee, as can be done with other filing fees. Rule 1007 (Lists, Schedules and Statements; Time Limits) would be changed to provide that schedules and statements filed before conversion of a case to another chapter are treated as filed in the converted case.

Rule 1019(7) (Conversion of Chapter 11 Reorganization Case, Chapter 12 Family Farmer's Debt Adjustment Case, or Chapter 13 Individual's Debt Adjustment Case to Chapter 7 Liquidation Case) would be abrogated to conform the rule to changes proposed in Rule 3002(c)(6) and the addition of Rule 3002(d). The proposed amendments to Rule 2002 (Notices to Creditors, Equity Security Holders, United States, and United States Trustee) would eliminate the need to mail to all parties copies of the summary of the chapter 7 trustee's final account, clarify the need to send notices to certain creditors, and eliminate certain abrogated provisions.

The proposed changes to Rule 2015 (Duty to Keep Records, Make Reports, and Give Notice of Case) would clarify when a debtor in a chapter 12 or 13 case must file an inventory of the debtor's property. Rule 3002(c)(6) (Filing Proof of Claim or Interest) would be abrogated, and a new Rule 3002(d) would be added to provide that

a creditor holding a claim that has been tardily filed may be entitled to receive a distribution in a chapter 7 case.

Rule 3016(a) (Filing of Plan and Disclosure Statement in Chapter 9 Municipality and Chapter 11 Reorganization Cases), which deals with the right to file a competing chapter 11 plan after the approval of a disclosure statement, would be abrogated, because its effect of prohibiting the filing of a competing chapter 11 plan without a court order could be inconsistent with § 1121(d) of the Bankruptcy Code. The proposed amendments to Rule 4004 (Grant or Denial of Discharge) would delay the debtor's discharge in a chapter 7 case if there is a pending motion to extend the time for filing a complaint objecting to the discharge or if the filing fee has not been paid.

Rule 5005 (Filing and Transmittal of Papers) would be amended to authorize local court rules to permit documents to be filed, signed, or verified by electronic means if the means are consistent with technical standards, if any, established by the Judicial Conference. The proposed amendments to Rule 7004 (Process; Service of Summons, Complaint) would conform the rule to the changes made to Civil Rule 4 in 1993.

Rule 8008 (Filing and Service) would be amended to conform the rule to the proposed change of Rule 5005 that authorizes filing by electronic means. Rule 9006 (Time) would be amended to conform the rule to the abrogation of Rule 2002(a)(4) and the renumbering of Rule 2002(a)(8).

Your committee voted to circulate the proposed amendments to the bench and bar for comment.

III. Amendments to the Federal Rules of Civil Procedure.

A. Rules Recommended for Approval and Transmission

The Advisory Committee on Civil Rules submitted to your committee proposed amendments to Civil Rules 50, 52, 59, and 83. The proposed amendments were circulated to bench and bar in October 1993, and a public hearing was held immediately before the committee's meeting in April 1994.

The changes to Rules 50, 52, and 59 would establish a uniform period for posttrial motions authorized by those rules. The rules had been inconsistent with respect to whether the different posttrial motions had to be filed, made, or served during the prescribed period. The inconsistent time periods caused problems, particularly when several postjudgment motions were submitted at the same time. These problems affected provisions of the Appellate Rules and the Bankruptcy Rules tied to these Civil Rules.

The proposed amendments set a uniform deadline no later than 10 days after entry of judgment for filing motions under Rule 50 (Judgment as a Matter of Law in Actions Tried by a Jury; Alternative Motion for New Trial; Conditional Rulings), Rule 52 (Findings by the Court; Judgment on Partial Findings), and Rule 59 (New Trials; Amendment of Judgments).

Rule 83 (Rules By District Courts) would be amended as part of a series of changes common to the other sets of rules regarding the uniform numbering of local court rules and orders regulating matters not covered by national or local rules. The amendments would provide that a local rule imposing a requirement of form could not

be enforced in a manner that would cause a party to lose rights because of a nonwillful failure to comply. And no sanction or other disadvantage could be imposed for failure to comply with any procedural requirement not in federal law, federal rules, or local district rules unless actual notice of the requirement had been furnished in the particular case.

At the request of your committee, the advisory committee also published for public comment proposed amendments to Rule 84 dealing with technical amendments. But the advisory committee recommended that authorizing the Judicial Conference to make technical amendments to the rules directly should be more appropriately sought by legislation rather than through the rulemaking process. Your committee decided not to approve any amendment to Rule 84.

The proposed amendments to the Federal Rules of Civil Procedure, as recommended by your committee, are in *Appendix C* together with an excerpt from the advisory committee report.

Recommendation: That the Judicial Conference approve proposed amendments to Civil Rules 50, 52, 59, and 83 and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the court and transmitted to Congress in accordance with the law.

B. Rules Approved for Publication and Comment

The Advisory Committees on Bankruptcy Rules and Appellate Rules are recommending proposed amendments to be published for comment that would permit documents to be filed by electronic means so long as they are consistent with technical standards, if any, established by the Judicial Conference. The Advisory Committee on Civil Rules did not consider similar changes to Civil Rule 5(e), but the committee's

chairman agreed to publication of a parallel proposal if approved by mail vote of the advisory committee.

Your committee voted to publish the proposed amendments to Rule 5(e) to the bench and bar for comment, subject to the concurrence of the Advisory Committee on Civil Rules. The advisory committee later approved the publication.

C. Amendment Regarding *Voir Dire* Under Consideration

In light of the recent Supreme Court decision in *J.E.B. v. Alabama*, 114 S.Ct. 1419 (1994), and its predecessor decisions starting with *Batson v. Kentucky*, 476 U.S. 79 (1986), the advisory committee also advised your committee that it intends to consider at its next meeting proposing amendments to Rule 47(a). The amendments might require some active participation of lawyers in *voir dire* to account for the increased reliance on *voir dire* in jury selection as a direct result of *J.E.B.*

IV. Amendments to the Federal Rules of Criminal Procedure.

A. Recommended for Approval and Transmission

The Advisory Committee on Criminal Rules submitted proposed amendments to Criminal Rules 5, 40, 43, 46, 49, 53, 57, and 59. The proposed amendments were circulated to bench and bar for comment in October 1993, with the exceptions of the proposed technical amendments to Rules 46 and 49. A public hearing was held immediately before the committee's meeting in April 1994.

The proposed amendments to Rule 5 (Initial Appearance Before the Magistrate Judge) would exempt the government from promptly presenting a defendant charged only under 18 U.S.C. § 1073 (Unlawful Flight to Avoid Prosecution) to a magistrate

judge where the United States had no intention of prosecuting the defendant for that offense, but only assisting State authorities in apprehending the State offender. Under the amendments, the fugitive must be transferred without unnecessary delay to State officials, and the complaint alleging a violation of § 1073 must be dismissed.

Rule 40 (Commitment to Another District) would be amended to cross-reference the proposed changes in Rule 5. The proposed amendments to Rule 43 (Presence of the Defendant) would clarify the court's authority to sentence a defendant - who is absent voluntarily at the imposition of sentence, e.g., a fugitive - *in absentia* after jeopardy has attached, including after entry of a guilty or *nolo contendere* plea.

The proposed change to Rule 46(i) (Release from Custody) would correct an inadvertent cross-reference in the rule. Rule 49(e) (Service and Filing of Papers) would be repealed as unnecessary, because the statutory provisions referred to in the provision regarding filing notice of dangerous offender status have been abrogated. The proposed amendments to Rules 46 and 49 are entirely technical or conforming in nature and publishing them for public comment was unnecessary.

The proposed amendments to Rule 53 (Regulation of Conduct in the Court Room) would retain the prohibition against broadcasting of criminal cases, but would permit it if the Judicial Conference authorizes televised coverage under whatever guidelines it determines to be appropriate. The change would not require the courts to permit such coverage in criminal cases. It would provide courts with the same discretion to permit televising criminal case proceedings as they have with regard to civil case proceedings. Judicial Conference guidelines to permit broadcasting of civil

case proceedings are now under active consideration by the Committee on Court Administration and Case Management.

Your committee considered at length the proposed amendments to Rule 53. Several members voiced strong reservations or objections to the amendments. And they criticized the need and justification for the changes, disputing the favorable conclusions drawn from survey findings in various pilot projects, which monitored televised coverage in civil cases. Other members were persuaded that televised coverage would not interfere or adversely affect the conduct of criminal proceedings. Many State courts have permitted broadcasting of criminal case proceedings with no untoward problems. In addition, the vote of the Advisory Committee on Criminal Rules was nearly unanimous (only one member opposed the proposal) in approving the proposed amendments.

On a 7 to 6 vote, your committee decided to send forward the proposed amendments to Rule 53. At your committee's request, the chairman of the advisory committee agreed to revise the Committee Note and eliminate the discussion of the benefits of televised courtroom coverage. The amendment's primary purpose -- to provide the Judicial Conference with equal authority to permit and regulate televised coverage in civil and criminal trials -- would be highlighted.

Your Committee noted the advisory committee's desire to be actively involved in the drafting of appropriate guidelines. The Committee on Court Administration and Case Management (CACM) is responsible for monitoring the pilot projects dealing with televised broadcasting of judicial proceedings. Your committee will consult with CACM

and advise them of the advisory committee's willingness to participate in the drafting of the guidelines.

Rule 57 (Rules by District Courts) would be amended to reflect similar changes proposed to the other sets of rules dealing with uniform numbering of local court rules and restrictions on the imposition of sanctions for noncompliance with local court procedures.

The proposed amendments to Rule 59 (Effective Date; Technical Amendments), which would authorize the Judicial Conference to make technical amendments to the rules, were not approved along with proposed amendments to the other sets of rules on the same subject.

The proposed amendments to the Federal Rules of Criminal Procedure, as recommended by your committee, are in *Appendix D* together with an excerpt from the advisory committee report.

> **RECOMMENDATION:** That the Judicial Conference approve the proposed amendments to Criminal Rules 5, 40, 43, 46, 49, 53, and 57 and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

B. Recommended Referral on Federal Defender Program

The *Report of the Judicial Conference of the United States on the Federal Defender Program* (March 1993) recommended that:

> The proposal to require the prosecution to provide copies of discoverable materials to the defense and allocate the costs of duplication should be referred to the standing Committee on Rules of Practice and Procedure, for consideration in accordance with the Rules Enabling Act.

The Advisory Committee on Criminal Rules considered the proposal. It noted that the government now often provides the defense with access to photocopying machines for purposes of discovery. In any event, the advisory committee concluded that a requirement to allocate discovery costs among the parties is a subject more appropriately handled by statutory authorization. Your committee concurs with its advisory committee's conclusion.

RECOMMENDATION: That the Judicial Conference refer the proposal in the Report on the Federal Defender Program to allocate certain discovery costs between the government and the defense in criminal cases to the Committee on Defender Services for further consideration.

C. Rules Approved for Publication and Comment

The Advisory Committee recommended publication of proposed amendments to Rules 16 and 32 for public comment.

The proposed amendments to Rule 16 (Discovery and Inspection) would provide limited disclosure by the prosecution of the names and statements of witnesses at least seven days before trial. Under the proposed amendments, the government may refuse to disclose the information if it believes in good faith that pretrial disclosure of this information would threaten the safety of a person or risk the obstruction of justice. In such a case, the government simply would file a *nonreviewable, ex parte* statement with the court stating why it believes - under the facts of the particular case - that a safety threat or risk of obstruction of justice exists. The amendment also would provide reciprocal discovery by the defense.

The Department of Justice traditionally has opposed any liberalization in the rules on the disclosure of this information prior to trial. It noted that many

prosecutors already follow open file disclosure, but acknowledged that some prosecutors follow a more restrictive disclosure policy. The Department indicated that it has been working internally to reach a more liberal disclosure policy. And it strongly recommended that it should be given more time to resolve the matter by policy directive, rather than by mandatory rules.

At the request of the Department of Justice, your committee delayed publishing the proposed amendments to the rule at its January 1994 meeting to allow the Department to reach a resolution internally. Your committee was also concerned with possible Jencks Act inconsistencies with the draft amendments. The advisory committee had already delayed consideration of the proposal to publish the amendments at its April 1993 meeting to provide the newly appointed Attorney General with an opportunity to study it.

Your committee considered the Department's renewed request for additional delay in seeking an in-house resolution of the discovery issue. It also addressed the Jencks Act issue and noted that other amendments to the Criminal Rules, which mandated pretrial disclosure of information by the defendant - presumably also inconsistent with the Jencks Act - were adopted without objections and put into effect. After considerable discussion, your committee concluded that additional delay in publishing the proposed amendments was unwarranted and determined that publication of the proposed amendments would be useful in eliciting comment from the bench and bar on the Jencks Act issue and on the overall merits of the proposal. The advisory committee chair accepted the recommendation of your committee to revise the

Note to the amendments to highlight the Jencks Act issue before publishing it for public comment.

The proposed amendment to Rule 32 (Sentence and Judgment) would explicitly permit the trial court, in its discretion, to conduct forfeiture proceedings after the return of a verdict, but before sentencing.

Your committee voted to circulate the proposed amendments to the bench and bar for comment.

V. Amendments to the Federal Rules of Evidence.

A. **No Rules Recommended for Approval and Transmission**

The Advisory Committee on Evidence Rules submitted to your committee proposed amendments to Evidence Rule 412 and 1102.

The proposed amendments to Rule 412 (Sex Offense Cases; Relevance of Victim's Past Behavior) would reinstate the provisions approved by the Judicial Conference in September 1993, but withheld by the Supreme Court and not transmitted to Congress in April 1994. The provisions were returned to the advisory committee for further consideration in light of concerns expressed by some members of the Court. The same provisions are now included in legislation pending in Congress and would extend the privacy protection under the rule to alleged victims in civil case proceedings. In light of the likelihood of Congressional passage of the provision, your committee with the concurrence of the advisory committee's chairman decided to defer taking action on the proposed amendments until its next meeting to await the outcome of the pending legislation.

The proposed amendments to Rule 1102 (Amendments), which would allow the Judicial Conference to make technical amendments to the rules, were not approved by your committee. The same proposed amendments were not approved in the other sets of rules.

B. **Informational Statement Approved for Publication and Comment**

Since its inception in 1992, the advisory committee has been engaged in a comprehensive review of all the Evidence Rules, and it has now completed an initial assessment of a substantial number of the rules. Although some rules initially caused interpretational problems, the committee concluded that amendments to clarify meanings that have become settled would ultimately be counterproductive. A new round of interpretations would begin with regard to the new language. Accordingly, the advisory committee has decided at this time not to amend a number of rules. The advisory committee is concerned, however, that it is not receiving sufficient input from the public and bar, and believes that comments on its work would be helpful. Accordingly, it recommended that public comment be requested on its tentative decision not to amend Evidence Rules 101, 102, 105, 106, 201, 301, 302, 401, 402, 403, 404, 409, 601, 602, 603, 604, 607, 608, 609, 610, 611, 612, 613, 614, and 615.

Your committee voted to circulate to the bench and bar for comment a list of the rules that the advisory committee decided not to amend.

VI. Facsimile Filing Standards.

At its September 1993 session, the Judicial Conference referred to the Committee on Rules of Practice and Procedure, in coordination with the Committees on Automation and Technology and Court Administration and Case Management, for a report to the September 1994 Conference,

the question of whether, and under what technical guidelines, filing by facsimile on a routine basis should be permitted.

At the request of your committee in March 1993, the Committee on Court Administration and Case Management (CACM) withdrew its proposed guidelines from the consideration of the Judicial Conference that would have permitted filing by facsimile on a routine basis. Your committee and its advisory committees devoted substantial time in reviewing the guidelines. In cooperation with CACM, the guidelines were revised consistent with procedures under the Rules Enabling Act.

In January 1994 your committee reevaluated the various problems associated with the revised standards allowing facsimile filing on a routine basis and found that: (a) the standards would impose great burdens on clerks' offices; (b) the technical equipment requirements under the standards would not be honored by those members of the bar who have obsolete equipment; and (c) the standards might create a trap for members of the bar who rely on last minute filings, but who are frustrated because others are using the same transmission lines.

Your committee agreed, nonetheless, that facsimile filing should be permitted on a non-routine and locally approved basis to reflect actual practices in the courts. The current policy of the Judicial Conference permits filing by facsimile in emergencies. To facilitate this alternative, your committee revised the guidelines and transmitted a more restricted set of revised standards on facsimile filing in exceptional cases to CACM and the Committee on Automation and Technology (CAT) for their consideration and comment. At the June 1994 meeting, we considered the responses of CACM and CAT. We believe that all three committees are now in agreement that

facsimile filing on a routine basis should not be approved and that promulgating standards to allow facsimile filing in exceptional cases would be unnecessary.

RECOMMENDATION: That the Judicial Conference continue the existing policy on facsimile filing and take no action to permit facsimile filing on a routine basis.

VII. Informational Items.

A. **Self-Study Evaluation**

As part of its long-range planning, your committee authorized a self-study soliciting comments from the public to evaluate the federal rulemaking process. Your committee is now studying the comments.

One of the issues under consideration is the appropriate composition of the rules committees. Your committee is aware of the bill (S. 2212) introduced by Senator Heflin that would require a majority of members of each of the rules committees to be members of the practicing bar. The committee advised Senator Heflin of its current reach-out efforts being undertaken, including enlarged and revised mailing lists, to elicit more bar participation in the rulemaking process.

B. **Ninth Circuit Local Rule on Capital Cases**

On March 11, 1994, five attorneys general from States within the Ninth Circuit requested the Judicial Conference to exercise its authority under 28 U.S.C. § 331 to modify or abrogate the local rules of their circuit regarding capital cases. The request was referred to the Advisory Committee on Appellate Rules on March 29 for its April 25-26 meeting.

In accordance with the 1988 amendments to the Rules Enabling Act, the Judicial Conference is obligated to review local rules promulgated by the courts of appeals. Under the amendments, the Conference "may modify or abrogate any such rule so reviewed found inconsistent (with federal law) in the course of such review." The amendments parallel amendments that authorize the respective judicial councils to modify or abrogate local rules promulgated by district courts that are found inconsistent with federal law. Until the instant matter, the rules committees have never been presented with a request to modify or abrogate a local rule of a court of appeals.

The request of the attorneys general challenged several specific provisions contained in Local Rule 22, which was adopted by the Ninth Circuit on February 14, 1994. The advisory committee provided the Ninth Circuit with an opportunity to respond. It considered at length the detailed request submitted by the attorneys general and the response from the Ninth Circuit. Before addressing the merits of the request, the advisory committee established several threshold standards as a framework for formulating recommendations to resolve the instant questions regarding the disputed Ninth Circuit rule and future challenges of local court of appeals' rules.

The advisory committee identified several provisions in the Ninth Circuit rule whose consistency with federal law, including the Federal Rules of Appellate Procedure, appeared questionable. Some of the votes on individual provisions in the rule were closely divided. The advisory committee ultimately voted to report that no provision should be abrogated or modified, but two members noted that their votes not

to abrogate were based on their judgment that the submitted materials were inadequate to reach the merits of the provisions.

Your committee considered the advisory committee's report and a subsequent letter from the attorneys general offering to present additional material to support their request. The ensuing committee discussion addressed the purposes and intent of Congress' delegation of authority to the Judicial Conference to monitor local rules, the precedent setting nature of the request, the complexity and uniqueness associated with death penalty cases, the practical problems with voting procedures in a large circuit, the response of the Ninth Circuit on the merits of the request, the availability of an option of handling the issue through litigation, and other matters.

Your committee concluded that additional information was necessary before it could make a recommendation. Accordingly, it asked the chair to prepare a letter accepting the offer of additional information from the attorneys general and inviting additional comment from the Ninth Circuit for timely consideration of the matter at its next meeting in January.

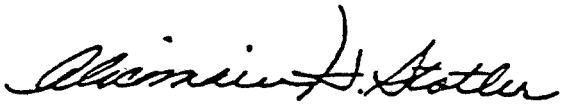
C. Report to the Chief Justice on Proposed Amendments Generating Substantial Controversy

In accordance with the standing request of the Chief Justice, a summary of issues concerning the proposed amendments generating substantial controversy is set forth in *Appendix E*.

D. Chart Showing Status of Proposed Amendments

A chart prepared by the Administrative Office (reduced print) is attached as *Appendix F*, which shows the status of the proposed amendments to the rules.

Respectfully Submitted,



Alicemarie H. Stotler, Chair
Thomas E. Baker
William O. Bertelsman
Frank H. Easterbrook
Thomas S. Ellis, III
Jamie S. Gorelick
Geoffrey C. Hazard, Jr.
James A. Parker
Alan W. Perry
George C. Pratt
Sol Schreiber
Alan C. Sundberg
E. Norman Veasey
William R. Wilson, Jr.

Appendix A: Proposed Amendments to the Federal Rules of Appellate Procedure

Appendix B: Proposed Amendments to the Federal Rules of Bankruptcy Procedure

Appendix C: Proposed Amendments to the Federal Rules of Civil Procedure

Appendix D: Proposed Amendments to the Federal Rules of Criminal Procedure

Appendix E: Proposed Rules Amendments Generating Substantial Controversy

Appendix F: Chart Showing Status of Rules Amendments

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

TO: Honorable Alicemarie Stotler, Chair, and Members of the Standing Committee on Rules of Practice and Procedure

FROM: Honorable James K. Logan, Chair
Advisory Committee on Appellate Rules

DATE: May 27, 1994

The Advisory Committee on Appellate Rules submits the following items to the Standing Committee on Rules:

I. Action Items

A. Proposed amendments to Federal Rules of Appellate Procedure 4(a)(4), 8, 10, 47, and 49,* approved by the Advisory Committee on Appellate Rules at its April 25 and 26 meeting. The Advisory Committee requests that the Standing Committee approve these amended rules and forward them to the Judicial Conference.

The proposed amendments were published in November 1993. A public hearing was scheduled for March 14, 1994 in Denver, Colorado, but was rescheduled for April 25. None of the testimony dealt with any of the rules that the Advisory Committee requests be sent to the Judicial Conference. The Advisory Committee has reviewed the written comments and, in some instances, altered the proposed amendments in light of the comments.

- Part A(1) of this Report summarizes the proposed amendments.
- Part A(2) includes the text of the amended rules.
- Part A(3) is the GAP Report, indicating the changes that have occurred since publication.
- Part A(4) summarizes the comments.

* * * * *

*The Standing Committee did not approve the proposed amendment to Rule 49 for submission to the Judicial Conference.

SUMMARY OF PROPOSED RULE AMENDMENTS TO BE FORWARDED TO THE JUDICIAL CONFERENCE

1. An amendment to Rule 4(a)(4) is proposed. The amendment is intended to clarify the procedure for a party who wants to obtain review of an alteration or amendment of a judgment upon disposition of a posttrial motion. The party may file a notice of appeal, or, if the party filed a notice of appeal prior to disposition of the motion, the party may amend the previously filed notice. Under changes to Rule 4(a)(4) that became effective on December 1, 1993, a previously filed notice of appeal ripens into an operative notice of appeal upon disposition of the posttrial motion but only as to the judgment or order specified in the original notice of appeal. Appeal from the disposition of the motion requires either amendment of the previously filed notice or the filing of a notice of appeal.

   In addition Rule 4(a)(4) is amended to conform to amendments to Fed. R. Civ. P. 50, 52, and 59. Civil Rules 50, 52, and 59 were previously inconsistent with respect to whether postjudgment motions must be filed or merely served no later than 10 days after entry of judgment. As a consequence Rule 4(a)(4) said that such motions must be "made" or "served" within the 10-day period in order to extend the time for filing a notice of appeal. Civil Rules 50, 52, and 59, are being amended to require "filing" no later than 10 days after entry of judgment. Consequently, Rule 4(a)(4) is being amended to require "filing" of a postjudgment motion within the same period in order to extend the time for filing a notice of appeal.

2. A technical amendment to Rule 8(c) is proposed. The amendment conforms subdivision (c) to previous amendments to Fed. R. Crim. P. 38.

   Subdivision 8(c) currently provides that a stay in a criminal case shall be had in accordance with the provisions of Rule 38(a). When Rule 8(c) was adopted, Criminal Rule 38(a) established procedures for obtaining a stay of execution when the sentence in question was death, imprisonment, a fine, or probation. Criminal Rule 38 was later amended and it now treats each of those topics in a separate subdivision. The proper cross-reference is to all of Criminal Rule 38, so the reference to subdivision (a) is deleted.

3. An amendment to Rule 10(b)(1) is proposed to conform that paragraph to the amendments to Rule 4(a)(4). The purpose of this amendment is to

suspend the 10-day period for ordering a transcript if a timely postjudgment motion is made and a notice of appeal is suspended under Rule 4(a)(4).

4. Amendments to Rule 47 are proposed. These amendments, and the proposed Rule 49, are the result of collaborative efforts by the chairs and reporters of the various advisory committees. The amendments to Rule 47 require that local rules be consistent not only with the national rules but also with Acts of Congress and that local rules be numbered according to a uniform numbering system. The amendments further require that all general directions regarding practice before the court be in local rules rather than internal operating procedures or standing orders. The amendments also state that a nonwillful violation of a local rule imposing a requirement of form may not be sanctioned in any way that will cause the party to lose rights. The amendments further allow a court to regulate practice in a particular case in a variety of ways so long as any such orders are consistent with federal law.

* * * * *

GAP REPORT
CHANGES MADE AFTER PUBLICATION

1. There were no comments on the proposed amendment of Rule 4(a)(4), and no changes have been made.

2. There were no comments on the proposed amendment of Rule 8, and no changes have been made.

3. There was one comment on the proposed amendment of Rule 10, but it resulted in no change in the proposed amendment.

   The purpose of the amendment is to suspend the 10-day period for ordering a transcript if a timely postjudgment motion is made that suspends a filed notice of appeal under Rule 4(a)(4). The commentator suggested that counsel be required to notify the court reporter when there is no need to proceed with preparation of the transcript because the appeal is suspended or dismissed pending disposition of the postjudgment motion. The Advisory Committee did not add such a requirement, believing that the party bearing the cost of production of the transcript will inform the court reporter.

4. There were three comments on the proposed amendment of Rule 47 and the Advisory Committee recommends several changes in Rule 47. The changes on pages 11 and 12 are indicated by the shading.

   a. At its February meeting, the Advisory Committee on Bankruptcy Rules recommended a change in that part of the rule dealing with sanctions for violation of a local rule imposing a requirement of form. The published rule said that no sanction that would cause a party to lose rights should be imposed for a "negligent" failure to comply with such a local rule. The Bankruptcy Committee recommended that "negligent" be changed to "nonwillful." The Advisory Committee on Appellate Rules recommends an identical change found at line 23 of the amended rule.

   b. Two of the commentators expressed concern about that in some circuits "internal operating procedures" (I.O.P.'s) are used like local rules and directly affect a party's dealings with the court.

Because directions concerning practice and procedure should be in local rules and not I.O.P.'s, the Advisory Committee recommends the addition of a sentence to 47(a)(1), requiring that generally applicable directions regarding practice before a court must be in a local rule rather than an I.O.P. or standing order. The new sentence is at lines 5-8.

The civil, bankruptcy, and criminal versions of this rule do not contain a parallel sentence. During prior discussions, the other committees were apparently satisfied that the language of subdivision (b) provides a strong incentive for a court to use local rules whenever possible rather than internal operating procedures or standing orders. Subdivision (b) states that "no sanction or other disadvantage may be imposed" for noncompliance with a requirement that is not contained in the federal rules or local rules unless the violator has "actual notice of the requirement."

The issue is different in courts of appeals than in district courts because a court of appeals judge does not sit solo in a courtroom. Indeed, the panel of three is constantly reconstituted and, for that reason, practice is uniform within a circuit. Standing orders are not a problem in the courts of appeals. It is far more likely in a court of appeals that all general directives could be placed in local rules. The inappropriate use of internal operating procedures rather than local rules is a problem. A practitioner who examines the local rules, but not the internal operating procedures, may be caught unaware of a practice requirement buried in the internal operating procedures. Furthermore, the procedures for promulgation of local rules is not applicable to the development of internal operating procedures.

The Advisory Committee believes that the situation in the courts of appeals is sufficiently dissimilar to that in the district courts to justify different treatment in the rule.

c. The Advisory Committee also recommends changing subdivision (b), if the new sentence discussed above is approved.

As published, subdivision (b) authorizes general regulation of practice by means other than rules. The published rule does not limit such regulation to entry of an order in a particular case. The

published rule states that a court may not sanction failure to comply with a non-rule requirement "unless the alleged violator has been furnished in the particular case with actual notice of the requirement." That limitation applies to regulation by standing order or some other similar means.

If, as recommended by the Advisory Committee, a sentence is added to rule (a) requiring that all general directions regarding practice must be in rules, there is no need for the sanctions limitation in (b). The only type of non-rule regulation permitted would be by order in a particular case, in which instance there is actual notice. So, the Advisory Committee recommends deletion of the sanctions limitation and amendment of the first sentence, lines 24 through 26, to make it clear that it is referring to orders in individual cases.

d. The Committee Notes have been altered to conform to the changes recommended above. The altered portion of the comments are shaded for easy identification.
In addition to the conforming changes, the Advisory Committee voted to add a new sentence to the Notes. The sentence states, "It is the intent of this rule that a local rule may not bar any practice that these rules explicitly or implicitly permit." It may be found at lines 3 through 5 of the Committee Note.

5. The only comment on Rule 49 was that the delegation of authority to the Judicial Conference to make technical amendments might be better made by amending the Rules Enabling Act. The Advisory Committee has made no changes in the proposed Rule 49.

* * * * *

SUMMARY
COMMENTS RECEIVED ON PROPOSED AMENDMENTS

1. There were no comments on the proposed amendment of **Fed. R. App. P. 4(a)(4).**

2. There were no comments on the proposed amendment of **Fed. R. App. P. 8.**

3. There was one comment on the proposed amendment of **Fed. R. App. P. 10.** The purpose of the amendment is to suspend the 10-day period for ordering a transcript if a timely postjudgment motion is made that suspends a filed notice of appeal under Rule 4(a)(4).

   The commentator suggests that counsel should be required to notify the court reporter when there is no need to proceed with preparation of the transcript because the appeal is suspended or dismissed pending disposition of the postjudgment motion.

4. Three comments were submitted that discuss the proposed amendments of **Fed. R. App. P. 47.**

   One commentator expressed approval of all of the amendments to Rule 47. Another commentator approved the proposed amendments but stated that they were not strong enough to preclude conflicting local rules or to prevent divergent local practices. That commentator suggested strengthening Rule 47. The third commentator was concerned about the fact that internal operating procedures operate like local rules in some circuits and that Rule 47 did not subject I.O.P's to the same constraints as local rules and standing orders. That commentator also pointed out that subdivision (a) requires consistency with Acts of Congress and the national rules, but subdivision (b) requires consistency with federal law. He asked whether the language should be consistent.

* * * * *

LIST OF COMMENTATORS
SUMMARY OF THEIR INDIVIDUAL COMMENTS

1. Rule 4(a)(4)
none

2. Rule 8
none

3. Rule 10
There was one commentator

Honorable J. Clifford Wallace
Chief Judge, United States Court of Appeals
United States Courthouse
San Diego, California 92101-8918

Chief Judge Wallace suggests that counsel be required to notify the court reporter when there is no need to proceed with preparation of the transcript if the appeal is suspended or dismissed pending disposition of the postjudgment motion.

4. Rule 47
There were three commentators

a. Philip A. Lacovara, Esquire
Mayer, Brown & Platt
2000 Pennsylvania Avenue, N.W.
Washington, D.C. 20006-1882

Mr. Lacovara has three comments:

i. He notes that paragraph (a)(1) requires that circuit "rules" and "local rules" must conform to federal law. The third sentence of the paragraph requires the clerk of a court of appeals to send the Administrative Office a copy not only of each "local rule" but also of each "internal operating procedure." Mr. Lacovara suggests that the rule should require that internal operating procedures, as well as local rules, be consistent with federal law.

ii. Because in some circuits "internal operating procedures" directly affect the parties' dealings with the court, paragraph (a)(2) and

subdivision (b) (both of which deal with enforcement of local practice requirements) should assure that the provisions requiring notice and the limitation on sanctions for negligent non-compliance should apply to violations of internal operating procedures.

iii. Shouldn't the same language be used in paragraph (a)(1), requiring that local rules be consistent with "Acts of Congress," and subdivision (b), requiring that local regulation of practice be consistent with "federal law"?

b. National Association of Criminal Defense Lawyers
1627 K Street
Washington, D.C. 20006

The National Association of Criminal Defense Lawyers expressed general approval of the proposed amendments to Rule 47.

c. American Bar Association
Section of Litigation
750 North Lake Shore Drive
Chicago, Illinois 606011

The ABA Section of Litigation states that the amendments to Rule 47 represent a step in the right direction, but the Section believes that a stronger proclamation is needed to ensure the consistency of local rules (and internal operating procedures) with the federal rules and to control supplementation of the federal rules with divergent local requirements. Specifically, the Section recommends:

i. Rule 47 should preclude conflicting local rules. Local rules that are more burdensome than the national rules should not be permitted unless expressly authorized by the national rule. Local rules that simplify or streamline procedure, however, should be permitted, provided that compliance with the FRAP satisfies the party's obligation to the court.

ii. Each circuit should be permitted to amend its local rules only once a year absent exigent circumstances.

iii. Each circuit should have a rules officer to whom questions concerning local rules are referred for an authoritative answer.

* * * * *

Rule 4. Appeal as of Right - When Taken

(a) *Appeal in a Civil Case.*

* * * * *

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

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

(B) to amend or make additional findings of fact under Rule 52(b), whether or not granting the motion would alter the judgment;

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

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

---

*New matter is underlined; matter to be omitted is lined through.

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

(F) for relief under Rule 60 if the motion is ~~served~~ filed ~~within~~ no later than 10 days after the entry of judgment.

A notice of appeal filed after announcement or entry of the judgment but before disposition of any of the above motions is ineffective to appeal from the judgment or order, or part thereof, specified in the notice of appeal, until the ~~date of the~~ entry of the order disposing of the last such motion outstanding. Appellate review of an order disposing of any of the above motions requires the party, in compliance with Appellate Rule 3(c), to amend a previously filed notice of appeal. A party intending to challenge an alteration or amendment of the judgment ~~shall~~ must file ~~an~~ a notice, or amended notice, of appeal within the time prescribed by this Rule 4 measured from the entry of the order disposing of the

last such motion outstanding. No additional fees will be required for filing an amended notice.

* * * * *

Committee Note

Subdivision (a). Fed. R. Civ. P. 50, 52, and 59 were previously inconsistent with respect to whether certain postjudgment motions had to be filed or merely served no later than 10 days after entry of judgment. As a consequence Rule 4(a)(4) spoke of making or serving such motions rather than filing them. Civil Rules 50, 52, and 59, are being revised to require filing before the end of the 10-day period. As a consequence, this rule is being amended to provide that "filing" must occur within the 10 day period in order to affect the finality of the judgment and extend the period for filing a notice of appeal.

The Civil Rules require the filing of postjudgment motions "no later than 10 days after entry of judgment" -- rather than "within" 10 days -- to include postjudgment motions that are filed before actual entry of the judgment by the clerk. This rule is amended, therefore, to use the same terminology.

The rule is further amended to clarify the fact that a party who wants to obtain review of an alteration or amendment of a judgment must file a notice of appeal or amend a previously filed notice to indicate intent to appeal from the altered judgment.

Rule 8. Stay or Injunction Pending Appeal

* * * * *

(c) *Stays in a Criminal Cases.*-- ~~Stays~~ A stay in a criminal cases shall be had in accordance with the provisions of Rule 38~~(a)~~ of the Federal Rules of Criminal Procedure.

Committee Note

Subdivision (c). The amendment conforms subdivision (c) to previous amendments to Fed. R. Crim P. 38. This amendment strikes the reference to subdivision (a) of Fed. R. Crim. P. 38 so that Fed. R. App. P. 8(c) refers instead to all of Criminal Rule 38. When Rule 8(c) was adopted Fed. R. Crim. P. 38(a) included the procedures for obtaining a stay of execution when the sentence in question was death, imprisonment, a fine, or probation. Criminal Rule 38 was later amended and now addresses those topics in separate subdivisions. Subdivision 38(a) now addresses only stays of death sentences. The proper cross reference is to all of Criminal Rule 38.

Rule 10. The Record on Appeal

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

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

(1) Within 10 days after filing the notice of appeal or entry of an order disposing of the last timely motion outstanding of a type specified in Rule 4(a)(4), whichever is later, the appellant ~~shall~~ must order from the reporter a transcript of such parts of the proceedings not already on file as the appellant deems necessary, subject to local rules of the courts of appeals. The order

~~shall~~ must be in writing and within the same period a copy ~~shall~~ must be filed with the clerk of the district court. If funding is to come from the United States under the Criminal Justice Act, the order ~~shall~~ must so state. If no such parts of the proceedings are to be ordered, within the same period the appellant ~~shall~~ must file a certificate to that effect.

* * * * *

Committee Note

Subdivision (b)(1). The amendment conforms this rule to amendments made in Rule 4(a)(4) in 1993. The amendments to Rule 4(a)(4) provide that certain postjudgment motions have the effect of suspending a filed notice of appeal until the disposition of the last of such motions. The purpose of this amendment is to suspend the 10-day period for ordering a transcript if a timely postjudgment motion is made and a notice of appeal is suspended under Rule 4(a)(4). The 10-day period set forth in the first sentence of this rule begins to run when the order disposing of the last of such postjudgment motions outstanding is entered.

Rule 47. Rules ~~by~~ of a Courts of Appeals

(a) *Local Rules.*

(1) 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 for comment, ~~from time to time~~ make and amend rules governing its practice. A generally applicable direction to a party or a lawyer regarding practice before a court must be in a local rule rather than an internal operating procedure or standing order. 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 and 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.~~

(2) A local rule imposing a requirement of form must not be enforced in a manner that causes a party to lose rights because of a nonwillful failure to comply with the requirement.

(b) *Procedure When There Is No Controlling Law.* -- A court of appeals may regulate practice in a particular case in any manner consistent with federal law, these rules, and local rules of the circuit. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local

circuit rules unless the alleged violator has been furnished in the particular case with actual notice of the requirement.

Committee Note

Subdivision (a). This rule is amended to require that a generally applicable direction regarding practice before a court of appeals must be in a local rule rather than an internal operating procedure or some other general directive. It is the intent of this rule that a local rule may not bar any practice that these rules explicitly or implicitly permit. Subdivision (b) allows a court of appeals to regulate practice in an individual case by entry of an order in the case. The amendment also reflects the requirement 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 and Acts of Congress.

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.

Paragraph (2) is new. Its aim is to protect against loss of rights in the enforcement of local rules relating to matters of

form. The proscription of paragraph (2) is narrowly drawn -- covering only violations that are not willful and only those involving local rules directed to matters of form. It does not limit the court's power to impose substantive penalties upon a party if it or its attorney stubbornly or repeatedly violates a local rule, even one involving merely a matter of form. Nor does it affect the court's power to enforce local rules that involve more than mere matters of form.

Subdivision (b). This rule provides flexibility to the court in regulating practice in a particular case 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.

The amendment to this rule disapproves imposing any sanction or other disadvantage on a person for noncompliance with such a directive, unless the alleged violator has been furnished in a particular case with 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.

Agenda Item 1C

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

FROM: Carol Ann Mooney, Reporter

DATE: March 11, 1994

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

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

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

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

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

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

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

Rule 29. Brief of An Amicus Curiae

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

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

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

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

(3) when requested by the court.

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

(1) the movant's interest, and

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

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

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

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

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

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

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

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

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

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

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

Committee Note

Rule 29 is entirely rewritten.

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

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

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

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

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

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

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

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

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

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

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

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

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

Attachment A
Current Rule 29

CURRENT FED. R. APP. P. 29

Rule 29. Brief of an amicus curiae

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

Draft One - September 1993

Rule 29. Brief of An Amicus Curiae

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

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

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

(3) when requested by the court;

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

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

state

(1) the movant's interest, and

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

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

(1) jurisdiction,

(2) the issues,

(3) the case, and

(4) the standard of review.

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

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

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

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

Committee Note

Rule 29 is entirely rewritten.

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

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

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

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

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

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

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

Draft Two - September 1993

Rule 29. Brief of An Amicus Curiae

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

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

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

(3) when requested by the court;

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

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

(1) the movant's interest, and

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

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

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

(1) jurisdiction,

(2) the issues,

(3) the case, and

(4) the standard of review.

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

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

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

Committee Note

Rule 29 is entirely rewritten.

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

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

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

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

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

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

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

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

CIRCUIT RULES AND I.O.P.'s

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

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

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

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

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

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

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

of an *amicus curiae* will be received.

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

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

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

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

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

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

4th Cir. I.O.P. 29.1

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

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

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

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

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

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

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

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

* * * * *

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

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

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

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

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

All amicus curiae briefs shall be limited to 20 pages.

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

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

No reply brief of an amicus curiae will be received.

Advisory Committee Note to Rule 29-1

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

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

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

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

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

A. *Formal Requirements as to Contents.*

* * * * *

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

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

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

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

Each principal and amicus brief shall consist, in the order listed, of the following:
(a) *Cover Page.* Elements to be shown on the cover page include . . .
(b) *Certificate of Interested Persons and Corporate Disclosure Statement.* A Certificate . . .
(c) *Statement Regarding Oral Argument.* Appellant's brief shall include . . .
(d) *Table of Contents and Citations.* The table of contents and citations shall include . . .
(e) *Statement Regarding Adoption of Briefs of Other Parties.* A party who . . .
(f) *Statement of Jurisdiction.* Each brief shall include a concise statement of the statutory or other basis of the jurisdiction of this court, containing citations of authority when necessary.
(g) *Statement of the Issues.*
(h) *Statement of the Case.* . . .
(i) *Summary of the Argument.* The opening brief of the parties shall . . .
(j) *Argument and Citations of Authority.* . . .
(k) *Conclusion.*
(l) *Certificate of Service.*

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

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

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

(a) *Content; form.* The brief of an amicus curiae shall comply with Rules 28 and 32 of the Federal Circuit Rules except as provided in this rule. The statements of related cases, of jurisdiction, of the issues, and of the case, and the addendum, may be omitted. The brief shall not exceed 20 pages exclusive of the items listed in (1) through (6), (12), and (13) of Rule 28(A) of these Federal Circuit Rules. The cover of such a brief shall indicate whether it urges affirmance or reversal of the judgment or order under review. An amicus may not file a reply brief except by leave of the court granted only in extraordinary circumstances.
(b) *List of Amicus Curiae.* The clerk shall maintain a list of bar associations and other organizations to be invited to file amicus curiae brief when directed by the court. Bar associations and other organizations will be placed on the list upon request. The request shall be reviewed annually not later than October 1st.

Attachment D
Supreme Court Rules

SUPREME COURT RULE 37. BRIEF OF AN AMICUS CURIAE

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

* * * * *

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

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

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

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

L. RALPH MECHAM
DIRECTOR

JAMES E. MACKLIN, JR.
DEPUTY DIRECTOR

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
CHIEF, RULES COMMITTEE
SUPPORT OFFICE

September 24, 1993

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

Dear Judge Sloviter:

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

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

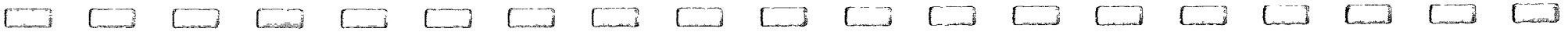
Sincerely,

John K. Rabiej

John K. Rabiej

Enclosure

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



ADVISORY COMMITTEE ON CODES OF CONDUCT
ADVISORY OPINION NO. 63

Disqualification in Relation to Amici.

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

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

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

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

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

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

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

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

Finally, it should be emphasized that if an interest in an amicus would not be substantially affected by the outcome and if the judge's impartiality might not otherwise reasonably be questioned, stock ownership in an amicus is not per se a disqualification.

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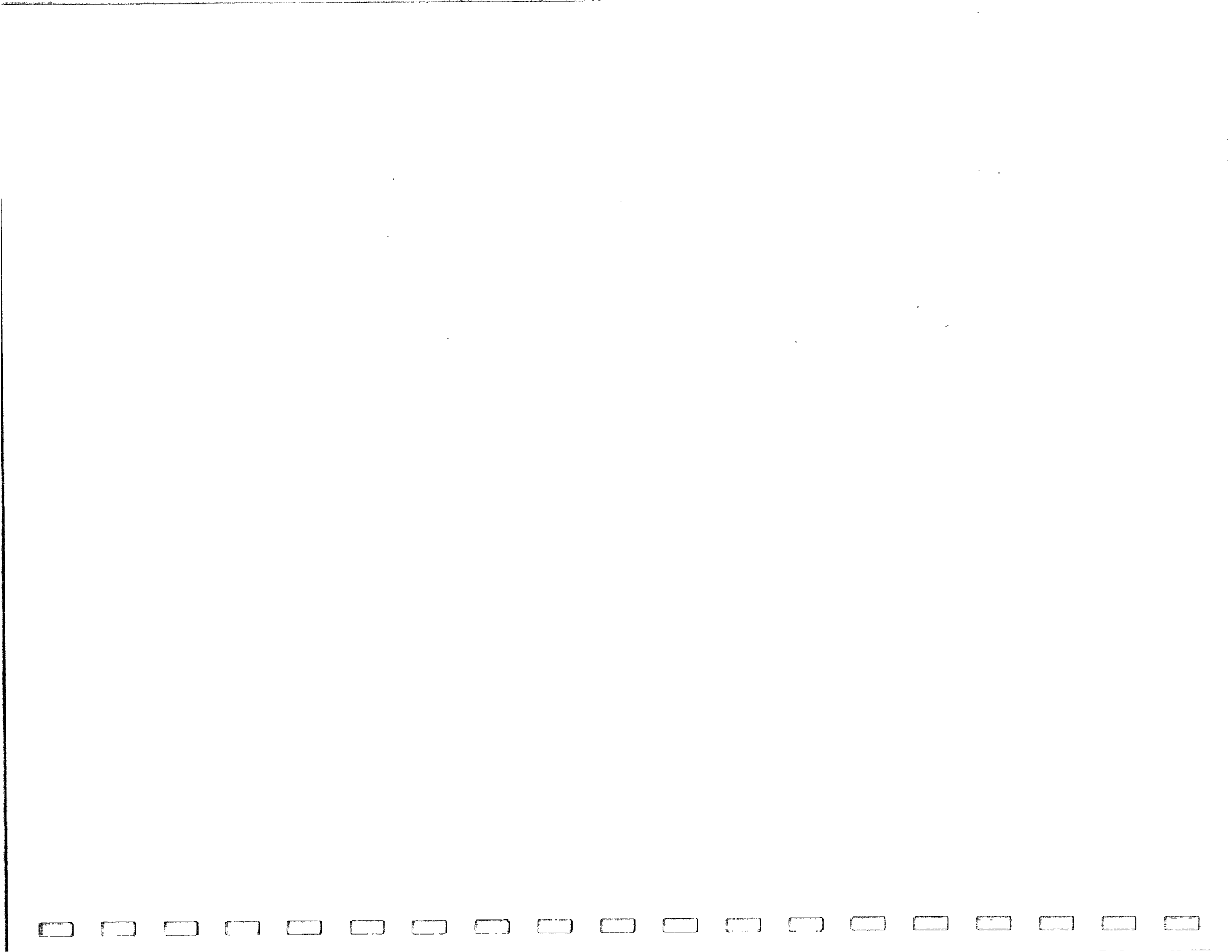
[1] Professor Thode explains that the test is "not whether a judge has a 'substantial interest' but whether the interest that he has could be substantially affected by a decision in the proceeding before him."

[2] Section 455(e) of Title 28 provides that disqualification for the existence of the reasonable appearance of partiality may be waived by the parties. The Code of Judicial Conduct has a similar provision. See State of California v. Kleppe, 431 F.Supp. 1344, 1350-1351 (C.D. Cal. 1977).

The appearance of impropriety standard was the one relied on by the trial judge to disqualify himself in State of California v. Kleppe, 431 F.Supp. 1344, 1349-1350 (C.D. Cal. 1977), which concerned Exxon's offshore oil leasing. The judge not only owned stock in nonparty Union Oil, whose own operations nearby would be affected by the case's outcome and who had royalty override and partnership arrangements with Exxon in the area, but had also served as Union's litigation counsel for twelve years and reviewed oil and gas leases for it, possibly including some in the area under the judge's consideration.



Agenda Item I-D

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

FROM: Carol Ann Mooney, Reporter

DATE: March 11, 1994

RE: Items 89-5, 90-1, 91-25 and 92-4, amendment of Rule 35 re: in banc proceedings

There are four items on the Committee's docket dealing with Rule 35; they are items 89-5, 90-1, 91-25 and 92-4.

Items 89-5 and 90-1 involve proposed amendments that would treat a request for a rehearing in banc like a petition for a panel rehearing so that a request for a rehearing in banc also will suspend the finality of a court of appeals' judgment and extend the period for filing a petition for writ of certiorari. The proposed amendments also would change the term "suggestion" for rehearing in banc to "petition." Both changes have been approved by the Advisory Committee (April 1993) and by the Standing Committee (July 1993) for publication. Publication of these proposed changes has been delayed, however, pending resolution of items 91-25 and 92-4. The drafts in this memorandum reflect the changes approved under items 89-5 and 90-1.

Item 91-25 grew out of the Local Rules Project. The Project suggested that the Advisory Committee consider adopting some or all of the provisions in the various circuit rules dealing with suggestions for in banc determination. In its response to the Local Rules Project Report, the Fifth Circuit recommended adoption of its rule which specifies the contents of a suggestion for in banc consideration.

At the September 1993 meeting, the Advisory Committee considered two drafts prepared pursuant to those suggestions. The Committee consensus was that it was unnecessary to specify the contents of a petition for rehearing in banc in detail, thus eliminating one draft from consideration. The other draft made only one significant change in the rule. The draft required a petition for in banc consideration to include a statement demonstrating that in banc consideration is appropriate. Ten circuits currently have a similar requirement. The Committee approved that draft along with some additional changes:

1. the rule should include a length limitation;
2. the caption of subdivision (a) should be changed from "When Hearing or Rehearing In Bank Will Be Ordered" to "When Hearing or Rehearing In Bank May Be Ordered;" and
3. subdivision (f) should be amended to make it clear that a senior judge or a judge sitting by designation may not call for a vote on a request for rehearing in banc unless such a judge was member of the panel whose decision is sought to be reviewed.

Item 92-4 involves a suggestion from the Solicitor General that intercircuit conflict should be made an explicit ground for granting an in banc hearing. The Committee agreed that the Rule should include some reference to intercircuit conflict as grounds for granting rehearing in banc.

The Solicitor General's suggestion had been to amend subdivision (a) so that intercircuit conflict would be treated as a separate category of cases as to which in banc review would be appropriate. The Committee did not decide, however, whether to adopt that approach or to treat intercircuit conflict as grounds for determining that a proceeding involves a question of "exceptional importance."

I was asked to prepare a new draft integrating all of the decisions made to date. Because the Committee did not decide exactly how to treat a case involving an intercircuit conflict, there are two drafts. Draft one treats intercircuit conflict as grounds for finding that a proceeding involves a question of "exceptional importance;" that approach requires amendment only of subdivision (b). Draft two treats intercircuit conflict as a separate category of cases as to which in banc review may be appropriate; this approach requires amendment of both subdivisions (a) and (b).

Rule 35. ~~Determination of Causes by the Court~~ In Banc Proceedings

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

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

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

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

(1) The petition must begin with a statement either that:

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

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

(B) the proceeding involves one or more questions of exceptional importance; each such question must be concisely stated, preferably in a single sentence. A proceeding may present a question of exceptional importance when it involves an issue as to which the panel decision in that case, or another decision of the court to which the petition is addressed, conflicts with a decision of another federal court of appeals (citation to the conflicting case or cases is required).

(2) A petition for hearing or rehearing in banc may not exceed 15 pages unless the court provides otherwise by local rule or by

order in a particular case. When both a petition for panel rehearing and a petition for rehearing in banc are filed, whether or not they are combined in a single document, the combined documents may not exceed 15 pages.* Pages excluded by Rule 28(g) do not count.

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

(c) *Time for ~~Suggestion~~ Petition of a Party for Hearing or Rehearing in Banc.* ~~; Suggestion Does Not~~

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* **Reporter's Comment:** The Committee did not address the problem of the length limit when both a petition for panel rehearing and a petition for rehearing in banc are filed. Three circuit rules, D.C. Cir. R. 35 (b), 10th Cir. R. 35.5, and 11th Cir. R. 35-8, use the approach taken in the draft. The other circuits do not address the issue.

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

** **Reporter's Comment:** The requirement that a petition to hear "an appeal" initially in banc must be filed by the "date on which the appellee's brief is filed," is unchanged from the current rule.

Would it be better to require filing by the date on which the appellee's brief is due? An appellant who wishes to request in banc consideration must anticipate the filing date of the appellee's brief. If there are multiple appellees who are separately represented, is the petition due when the first appellee's brief is filed?

Should the word "appeal" be changed to "proceeding" because requests for in banc consideration are not limited to appeals? I think not; that change would complicate the due date for the petition and requests for in banc consideration of motions, etc. are sufficiently rare that it is probably not worth the complication.

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

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

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

Committee Note

One of the purposes of the amendments is to treat a request for a rehearing in banc like a petition for panel rehearing so that a request for a rehearing in banc will suspend the finality of the court of appeals' judgment and extend the period for filing a petition for writ of certiorari. Companion amendments are made to Rule 41.

Subdivision (a). The title of this subdivision is changed from "When a Hearing or Rehearing In Banc Will Be Ordered" to "When a Hearing or Rehearing In Banc May Be Ordered." The change emphasizes the discretion a court has with regard to granting in banc review.

Subdivision (b). The term "petition for rehearing in banc" is substituted for the term "suggestion for rehearing in banc." The terminology change is not a necessary part of the changes that extend the time for filing a petition for a writ of certiorari when a party requests a rehearing in banc. The terminology change reflects, however, the Committee's intent to treat similarly a petition for panel rehearing and a request for a rehearing in banc.

The amendments also require each petition for in banc consideration to begin with a statement concisely demonstrating that the case meets the criteria for in banc consideration. It is the Committee's hope that requiring such a statement will cause the drafter of a petition to focus on the narrow grounds that support in banc consideration and to realize that a petition should not be filed unless the case meets those rigid standards.

Intercircuit conflict is cited as a reason for determining that a proceeding involves a question of "exceptional importance." Intercircuit conflicts create problems. When the circuits construe the same federal law differently, parties' rights and duties depend upon where a case is litigated. Given the increase in the number of cases decided by the federal courts and the Supreme Court's inability to increase the number of cases it considers on the merits, conflicts between the circuits may remain unresolved by the Supreme Court for an extended period of time. The existence of an intercircuit conflict often generates additional litigation in the other circuits as well as in the circuits that are already in conflict. Although an in banc proceeding will not necessarily prevent intercircuit conflicts, an in banc proceeding provides a safeguard against unnecessary intercircuit conflicts.

Four circuits have rules or internal operating procedures that recognize a conflict with another circuit as a legitimate basis for granting a rehearing in banc. D.C. Cir. R. 35(c); 7th Cir. R. 40(c); 9th Cir. R. 35-1; and 4th Cir. I.O.P. 40.5. An intercircuit conflict may present a question of "exceptional importance" because of the costs that intercircuit conflicts impose on the system as a whole, in addition to the significance of the issues involved. It is not, however, the Committee's intent to make the granting of a hearing or

rehearing in banc mandatory whenever there is an intercircuit conflict.

When a panel decision conflicts with a decision of another circuit, a petition to rehear the case in banc may be appropriate. Subpart (b)(1)(B) also provides that a petition may state that the proceeding involves an issue as to which "another decision of the court" conflicts with a decision of another circuit. That language is included because a request for an initial hearing in banc may be appropriate when a proceeding involves an issue as to which a decision in an earlier case from the circuit conflicts with a decision from another circuit.

Counsel are reminded that their duty is fully discharged without filing a petition for rehearing in banc unless the case meets the rigid standards of subdivision (a) of this Rule.

Paragraph (2) of this subdivision establishes a maximum length for a petition. Fifteen pages is the length currently used in five circuits; D.C. Cir. R. 35(b), 5th Cir. R. 35.5, 10th Cir. R. 35.5, 11th Cir. R. 35-8, and Fed. Cir. R. 35(d). Each request for in banc consideration must be studied by every active judge of the court and is a serious call on limited judicial resources. The extraordinary nature of the issue or the threat to uniformity of the court's decision can be established in most cases in less than fifteen pages.

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

Subdivision (c). Two changes are made in this subdivision. First, the sentence stating that a request for a rehearing in banc does not affect the finality of the judgment or stay the issuance of the mandate is deleted. The deletion of that sentence does not affirmatively accomplish the goal of extending the period for filing a petition for writ of certiorari; it simply sets the stage for such an amendment. In order to affirmatively accomplish that objective, Sup. Ct. R. 13.4 must be amended.

Second, the language permitting a party to include a

request for rehearing in banc in a petition for panel rehearing is deleted. The Committee believes that those circuits that want to require two separate documents should have the option to do so.

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

Subdivision (f). This is a new subdivision. The substance of the subdivision, however, was drawn from former subdivision (b).

Because of the discretionary nature of the in banc procedure, the filing of a suggestion for rehearing in banc has not required a vote; a vote is taken only when requested by a judge of the court in regular active service or by a judge who was a member of the panel that rendered the decision sought to be reheard. It is not the Committee's intent to change the discretionary nature of the procedure or to require a vote on a petition for rehearing in banc. The rule continues, therefore, to provide that a court is not obligated to vote on such petitions. It is necessary, however, that each court develop a procedure for disposing of such petitions because they will suspend the finality of the court's judgment and toll the time for filing a petition for certiorari.

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

(1) The petition must begin with a statement that:

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

(2) A petition for hearing or rehearing in banc may not exceed 15 pages unless the court provides otherwise by local rule or by order in a particular case. When both a petition for panel rehearing and a petition for rehearing in banc are filed, whether or not they are combined in a single document, the combined documents may not exceed 15 pages.*** Pages excluded by Rule 28(g) do not count.

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~~requests a vote on such a suggestion made by a party.~~

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

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Intercircuit conflict may provide the basis for such a statement. When a panel decision conflicts with a decision of another circuit, a petition to rehear the case in banc may be appropriate. Subpart (b)(1)(B) also provides that a petition may state that the appeal involves an issue as to which "another decision of the court" conflicts with a decision of another circuit. That language is included because a request for an initial hearing in banc may be appropriate when an appeal involves an issue as to which a decision in an earlier case from the circuit conflicts with a decision from another circuit.

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Subdivision (f). This is a new subdivision. The substance of the subdivision, however, was drawn from former subdivision (b).

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Draft One - September 1993

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

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

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

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

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

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

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

~~No response shall be filed unless the court shall so order. The clerk shall transmit any~~

~~such suggestion to the members of the panel and the judges of the court who are in regular active service but a vote need not be taken to determine whether the cause shall be heard or reheard in banc unless a judge in regular active service or a judge who was a member of the panel that rendered a decision sought to be reheard requests a vote on such a suggestion made by a party.~~

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

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

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

(f) *Voting on a Petition.* -- The clerk must transmit any such petition to the judges of the court who are in regular active service and, with respect to a petition for rehearing, to any other members of the panel that rendered the decision sought to be

reheard but a vote need not be taken to determine whether the cause will be heard or reheard in banc unless a judge requests a vote.

Committee Note

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

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

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

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

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

Draft Two - September 1993

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

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

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

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

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

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

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

(B) a statement that either

(i) the panel decision conflicts with a decision of the United States Supreme Court or of the court to which the

---

[1] Rule 32(b)(1), as approved for publication in December, states:
(1) A petition for rehearing, a petition for rehearing in banc, and any response to such petition must ~~shall~~ be produced in a manner prescribed by subdivision (a) with a cover the same color as the party's principal brief.
It does not apply to a petition for an initial hearing in banc. Should it?

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

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

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

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

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

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

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

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

(I) a conclusion.

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

pages containing the corporate disclosure statement, table of contents, table of authorities, proof of service, and any addendum containing statutes, rules, regulations, etc.

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

~~No response shall be filed unless the court shall so order. The clerk shall transmit any such suggestion to the members of the panel and the judges of the court who are in regular active service but a vote need not be taken to determine whether the cause shall be heard or reheard in 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.

Attachment B
Sept. 1993 Draft
Item 92-4

Solicitor General's Draft

Rule 35. Determination of Causes by the Court In Banc

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

Attachment C
Local Rules

D.C. Cir. R. 35. Petition for Rehearing and Suggestion for Hearing or Rehearing *In Banc*

* * * * *

(b) Number of Copies and Length. An original and 4 copies of petitions for rehearing, and an original and 19 copies of suggestions for hearing or rehearing *in banc* shall be filed. Such petitions and suggestions may be combined in one pleading or filed as separate documents. Whether filed as one pleading or as separate documents, a petition and/or suggestion shall not exceed a cumulative length of 15 pages, and shall otherwise conform to the requirements for a motion specified in Circuit Rule 27. This court disfavors motions to exceed page limits and such motions will be granted only for extraordinarily compelling reasons.

(c) Contents of Suggestion for In Banc Consideration. A suggestion for hearing or rehearing *in banc* shall contain a separate introductory section, captioned "Concise Statement of Issue and Its Importance," that shall set forth the reasons why the case is of exceptional importance or, where applicable, with what decision or decisions of the Supreme Court of the United States, of this court, or of any other federal appellate court, the panel decision is claimed to be in conflict. Without such a statement, the suggestion will not be accepted for filing.

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

2. *Rehearing En Banc.*

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

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

Supplementing FRAP Rule 35, the following requirement shall apply:

Each application shall be submitted with ten copies.

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

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

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

3rd Cir. R. 35. Required Statement of Rehearing In Banc.

Where the party suggesting rehearing in banc is represented by counsel, the suggestion shall contain, so far as is pertinent, the following statement of counsel:

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

Or, that this appeal involves a question of exceptional importance, i.e. [set forth in one sentence]."

3rd Cir. R. 32.3 Form of Motions and Other Papers Only

* * * * *

(b) Suggestions for rehearing in banc in which the petitioner is represented by counsel shall contain the "Statement of Counsel" required by 3rd Cir. LAR 35.1. All petitions or suggestions seeking either panel rehearing or rehearing in banc shall include as an exhibit a copy of the panel's judgment, order, and opinion, if any, as to which rehearing is sought.

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

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

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

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

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

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

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

_____

Attorney of record for _____

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

35.2.3. Table of contents and citations;

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

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

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

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

35.2.8. Conclusion; and

35.2.9. Certificate of service.

* * * * *

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

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

* * * * *

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

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

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

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

_____

(Signature)

Attorney of record for:

_____

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

7th Cir. R. 40. Petitions for Rehearing

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

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

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

* * * * *

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

* * * * *

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

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

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

(i) I express a belief, based on a reasoned and studied professional judgment, that the decision is contrary to the following decisions of the United States Court of Appeals for the Eighth Circuit [or the

Supreme Court of the United States], and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this court: [cite specifically the case or cases].

Attorney of Record
for [Name of Party]

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

Attorney of Record
for [Name of Party]

* * * * *

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

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

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

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

* * * * *

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

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

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

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

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

/s/_____
Attorney of Record for _____

* * * * *

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

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

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

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

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

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

I express a belief, based on a reasoned and studied professional

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

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

/s/_____
Attorney of Record for
_____

(d) table of contents and citations;

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

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

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

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

(i) conclusion;

(j) certificate of service.

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

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

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

* * * * *

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

counsel at the beginning of the suggestion:

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

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

> Based on my reasoned and studied professional judgment, I believe the panel decision is contrary to the following decision(s) of the Supreme Court of the United States or the precedent(a) of this court: (cite specifically the decision(s) or precedent(s)).
>
> Based on my reasoned and studied professional judgment, I believe this appeal requires answer to one or more precedent-setting questions of exceptional importance: (set forth each question in a separate sentence).
>
> /s/ _____
> Attorney of Record for _____

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

(d) Suggestions for rehearing in banc; response; format; service; length; cover; certificate of interest; appendix; number of copies. A suggestion for rehearing in banc or response if requested by the court shall be in the form prescribed by Rule 32(a) of the Federal Rules of Appellate Procedure. A suggestion for rehearing in banc or response may not exceed 15 pages, excluding pages containing the certificate of interest, table of contents, table of citations, and any addendum

containing statutes, rules, regulations, etc. The cover shall contain the information required of briefs (see Fed. Cir. R. 32(e)). The cover of the suggestion shall be yellow and the cover of the answer, if one is required by the court, shall be brown. A certificate of interest (see Fed. Cir. R. 47.4) shall immediately follow the cover. A copy of the opinion in the appeal sought to be reheard shall be bound with the suggestion as an appendix. Fifteen copies of the suggestion for rehearing in banc shall be filed with the court, and two copies shall be served on each party separately represented.

Agenda Item 17

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

FROM: Carol Ann Mooney, Reporter

DATE: October 10, 1994

SUBJECT: Item 93-3, amendment of Rule 41 to expand the 7 day period for issuing the mandate;
Item 93-6, amendment of Rule 41 regarding the effective date of the mandate

I. Item 93-3, amendment of Rule 41 to expand the 7 day period for issuing the mandate.

A. Background

A proposed amendment to Rule 40, which lengthens the time for filing a petition for rehearing from 14 to 45 days in a civil case involving the United States, will become effective on December 1, 1994, unless Congress acts to overrule it. A companion amendment to Rule 41(a) is also pending before Congress.

Rule 41(a) currently requires a court of appeals to issue its mandate 21 days after entry of judgment. The 21 day period means that the mandate generally issues 7 days after expiration of the time for filing a petition for rehearing, which is currently 14 days for all parties. Rule 41(a) further provides that the timely filing of a petition for rehearing ordinarily stays the mandate until disposition of the motion. Because the proposed amendment to Rule 40 lengthens the time for filing a petition for rehearing to 45 days in some, but not all cases, issuing the mandate 21 days after entry of judgment will be inappropriate in those instances in which the time for filing a petition for rehearing has not yet expired.

The proposed amendment to Rule 41 generally requires a court of appeals to issue the mandate 7 days after expiration of the time for filing a petition for rehearing. As a result the mandate usually still will issue 21 days after entry of judgment unless the time is extended by the filing of a petition for rehearing. In civil cases involving the United States, however, the mandate will issue 52 days after entry of judgment, or later if a petition for rehearing is filed.

When the proposed amendments to Rule 40 and 41 were published for comment, Judge Newman 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 or after denial of a petition for rehearing. Judge Newman's suggestion would allow a court of appeals to enter the mandate earlier than 7 days after the relevant event. The Advisory Committee did not adopt that suggestion believing that there should be a day certain for issuance of the mandate.

Ironically, the Advisory Committee's discussion of the suggestion actually focused upon whether 7 days is too short a time rather than too long a time. One Committee member noted that a proposed amendment to Rule 41(b), also currently pending before Congress, requires a petition for 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 member noted that the new requirements may make it more difficult for the party seeking a stay to obtain one within the 7-day period.

As evidenced by the fact that the proposed amendments to Rules 40 and 41 are currently pending before Congress, the Advisory Committee decided to send the proposed amendments forward to the Standing Committee. The Advisory Committee decided, however, to return to the question of whether the 7-day period is appropriate.

B. Discussion

Because the amendments to Rule 41(b) do not appear to be a major departure from current practice in most circuits, it is not clear that there is a need to extend the 7-day period.

Although the proposed changes to Rule 41(b) require a party to show grounds for a stay, a party has the time period for filing the petition for rehearing (14 or 45 days) as well as the 7 days thereafter to formulate the arguments and obtain a stay. A party, therefore, has a minimum of 21 (or in a civil case involving the United States 52) days in which to obtain a stay. If a party files a petition for rehearing, it is likely that the time will be extended a few days awaiting the disposition of the motion and, therefore, the actual period may be longer than 21 or 52 days. In addition, the arguments for granting a stay are often the same arguments presented in the petition for rehearing, so it should be possible to prepare the motion for stay simultaneously with the petition for rehearing.

Moreover, the proposed amendment to Rule 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 a stay is granted. Local rules in three circuits require a showing similar to that required by proposed Rule 41(b); that is "that a petition for certiorari would present a substantial question and there there is good cause for a stay."[1] Three other circuits

[1] D.C. Cir R. 41(a)(2) ("a stay of the issuance of mandate shall not be granted unless the motion sets forth facts showing good cause for the relief sought"); 4th Cir. I.O.P. 41.2 ("the motion must present a substantial question or set forth good or probable cause for a stay"); 7th Cir. R. 41(a) ("In the absence of extraordinary need, the mandate will not be stayed . . . except upon a specific motion which includes . . . [a] substantial showing that the petition for certiorari which is being filed raises an important question meriting review by the Supreme Court").

require a similar showing in criminal appeals.[2] Four additional circuits make it clear that a stay of mandate is not granted simply upon request.[3]

If it is true that the amendment of Rule 41(b) will not significantly alter current practice, the 7-day period should be sufficient. The 7-day time period apparently does not presently cause any difficulties. If a mandate issues and a stay is subsequently granted, the court recalls the mandate. If that practice is undesirable, an amendment stating that if a motion for a stay is filed, the mandate cannot issue until the court acts on the motion might be preferable to lengthening the 7-day period.

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[2] 5th Cir. R. 41.1 (in a criminal appeal "[u]nless 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"); 8th Cir. R. 41A (in a criminal appeal the court will grant a stay "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 a civil case, the court "may deny a stay of mandate if the question would not likely be appropriate for determination by the Supreme Court"); 11th Cir. 41-1(a) (in a criminal appeal a stay "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").

[3] It is likely that there is little actual difference between the practice in these four circuits and those previously mentioned. The rules in these four circuits differ from the others in that they do not require the motion for a stay to show that there are grounds for granting the stay. The rules in these circuits state that it is sufficient if the court makes an independent determination there are grounds for the stay. Presumably that is the practice in the other circuits as well. 1st Cir. R. 41 (in a criminal case mandate will issue and bail will be revoked "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"); 6th Cir. R. 15(a) (mandate will issue "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"); 9th Cir. R. 41-1 (a stay will not be granted "if the Court determines that the petition for ceritorari would be frivolous or filed merely for delay"); 10th Cir. R. 41.1 (in a criminal case mandate will issue "except upon a showing that a petition to stay the mandate would not be frivolous or filed merely for delay, or an independent finding . . . to the same effect;" in a civil case mandate will issue "absent a finding by the court that a petition for certiorari would not result in pointless delay").

C. Drafts

1. Draft One - changing 7 days to 14

If the Committee decides to lengthen the 7-day period, the only change needed is to change 7 days to 14 days (or whatever period the Committee recommends) in Rule 41(a). For example:

Rule 41. Issuance of Mandate; Stay of Mandate[4]

(a) *Date of Issuance.* – The mandate of the court must issue ~~7~~ 14 days after the 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 must issue ~~7~~ 14 days after entry of the order denying the petition unless the time is shortened or enlarged by order.

Committee Note

Subdivision (a). The time for issuance of the mandate is extended from 7 to 14 days after expiration of the time for filing a petition for rehearing or, if such a petition is filed, after entry of the order denying the petition. The Committee believes that the additional time is necessary to

[4] This draft presumes that the amendments currently pending before Congress will become effective on December 1 and, therefore, uses the amended rule as the baseline. No style changes are proposed in this draft. At the time of this writing, I have not yet seen the Style Subcommittee's recommended changes for this rule and I am not certain when and how to integrate those changes in "rules in progress."

give a party a realistic opportunity to obtain a stay of the mandate before its issuance. The recent amendment of subdivision (b) of this rule requires a motion for 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. That new requirement may make it unlikely that a motion for a stay can be prepared and determined within 7 days.

2. Draft Two - style revisions

Although I am not certain how we will proceed to incorporate the Style Subcommittee's work in the rules in progress, I found it difficult to proceed further without trying to make the working draft closer to what I believe the Style Subcommittee wants. Therefore, Draft Two is simply a possible style revision. Although I have not yet received the Style Subcommittee's first draft of Rule 41, I have had the benefit of Mr. Garner's first draft. Using his ideas and a few of my own, Rule 41 might look something like the following:

Rule 41. Issuance of Mandate; Stay of Mandate

(a) *The Mandate; Date of Issuance.*

(1) Unless the court directs that a formal mandate issue, the mandate consists of a certified copy of the judgment, a copy of the court's opinion, if any, and any direction about costs.

(2) ~~The mandate of the court must issue 7 days after the 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 court must issue its mandate 7 days after the time for filing a petition for rehearing expires, unless an order shortens or extends the time or a petition for rehearing is filed. The timely filing of a petition for rehearing ~~will~~ stays the mandate until ~~disposition~~ the court disposes of the petition, unless ~~otherwise~~

~~ordered by~~ the court orders otherwise. If the petition is denied, the ~~mandate must~~ court must issue the mandate 7 days after entry of the order denying the petition ~~unless the time is shortened or enlarged by order~~ , but an order may shorten or extend the time.

(b) *Stay of Mandate Pending Petition for Certiorari.* A party ~~who files~~ filing a motion requesting a stay of mandate pending petition to the Supreme Court for a writ of certiorari must ~~file~~, at the same time, file 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 ~~must not~~ cannot exceed 30 days, unless the period is extended for cause shown or ~~unless during the period of the stay, a notice from~~ the clerk of the Supreme Court ~~is filed showing~~ files a notice during the stay indicating that the party who ~~has~~ obtained the stay ~~has~~ filed a petition for the writ ~~in which case~~ . In that case, the stay ~~will~~ continues until ~~final disposition by~~ the Supreme Court's final disposition. 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 before ~~the~~ granting or ~~continuance of~~ continuing a stay of ~~the~~ mandate.

3. Draft Three - motion for a stay pending petition to the Supreme Court for a writ of certiorari

If the Committee decides that it is unnecessary to expand the 7-day period in all instances, but the Committee wishes to ensure that the mandate does not issue while a motion for a stay of mandate is pending, Rule 41(a) could be amended to provide that the mandate cannot issue while the motion is pending. The D.C. Circuit rule contains such a provision. D.C. Cir. R. 41(a)(2).

Rule 41. Issuance of Mandate; Stay of Mandate

(a) *The Mandate: Date of Issuance.*

(1) Unless the court directs that a formal mandate issue, the mandate consists of a certified copy of the judgment, a copy of the court's opinion, if any, and any direction about costs.

(2) ~~The mandate of the court must issue 7 days after the 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 court must issue its mandate 7 days after the time for filing a petition for rehearing expires, unless an order shortens or extends the time, or a petition for rehearing or a motion for a stay of mandate pending petition to the Supreme Court for a writ of certiorari is filed. The timely filing of a petition for rehearing, or the filing of a motion for a stay of mandate

pending petition to the Supreme Court for a writ of certiorari, ~~will~~ stays the mandate until ~~disposition~~ the court disposes of the petition or motion, unless ~~otherwise ordered by~~ the court orders otherwise. If the ~~petition is denied~~ court denies the petition for rehearing or the motion for stay of mandate, the ~~mandate must~~ court must issue the mandate 7 days after entry of the order denying the petition or motion ~~unless the time is shortened or enlarged by order~~ , but an order may shorten or extend the time.

Committee Note

Subdivision (a). The amendment provides that the filing of a motion for a stay of mandate pending petition to the Supreme Court for a writ of certiorari delays the issuance of the mandate until the court disposes of the motion. If the court denies the motion, the court must issue the mandate 7 days after entering the order denying the motion. If the court grants the motion, the mandate is stayed according to the terms of the order granting the stay. Delaying issuance of the mandate eliminates the need to recall the mandate if the motion for a stay is granted. If, however, the court believes that it would be inappropriate to delay issuance of the mandate until disposition of the motion for a stay, the court may order that the mandate issue immediately.

II. Item 93-6, amendment of Rule 41 regarding the effective date of a court's judgment or order.

A. Background

In August 1993, Solicitor General Days wrote to the Advisory Committee proposing a different amendment to Rule 41. He suggests that Rule 41 should specify that a mandate is effective upon issuance. (A copy of his letter is attached.) The Solicitor General's letter notes that in the absence of a rule provision, the mandate could be considered 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." The Solicitor General's letter implicitly assumes that a judgment or order of a court of appeals is not effective until the mandate is effective.

The Solicitor's office was unable to find any case law addressing this issue, and identified only one local rule doing so. Fourth Circuit I.O.P. 41.1 states that "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."[5] In addition to the Fourth Circuit authority cited in the letter, 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]

As a result the Solicitor suggests amending Rule 41(a) to state that a mandate is effective immediately upon issuance. Specifically, the Solicitor General's letter suggested that the following sentence be added 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.

In addition, the Solicitor General notes that the same issue arises with respect to Supreme Court mandates. He suggests that the Advisory Committee either 1) amend FRAP 41 to state that the mandate of the Supreme Court is effective on the date it is issued as to any case on review from a federal court of appeals, or 2) suggest that the Supreme Court amend its rules to include such a provision.

The Solicitor General's letter was not the first time that uncertainty about the effective date of a court of appeals' judgment or order has been brought to the attention

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[5] Although the Solicitor General's 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.

of the Advisory Committee. The NLRB raised the same issue when it commented on the proposed amendments to Rules 40 and 41, which lengthen the time for filing a petition for rehearing in civil cases involving the United States.

The NLRB opposed lengthening the time for filing a petition for rehearing because the Board believed the change 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. Since lengthening the time for filing a petition for rehearing would delay the issuance of the mandate, and presumably the effective date of an enforcement order, the NLRB opposed the change.

The Advisory Committee approved the changes to Rules 40 and 41 inspite of the NLRB's opposition. Several members of the Advisory Committee noted that a court may direct that the mandate issue forthwith when immediate issuance is warranted.

The NLRB suggested a different solution to the problem. The Board suggested that the rules be amended to state that a judgment enforcing an order of an administrative agency is effective immediately upon issuance, i.e. before issuance of the mandate.

B. Discussion

The Solicitor General and the NLRB raise related but distinct questions. The NLRB raises the broader question of the time at which a court of appeals judgment or order becomes effective. Should it be considered effective upon entry of the order or judgment, or not until issuance of the mandate? The Solicitor General assumes that a court of appeals' judgment is not effective until issuance of the mandate, but wants to clarify whether the mandate is effective upon issuance, upon receipt by the lower court, or upon action by the lower court.

1. The NLRB question

The time at which a court of appeals judgment or order becomes effective is not simply of theoretical interest. It has clear impact when a case involves injunctive relief. The Solicitor General's letter uses as an example a case in which a district court issues an injunction that is reversed on appeal. The party prevailing on appeal must continue to comply with the injunction until the court of appeals judgment is effective. As the NLRB's letter points out, the same question arises when a court of appeals exercises its administrative enforcement jurisdiction. An order enforcing an administrative agency's decision may be injunctive in nature in that it requires some immediate affirmative action. The obligation to act arises only when the court of appeals judgment is effective.

I found no direct authority establishing that a court of appeals judgment becomes effective upon issuance of the mandate. The general understanding is that a court of appeals decision is not "final" until issuance of the mandate and, thus, that the court of appeals still has jurisdiction until issuance of the mandate. See, *e.g.*, United States v. Rivera, 844 F.2d 916, 926 (2d Cir. 1988), Zakalama v. Mount Sinai Medical Center, 906 F.2d 645, 649 (11th Cir. 1990).

That "finality" is equivalent to "effectiveness" of the courts judgment is less clearly stated, but apparently is the general understanding. That it must be so, is not a foregone conclusion. As the NLRB's comment points out, a district court's injunctive order is effective upon issuance unless stayed by the issuing court or a reviewing court.

I found one case in which the court of appeals implicitly equates finality with effectiveness. In In re Thorp, 655 F.2d 997 (9th Cir. 1981), a district court held an attorney in contempt for refusing to answer certain questions during a pre-trial hearing. The attorney appealed claiming that the attorney-client privilege applied. In August the court of appeals entered judgment stating that the attorney-client privilege was inapplicable and the trial recommenced in the district court. At trial the attorney once again refused to answer questions that he thought were covered by the attorney-client privilege and the district court again found him in contempt. Because the attorney's petition for rehearing was pending, the court of appeals did not issue its mandate until October. The court of appeals held that the district court should not have held the attorney in contempt before issuance of the mandate because "the controversy regarding the applicability of the attorney-client privilege had not become final as it was still before this court on appeal." Similarly, the third circuit has stated "the obligations of the parties are not fixed until the court's mandate issues, . . ." Finberg v. Sullivan, 658 F.2d 93, 96 n.5 (3rd Cir. 1981) (*en banc*).

In short, the NLRB's suggestion, that the rules be amended so that a judgment enforcing an order of an administrative agency is effective immediately upon issuance, would seem to be a departure from current understanding. When appropriate, a court of appeals may achieve that result by ordering immediate issuance of the mandate. But to treat the order as effective before issuance of the mandate, would be a significant change.

2. The Solicitor General's question

The Solicitor General's suggestion assumes that the issuance of the mandate is the event making a court of appeals judgment effective, but wants to clarify whether it is effective upon issuance, receipt of the mandate by the lower court, or upon action by the lower court.

The Solicitor General suggests that rule 41(a) should be amended to provide that the mandate is effective on the date it is issued. That is consistent with I.O.P.'s in the

Fourth and Tenth Circuits. The Solicitor further suggests that the rule provide that the mandate "shall be considered as having been entered on the docket of the court or agency below on the date of its issuance." The latter language may not be necessary. It seems to assume that entry of the mandate on the lower court's docket is necessary to its effectiveness. But if Rule 41 clearly states that the mandate is effective upon issuance, the issue would be settled.

C. Draft

Rule 41. Issuance of Mandate; Stay of Mandate

(a) *The Mandate; Date of Issuance; Effective Date.*

(1) Unless the court directs that a formal mandate issue, the mandate consists of a certified copy of the judgment, a copy of the court's opinion, if any, and any direction about costs.

(2) ~~The mandate of the court must issue 7 days after the 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 court must issue its mandate 7 days after the time for filing a petition for rehearing expires, unless an order shortens or extends the time or a petition for rehearing is filed. The timely filing of a petition for rehearing ~~will~~ stays the mandate until ~~disposition~~ the court disposes of the petition, unless ~~otherwise ordered by~~ the court orders otherwise. If the petition is

denied, the ~~mandate must~~ court must issue the mandate 7 days after entry of the order denying the petition ~~unless the time is shortened or enlarged by order~~ , but an order may shorten or extend the time.

(3) The court's mandate is effective on the day the court issues it.

Committee Note

Subdivision (a). Paragraph (3) has been added to subdivision (a). Paragraph (3) provides that the mandate is effective on the day the court issues it. A court of appeals' judgment or order is not final until issuance of the mandate; at that time the parties' obligations become fixed. This amendment is intended to make it clear that the mandate is effective upon issuance and that its effectiveness is not delayed until receipt of the mandate by the lower court or agency, or until the lower court or agency acts upon it. This amendment is consistent with the current understanding. See, *e.g.*, 4th Cir. I.O.P. 41.1; 10th Cir. I.O.P. VIII.B.1. Unless the court orders that the mandate issue earlier than provided in the rule, the parties can easily calculate the anticipated date of issuance and verify issuance with the clerk's office. In those instances in which the court orders earlier issuance of the mandate, the entry of the order on the docket alerts the parties to that fact.

LOCAL RULES AND I.O.P.'s

D.C. Cir. R. 41. Issuance of Mandate; Stay of Mandate; Remand

(a) Mandate.

(1) Time for Issuance. While retaining discretion to direct immediate issuance of its mandate in an appropriate case, the 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 *in banc* and, if such petition or suggestion is timely filed, until 7 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.

(2) 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. If a motion to stay issuance of the mandate is denied, the mandate ordinarily will issue 7 days thereafter. If the motion is granted, the stay ordinarily will not extend beyond 30 days from the date that the mandate otherwise would have issued. If a timely motion to stay issuance of the mandate has been filed, the mandate shall not issue while the motion is pending. If a party obtains a stay of issuance of the mandate, that party shall inform the clerk of this court whether a petition for a writ of certiorari has been filed with the Supreme Court within the period of the stay.

The clerk may grant an unopposed motion to stay issuance of the mandate for a period not longer than 30 days from the date that the mandate otherwise would have been issued. No motion to stay issuance of the mandate shall be granted by the clerk until after the response time has passed, unless the moving party represented in the motion that all other parties either consent to the stay or do not object thereto. The clerk may submit any motion governed by this subparagraph to the panel of the court that decided the case.

(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 of judgment granting or denying the relief sought shall become effective automatically 21 days after issuance in the absence of an order or other special direction of this court to the contrary.

(4) Mandate Recall if Rehearing in Banc Granted. When rehearing in banc is granted, the court will recall the mandate if it has been issued.

(b) Remand. If the record in any case is remanded to the district court or to an agency, this court retains jurisdiction over the case. If the case is remanded, this court does not retain jurisdiction, and a new notice of appeal or petition for review will be necessary if a party seeks review of the proceedings conducted on remand.

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 determines 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.

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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.

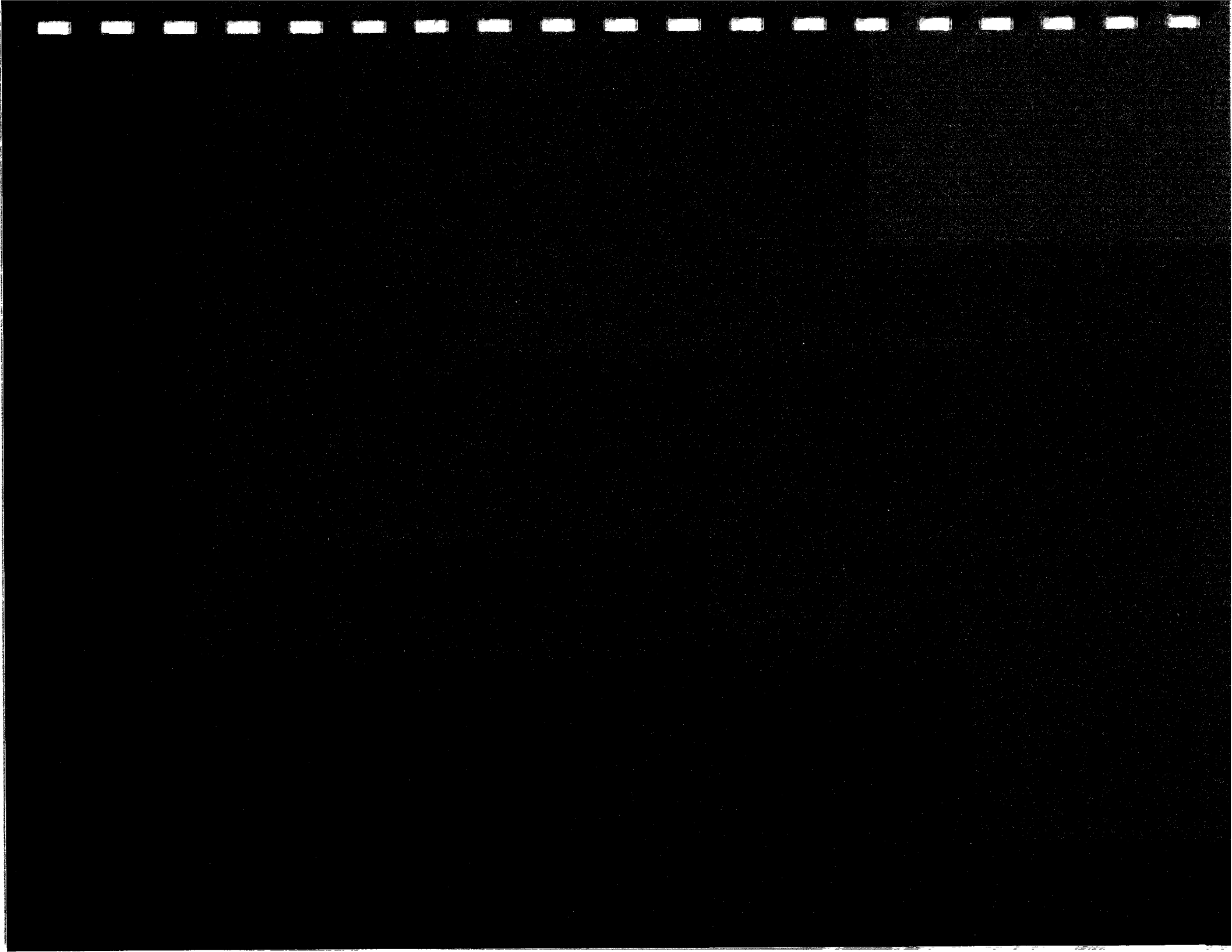
Thank you for your assistance in this matter.

Sincerely,

Drew S. Days, III
Solicitor General

cc: Carol Ann Mooney
Reporter, Appellate Rules Committee

Robert E. Kopp
Director, Appellate Staff
Civil Division



UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL
Washington, D.C. 20570

April 15, 1993

Peter G. McCabe, Esquire
Secretary of Committee on Rules of
Practice and Procedure
Administrative Office of the
United States Courts
Washington, D.C. 20544

Dear Mr. McCabe:

These comments on the preliminary draft of the proposed amendments to the Federal Rules of Appellate Procedure (FRAP) are submitted in response to the invitation for public comment in the announcement to the bench and the bar, dated December 29, 1992.

Rule 40(a):

While the proposed revisions to Rule 40(a) serve the laudable purpose of permitting the Government (and, incidentally, adverse parties) more time to deliberate before seeking rehearing in civil cases to which the Government is a party, the modification has a potentially, presumably unintended, adverse effect in cases initiated under Rule 15, involving enforcement of administrative orders. The effect of the revision is arguably to delay the injunctive effect of a judicial enforcement order until issuance of the mandate. We say "arguably" because there is no clear precedent on the issue of when an appellate court order in an administrative enforcement case becomes "final."

The decided cases, for the most part, hold that "finality," so far as the appellate case is concerned, occurs upon issuance of the mandate.[1] However, all of the published opinions of which we are aware arise in the context of appeals from district courts. The function of a court of appeals when exercising its administrative enforcement jurisdiction—for example, under Section 10(e) of the National Labor Relations Act (29 U.S.C. §160(e))—is markedly different from that which it exercises in its traditional "appellate" capacity. *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 141 (1940). It is settled that an enforcement order under Section 10(e) is injunctive in nature, and, if violated, may be vindicated in contempt proceedings brought directly in

[1] See, e.g., *U.S. v. Rivera*, 844 F.2d 916, 920-922 (2d Cir. 1988) ("finality" under Speedy Trial Act); *Matter of Thorp*, 655 F.2d 977 (9th Cir. 1981).

the rendering court. *Ford Motor Co. v. NLRB*, 305 U.S. 364, 373 (1939); *Amalgamated Utility Workers v. Consolidated Edison Co.*, 309 U.S. 261, 269-270 (1940); *NLRB v. P*I*E Nationwide, Inc.*, 894 F.2d 887, 890 (7th Cir. 1990); cf. *NLRB v. Jones & Laughlin Steel Co.*, 301 U.S. 1, 48 (1937). Indeed, the proposed new Rule 49, and particularly the Committee Notes, are further recognition of this special role in the enforcement of the NLRA and similar statutes that the courts of appeals are regularly called upon to play.

A common feature of enforcement orders under the NLRA is a provision directing the taking of some immediate affirmative action—for example, offering reinstatement to unlawfully discharged individuals, rescinding unlawfully changed terms and conditions of employment, or referring applicants for employment from a hiring hall. Such an order, if issued by a district court, would take effect immediately,[2] and would remain in effect unless stayed by the issuing court or a reviewing court. *Deering Milliken, Inc. v. FTC*, 647 F.2d 1124, 1129 & n.11 (D.C. Cir. 1978).[3] If the conventional wisdom—that the court of appeals' judgment does not become operative until issuance of mandate—is applicable to administrative enforcement cases, the necessary effect of the revision of Rule 40(a) (taken together with revised Rule 41(a)) will be to delay the injunctive effect of the order for an additional 31 days at a minimum. (Under Rule 41(a), the timely filing of a petition for rehearing stays issuance of mandate.)

A sensible way around this problem is to expressly recognize, in the Rule itself, that judgments enforcing orders of administrative agencies shall take effect immediately upon issuance—subject, of course, to stay by the court, pending rehearing or certiorari, upon a proper showing.[4] Such a provision would give proper cognizance to the unique

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[2] See, e.g., *Vuitton et Fils S.A. v. Carousel Handbags*, 592 F.2d 126, 129 n.5 (2d Cir. 1979) (defendants were responsible for obedience to injunction where they knew they were being enjoined and the terms of the injunction); *Bethlehem Mines v. U.M.W.A.*, 476 F.2d 860, 863-864 (3d Cir. 1973) (injunction became effective upon court's oral issuance); *Backo v. United Bhd. of Carpenters and Joiners et al.*, 438 F.2d 176, 180 (2d Cir. 1970) (respondents were under a duty to obey the court's order as soon as they learned of its issuance).

[3] Indeed, it is settled that the filing, and even the granting, of a petition for certiorari does not operate as a stay or excuse noncompliance with the lower court's order. *Magnum Import Co., Inc. v. Coty*, 262 U.S. 159, 163-164 (1923); *NLRB v. Holyoke Water Power Co.*, 793 F.2d 18 (1st Cir. 1986); *McCurry v. Allen*, 688 F.2d 581, 586 (8th Cir. 1982); *United States v. Eisner*, 323 F.2d 38, 42 (6th Cir. 1963).

[4] See, e.g., *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987).

role that the courts of appeals play in enforcement cases, as contrasted to traditional appellate cases, and to the distinct, injunctive character of enforcement orders.[5]

Rule 28(5):

Proposed Rule 28(5) would require a summary of argument in all cases. A preferable rule, we believe, would require a summary of argument only when the argument itself exceeds 25 pages. See Eighth Circuit Rule 28(1)(6). Cf. District of Columbia Circuit Rule 11(a)(5) and proposed amended Rule 28(6) (summary required if argument exceeds 14 (or 12) pages of standard typographical printing or 20 pages if reproduced by any other process). If the argument is short, a summary of argument ordinarily is not needed and its inclusion will often result in pointless repetition and needless expansion of the brief.

Rule 38:

We believe that the proposed amendment to Rule 38 would place unwarranted burdens on the courts before they could award damages or costs for frivolous litigation. Amended Rule 38 would read:

> 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. [New material underlined.]

As justification for placing the notice requirement on the court, the Committee Note states, in part:

> 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.

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[5] The Seventh Circuit appears to recognize this distinction: its Rule 41(c) provides that "[e]xecution 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."

Several other courts of appeals recognize the need for expedition in NLRB enforcement proceedings. *See*, 1st Cir. Rule 41; 9th Cir. Rule 41-1; 10th Cir. Rule 41.1.2.

Initially, we note that requests for Rule 38 sanctions are by no means commonplace in our litigation. On the contrary, they are quite unusual—and the awarding of such sanctions is, of course, even more unusual. In any event, we believe that it is not unreasonable to expect counsel to respond carefully to a motion or brief requesting sanctions for frivolous litigation. Indeed, in a very real sense, the entire brief is an effort to persuade the court of the merits of the litigant's position. Accordingly, we oppose any amendment to the rules that would prevent the court from simply deciding that the appeal is frivolous, and awarding Rule 38 damages or costs, after the parties have had a full opportunity to discuss the issue in their pleadings or briefs.

Nothing in *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 767 (1980), cited in the Committee Note, implies that such a procedure is improper. There, the Supreme Court, after concluding that federal courts have power to tax attorney's fees directly against counsel who have willfully abused court processes (*id.* at 754, 764-766), merely added: "Like other sanctions, attorney's fees certainly should not be assessed lightly or without fair notice and an opportunity for a hearing on the record." *Id.* at 767. There is no suggestion in the case that prior to granting a motion for attorney's fees, the federal court must first give notice that it might grant the motion, and then provide yet another opportunity to oppose it.

If the concern is to prevent the courts of appeals from imposing Rule 38 sanctions *sua sponte*, the words "from the court" could be deleted to make the proposed amendment read, "after notice and reasonable opportunity to respond." The accompanying notes could then make clear that the amendment contemplates no change in current practice whenever the issue of Rule 38 sanctions is adequately raised in a pleading or brief, which the opposing party has an opportunity to answer.

Rule 49:

We are in complete agreement with the advent and overall thrust of proposed Rule 49. As the Committee Note suggests, the Board has regularly called upon the courts of appeals to appoint special masters in contempt cases, and the proposed Rule would appear to codify existing practice.

In sum, we believe that:

1. Rule 40(a) should expressly provide that judgments enforcing orders of administrative agencies shall take effect immediately if not stayed by the court, upon a proper showing.

2. Rule 28(5) should require a summary of argument only when the argument itself exceeds 25 pages.

3. Rule 38 should not impose additional notice and hearing requirements on a court of appeals, if a request for sanctions has already been made in a pleading or brief and the party against whom sanctions are sought has had an opportunity to oppose sanctions.

4. Proposed Rule 49 should be adopted as written.

Sincerely yours,

Jerry M. Hunter

Jerry M. Hunter
General Counsel

[h:mccabe.ltr]

Agenda Item 1F

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

FROM: Carol Ann Mooney, Reporter

DATE: October 11, 1994

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

I. Background

The Judicial Conference and the Supreme Court have approved a proposed amendment to Rule 41(b) and it is currently pending before Congress; it will become effective on December 1, 1994, unless Congress acts to override it. The amendment 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.

The proposed amendment was published for comment in January 1993 and the the Advisory Committee discussed the comments at the 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]). 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

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[1] A proposed amendment to Rule 40, also pending before Congress, provides that in cases involving the United States, the parties have 45 days to file a petition for panel rehearing, 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.

extend the mandate beyond the 30 days, the party must file the petition for certiorari 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 also should be expanded to 90 days. Alternatively, the association suggests expanding the period 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."

II. Discussion

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 ensures that the mandate is not stayed for an extended period in a case in which the party may never petition for *certiorari*.

On the other hand, 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.

A. 90 day or 60-day presumptive period for a stay

The National Association of Criminal Defense Lawyers suggests that the presumptive period for a stay should be 90 days, the same length of time a party has to file a petition for certiorari with the Supreme Court. In the alternative, however, the assocation suggests that a 60-day period would provide a reasonable amount of time within which to prepare and file a petition for a writ of certiorari. If the Advisory Committee were to adopt either a 90-day or 60-day presumptive period, it may be

inappropriate to simply change 30 days to 90 or 60 days in Rule 41(b) because that could result in the period of the stay exceeding the time for filing a petition for certiorari.

Supreme Court Rule 13.1 states that a party has 90 days after entry of judgment by a court of appeals to file a petition for a writ of certiorari. If, however, the party files a petition for rehearing, the time for filing a petition for writ of certiorari runs from the denial of that petition or the entry of a subsequent judgment. Sup. Ct. R. 13.4. If a court of appeals grants a stay of mandate, it may be granted at the time the court denies the petition for rehearing, or it may be granted later. That means, that a stay of mandate may be granted after the 90-day period for filing a petition for certiorari has begun to run.

The fact that a stay of mandate may be granted after the period for filing a petition for certiorari has begun to run, may make it inappropriate to make the presumptive period for the stay 90 days. That could allow the stay to be effective past the deadline for filing a petition for certiorari even if no such petition is filed. The same could, of course be true with the 60-day period or even the 30-day period in the current rule, depending upon the delay between the entry of judgment or denial of a petition for rehearing and the granting of a stay. It is unlikely that the delay will be so long that the current 30-day presumptive period would end after the time for filing a petition for certiorari has elapsed. Can the same be said if the presumptive period is changed to 60 days?

The order granting a stay of mandate, however, states the period of the stay. Perhaps the rule only needs to state that the period may not exceed 90 (or 60) days if one assumes that the court will shorten the period whenever it would exceed the time for filing a petition for certiorari.

B. The length of the stay may not exceed the time for filing a petition for a writ of certiorari.

The Committee may believe that the rule should ensure that the length of the stay does not exceed the period for filing a petition for a writ of certiorari. The rule could provide that a "stay cannot exceed the time available to the party to file a petition for a writ of certiorari to the Supreme Court." That approach, however, could result in a stay of up to 150 days. Supreme Court Rule 13.2 authorizes a Justice to extend the time to file a petition for a writ of certiorari "for a period not exceeding 60 days. Rule 13.2 permits an extension only "for good cause shown."

If the only limit in the rule were that the period of the stay cannot exceed the time for filing a petition for a writ of certiorari, a court of appeals need not write an order granting a stay that liberally, but it could. A court of appeals may be confident that whenever a Justice extends the time for filing a petition for certiorari, the period of the stay should be similarly extended.

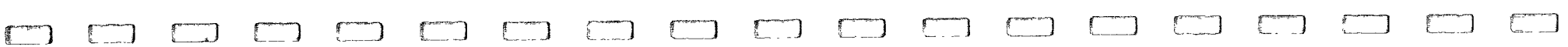
If the Committee believes that the normal 90 day period is sufficient, the rule could combine the two approaches and provide that a stay cannot exceed 90 [60] days, but in no event can it exceed the time available to the party to file a petition for a writ of certiorari to the Supreme Court.

III. Draft

Rule 41. Issuance of Mandate; Stay of Mandate

* * * * *

(b) *Stay of Mandate Pending Petition for Certiorari.* A party ~~who files~~ filing a motion requesting a stay of mandate pending petition to the Supreme Court for a writ of certiorari must ~~file~~, at the same time, file 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 ~~must not~~ cannot exceed ~~30~~ 90 days, unless the period is extended for cause shown, and it cannot, in either case, exceed the time available to the party who obtained the stay to file a petition for a writ of certiorari to the Supreme Court. ~~or unless during the period of the stay, a notice from~~ But, if the clerk of the Supreme Court ~~is filed showing~~ files a notice during the stay indicating that the party who ~~has~~ obtained the stay ~~has~~ filed a petition for the writ, ~~in which case~~ the stay ~~will~~ continues until ~~final disposition by~~ the Supreme Court's final disposition. 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 before ~~the~~ granting or ~~continuance of~~ continuing a stay of ~~the~~ mandate.

Committee Note

Subdivision (b). The amendment changes the maximum period for a stay of mandate, absent the court of appeals granting an extension for cause, to 90 days and in any event to no longer than the period the party who obtained the stay has to file a petition for a writ of certiorari to the Supreme Court. The presumptive 30-day period was adopted when a party had to file a petition for a writ of certiorari in criminal cases within 30 days after entry of judgment. Supreme Court Rule 13.1 now provides that a party has 90 days after entry of judgment by a court of appeals to file a petition for a writ of certiorari whether the case is civil or criminal.

The amendment does not require a court of appeals to grant a stay of mandate that is coextensive with the period granted for filing a petition for a writ of certiorari. The granting of a stay and the length of the stay remain within the discretion of the court of appeals. The amendment means only that a 90-day stay may be granted without a need to show cause for a stay longer than 30 days.

NACDL

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April 14, 1993

Peter G. McCabe, Secretary
Standing Committee on Rules of Prac. and Proc.
Judicial Conference of the United States
Administrative Office of the U.S. Courts
Washington, DC 20544

Re: Proposed Changes in Federal Rules of Evidence,
Federal Rules of Appellate Procedure,
and Federal Rules of Criminal Procedure
Request for Comments, Issued December 29, 1992

Dear Mr. McCabe:

As Co-Chairs of the National Association of Criminal Defense Lawyers' Committee on Rules of Procedure, we are pleased to submit the following comments on behalf of the 7500 members of our association, and its 40 state affiliates with a total membership of about 22,000.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 16. Discovery and Inspection

1. Corporate defendant statements

The amendment to subdivision (a)(1)(A) would require the government, in the case of a defendant which is an organization, to produce upon request a written statement of various persons (director, officer, employee or agent) who were so situated "as to have been able legally to bind the defendant in respect to the subject of the statement" or whose conduct would have been able legally to bind the defendant with respect to the conduct.

We endorse the amendment but would suggest that the provision be further modified to provide that it also applies to those persons who the government contends were in a position to bind the defendant. There may be situations where a defendant may not want to acknowledge, and may in fact dispute, that a particular person was able legally to bind it but the government may claim otherwise. If the government's position is that the person could

cover." While we question the need for the federal rules to dictate the location of the number of the case, if it is the intention of the provision to require the number to be at the very top of the cover page, the text of subdivision (a)(1) should be clarified. The order of discussion should correspond to the item's location on the cover page, from top to bottom. The subdivision would then read: "(1) the number of the case, which must be centered and placed at the top of the page, above all other information; the name of the court; ...."

3. Form of a petition for rehearing

Subdivision (b) provides that a petition for rehearing or suggestion for rehearing in banc shall be in the form required for a brief under subdivision (a). Since some circuits allow rehearing petitions to be done in the form of a motion, the subdivision should be modified to provide that a rehearing petition or suggestion for rehearing in banc may be in the form of a brief or a motion. Alternatively, subdivision (b) should be modified to provide that the petition shall be in the form prescribed by subdivision (a) unless a local rule provides otherwise.

Rule 38. Damages and Costs for Frivolous Appeals

The amendment would make it explicit that notice must be provided before damages or costs can be imposed. We believe the notice requirement is important and strongly endorse the Committee's proposed amendment.

Rule 41. Issuance of Mandate, Stay of Mandate

Presumptive period of stay pending certiorari

Subdivision (b) provides that the stay of the issuance of the mandate shall be for 30 days unless the period is extended for "cause shown" or unless a petition for a writ of certiorari is filed within the 30 day period and the party files a notice from the clerk of the Supreme Court reflecting the filing of the petition. The 30 day period was written into the rule at a time when the period for filing a petition for a writ of certiorari in a federal criminal case was 30 days. As of January, 1990, the Supreme Court's rules were amended to provide that a party has 90 days to file a petition for a writ of certiorari. The period of time in subdivision (b) should be modified to 90 days so that it corresponds to the Supreme Court rule. Even if the

period is not changed to 90 days, it should be extended to at least 60 days to provide a party with the benefit of a stay a reasonable amount of time within which to prepare and file a petition for a writ of certiorari.

NACDL appreciates the opportunity to offer our comments on the Standing Committee's proposals. We look forward to working with you further on these important matters.

Very truly yours,

William J. Genego
Peter Goldberger
Co-Chairs, National Association of Criminal Defense Laywers
Committee on Rules of Procedure

Agenda Item 16

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

FROM: Carol Ann Mooney, Reporter

DATE: October 13, 1994

SUBJECT: 93-5, amendment of Rule 26.1 re: use of the term affiliates, and
93-10, application of Rule 26.1 to trade associations

I. Item 93-5, 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 the 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

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[1] D.C. Cir. R. 26.1(a). This definition appears to be drawn from the definition of an "affiliate" in the regulations promulgated under the Securities Exchange Act of 1934. The regulations define an "affiliate as:

> [A] person "affiliated" with, a specified person, is a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, the person specified.

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]

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.

If the Committee wishes to retain the term affiliate, but clarify its meaning, Rule 26.1 could be amended to include a definition like that in the D.C. or Sixth Circuit rules.

Rule 26.1. Corporate Disclosure Statement

Any non-governmental corporate party to a civil or bankruptcy case or agency review proceeding and any non-governmental corporate defendant in a criminal case must file a statement identifying all parent companies, subsidiaries (except wholly-owned subsidiaries), and affiliates

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17 C.F.R. § 240.12b-2 (1994).
The same regulation defines "control" as:
> the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise.
> 17 C.F.R. § 240.12b-2 (1994).

[2] 6th Cir. R. 25.

that have issued shares to the public. For purposes of this rule, an affiliate is a corporation that directly, or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with, the corporate party. The statement must be filed with a party's principal brief or upon filing a motion, response, petition, or answer in the court of appeals, whichever first occurs, unless a local rule requires earlier filing. Whenever the statement is filed before a party's principal brief, an original and three copies of the statement must be filed unless the court requires the filing of a different number by local rule or by order in a particular case. The statement must be included in front of the table of contents in a party's principal brief even if the statement was previously filed.

II. Item 93-10, Applicability of 26.1 to Trade Associations

At one of the Advisory Committee's recent meetings, the question of the applicability of Rule 26.1 to trade associations was raised. The question of whether the rule does, or should, require a trade association to disclose all of its members was deferred for later discussion.

As the local rules attached to this memorandum disclose, most of the circuits rules are silent about the applicability of Rule 26.1 to trade associations. Two circuits, however, directly address the question and take opposite positions.

The D.C. circuit rule by its terms applies not only to corporations but also to an "association, joint venture, partnership, syndicate, or other similar entity." D.C. Cir. R. 26.1(a). As to unincorporated associations, the disclosure statement generally must include the "names of any members of the entity that have issued shares or debt securities to the public." The rule further provides, however, that a trade association need not list the names of its members. D.C. Cir. R. 26.1(b). For purposes of the rule, a trade association is defined as "a continuing association of numerous organizations or individuals, operated for the purpose of promoting the general commercial, professional, legislative, or other interests of the membership." Id.

In contrast, the fourth circuit rule states: "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." Note that in addition to disclosing each member of the association, the fourth circuit requires disclosure of each member's affiliates.

The Advisory Committee worked for several years to develop Rule 26.1. One of the drafts prepared for the Committee's consideration required disclosure of a trade association's publicly owned members, whenever a trade association is a party or an intervenor. That approach was thought to be a middle of the road approach requiring disclosure of members (which while possibly lengthy, should not be burdensome to produce) but not of their affiliates. The Committee ultimately approved a less detailed rule that had been modeled after Supreme Court Rule 28.1. Because there had been a lack of consensus among the circuits on the approach that should be taken (an earlier draft had been circulated to the circuits for comment), the Committee approved a rule that established minimum requirements that all circuits should meet. As the Committee Note to the rule indicates, a court of appeals is free to require additional information by local rule.

The language of Fed. R. App. P. 26.1 does not address the trade association question. The rule requires a "corporate" party to disclose "parent companies, subsidiaries (except wholly-owned subsidiaries), and affiliates." Even if a trade association is incorporated, its members are not subsidiaries or affiliates in the ordinary sense of those words.

Although the Committee in 1988 rejected a provision addressing the trade association issue, is it time to reverse that decision? If so, should the Committee reconsider a more global reversal of the rule's bare bones approach? Section 455 requires a judge to disqualify himself or herself from hearing a case whenever the judge's impartiality might reasonably be questioned. The statute addresses a much broader range of interests than simply stock ownership. One of the early drafts considered by the Committee would have required all parties (not just corporate parties) to list "all attorneys involved in the case, and all persons, associations of persons, firms, partnerships, or corporations having an interest in the outcome of the case, including subsidiaries, conglomerates, affiliates, and parent corporations, and other identifiable legal entities related to a party."

The Local Rules Project had suggested that Rule 26.1 should be broadened in an effort to eliminate the diverse circuit rules. The Advisory Committee voted to take no further action on that suggestion in light of the difficulty the Committee previously had encountered when trying to develop a rule that would be acceptable to most of the circuits.

CIRCUIT RULES

D.C. Cir. R. 26.1. Disclosure Statement

(a) 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, at the time specified in FRAP 26.1, or as otherwise ordered by the court, identifying all parent companies, subsidiaries, and affiliates that have issued shares or debt securities to the public. For the 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.

(b) The statement shall identify the represented entity's general nature and purpose, insofar as relevant to the litigation, and if the entity is unincorporated, the statement shall include the names of any members of the entity that have issued shares or debt securities to the public. No such listing need be made, however, of the names of members of a trade association or professional association. For purposes of this rule, a "trade association" is a continuing association of numerous organizations or individuals operated for the purpose of promoting the general commercial, professional, legislative, or other interests of the membership.

* * * * *

Third Cir. R. 26.1.1. Disclosure of Corporate Affiliations and Financial Interest.

(a) Promptly after the notice of appeal is filed, each corporation that is a party to an appeal, whether in a civil, bankruptcy, or criminal case, shall file a corporate affiliate/financial interest disclosure statement on a form provided by the Clerk that identifies every publicly owned corporation not named in the appeal with which it is affiliated. The form shall be completed whether or not the corporation has anything to report.

(b) Every party to an appeal shall identify on the disclosure statement required by FRAP 26.1 every publicly owned corporation not a party to the appeal, if any, that has a financial interest in the outcome of the litigation and the nature of that interest. The form shall be completed only if a party has something to report under this section.

* * * * *

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:

(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. If a large group of persons or firms can be specified by a generic description, individual listing is not necessary. . . .

Sixth Cir. R. 25. Disclosure of Corporate Affiliations and Financial Interest.

(a) Parties Required to Make Disclosure. With the exception of the United States government or agencies thereof or a state government or agencies or political subdivisions thereof, all parties and amici curiae 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.

(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, including governmental parties, which contains a complete list of the trial judge(s), all attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of the particular case, including subsidiaries, conglomerates, affiliates and parent corporations, and other identifiable legal entities related to a party. In criminal and criminal-related cases, the certificate shall also disclose the identity of the victim(s).

Federal Cir. R. 47.4. Certificate of Interest.

(a) *Contents.* To determine whether recusal is necessary or appropriate, an attorney for a party or amicus curiae other than the United States must furnish a certificate of interest (in the form set forth in the appendix of these rules) stating:

(1) The full name of every party or amicus represented by the attorney in

the case;

(2) The name of the real party in interest if the party named in the caption is not the real party in interest;

(3) The corporate disclosure statement prescribed in Rule 26.1 of the Federal Rules of Appellate Procedure; and

(4) The names of all law firms whose partners of associates have appeared for the party in the lower tribunal or are expected to appear for the party in this court. . . .

Agenda Item 1-H

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

FROM: Carol Ann Mooney, Reporter

DATE: October 13, 1994

SUBJECT: Item 94-1, amendment of Rule 26(c) re: length of time for responding when service is by mail

I. Background

Fed. R. App. P. 26(c) provides:

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

This provision is substantially the same as Civil Rule 6(e), Criminal Rule 45(e), and Bankruptcy Rule 9006(f). At the June 1994 Standing Committee meeting, a member of the Committee suggested that all these rules be amended by changing "three days" to "five days" because of frequent delays in mail delivery. The suggestion was made during discussion of the proposed amendments to Fed. R. App. P. 25 and 26 permitting use of commercial carriers as alternatives to the United States Post Office. As a result of the suggestion, the Standing Committee asked each of the advisory committees to consider this suggestion and to report its views at the January 1995 Standing Committee meeting.

The Advisory Committee on Bankruptcy Rules met on September 22 and 23 and will recommend that the 3-day mail rule not be changed to 5 days.

II. Discussion

A. When the Rule Applies

The rules applies only when 1) a prescribed time period begins upon service of a paper, and 2) service is by mail.

Most time periods under the rules do not run from the date of service of a notice or other paper. Rule 26(c) does not apply to the most crucial time periods in the rules, the jurisdictional filing deadlines in Rules 4 (notice of appeal), 5 (petition for permission to appeal an interlocutory order under § 1292(b)), 5.1 (petition for leave to appeal from district court judgment entered after an appeal under § 636(c)(4) from judgment entered upon direction of a magistrate judge), and 13 (notice of appeal from tax court) because the deadlines are measured from entry of the judgment or order appealed from rather

than from service of notice of entry.

The time periods prescribed by the rules that can be effected by Rule 26(c) include:

(1) the time to oppose a petition for permission to appeal an interlocutory order (**Rule 5(b)** -- the deadline is 7 days after service of the petition);

(2) the time to cross petition[1] or oppose a petition to appeal a district court judgment entered as a result of the district court's appellate review under § 636(c)(4) of judgment entered upon direction of a magistrate judge (**Rule 5.1(a)** -- the deadline is 14 days after service of the petition);

(3) the time for an appellee in to file a designation of additional items to be included in the record on appeal (**Rule 6(b)(2)(ii) and Rule 10(b)(3)** -- the deadline is 10 days after service of the appellant's designation) or, if there is no transcript, the time for an appellee's objection to the appellant's statement of the proceedings (**Rule 10(c)** -- the deadline is 10 days after service of the appellant's statement);

(4) the time for an administrative agency to file the record (**Rule 17(a)** -- the deadline is 40 days after service of the petition for review);

(5) the time to file, in the court of appeals, a motion to proceed in forma pauperis (**Rule 24(a)** -- the deadline is 30 days after service of notice of the district court's denial);

(6) the time to respond to a motion (**Rule 27(a)** -- the deadline is 7 days after service of the motion);

(7) if a court provides for deferred preparation of the appendix, the time for filing the appendix (**Rule 30(c)** -- the deadline is 21 days after service of the brief of the appellee);

(8) the time to file briefs (other than the appellant's principal brief) (**Rule**

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[1] Measuring the time period for a cross petition from the date of service of the petition is curious. It is not statutorily based. Section 636(c)(5) of title 28 authorizes review by a United States court of appeals of a district court's judgment when the district court has exercised appellate jurisdiction over judgment entered by direction of a magistrate. The statute does not establish any time limitation for filing a petition or cross petition with the court of appeals. In contrast, Rule 4 measures the time for a cross appeal from the filing date of a notice of appeal.

31(a) -- the deadline for an appellee's brief is 30 days after service of the appellant's brief; the deadline for a reply brief is 14 days after service of the appellee's brief);

(9) the time to object to a bill of costs (**Rule 39(d)** -- the deadline is 10 days after service of the bill of costs).[2]

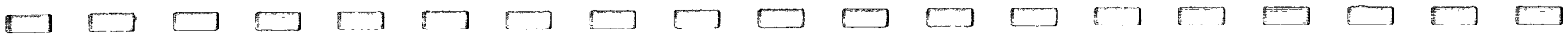
Rule 26(c) also appears to apply to periods prescribed by court order or local rule if the periods run from the service of a notice or other paper. I was unable, however, to find any case establishing that point.

B. The Effect of Changing from 3 to 5 days

Rule 26(a) states that if the last day of a time period prescribed by the rules is a Saturday, Sunday, or legal holiday, "the period runs until the end of the next day which is not one of the aforementioned days." That means that in some instances, adding two days (changing from 3 to 5 days) may actually add 4 days to the time period. The same thing occurs, of course, with the three day extension. That is, the current 3-day extension results in a 4 or 5-day extension in some circumstances. I simply want to make it clear that adding 5 days when service occurs by mail actually makes the maximum extension by virtue of 26(c) 7 days.

If period ends on:	**Under Rule 26(c) it it would extend to:**	**Suggested change would make it end:**
Monday	Thurs. (3 days later)	Monday (7 days later)
Tuesday	Friday (3 days later)	Monday (6 days later)
Wednesday	Monday (5 days later)	Monday (5 days later)
Thursday	Monday (4 days later)	Tuesday (5 days later)
Friday	Monday (3 days later)	Wednesday (5 days later)
Saturday	Tuesday (3 days later)	Thursday (5 days later)
Sunday	Wed. (3 days later)	Friday (5 days later)

[2] Rule 26(c) may also effect the time for objecting to a proposed judgment enforcing in part the order of an agency. Rule 19 provides that if an opinion of the court directs entry of a judgment enforcing in part the order of an administrative agency, the agency must serve and file a proposed judgment conforming to the opinion. Rule 19 further provides that if the respondent objects to the agency's proposed judgment, the respondent "shall within 7 days thereafter serve . . . and file" its proposed judgment. It is unclear whether the 7-day period within which the respondent must file its alternative judgment runs from the filing or service of the agency's proposed order. U.S.C.A. lists no cases construing Rule 19.



The impact of this change is probably best understood in context. The proposed revision of Fed. R. App. P. 27 that was published last month permits a movant to file a reply to a response. The reply is due 3 days after service of the response. Those members who were present for the discussion of the draft will recall that one of the objections to permitting a reply was that it would delay a ruling on the motion and in most instances for more than 3 days. For example, if a response were served on a Wednesday [Thursday], the 3 days permitted by Rule 27 would end 5 days later on Monday [Tuesday] because Rule 26(a) says that when a time period is less than 7 days, the intervening weekend days do not count. If the response had been served by mail and Rule 26(c) were amended to provide a 5-day extension for service by mail, the reply may not be due until the following Monday [Monday], 12 [11] days after the filing of the response.[3]

The Committee must weigh the need to protect a party from prejudice due to mail delays against the desire to expedite decisions, especially on motions.

C. Is the Change Necessary?

A court of appeals has the ability to enlarge all time periods effected by Rule 26(c) if there is good cause for doing so. Under Rule 26(b) a court of appeals may, for good cause, enlarge the time prescribed by the appellate rules, or permit an act to be done after the expiration of the time prescribed. The only exception is that a court may not enlarge the time for filing a notice of appeal or its equivalent. If a paper served by mail reaches a party so late that it is not reasonable to require the party to act within the

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[3] The reason that I say the period "may" end that late is that it is not clear how the 3-day rule in 26(c) interacts with the less than 7-day rule in 26(a). 26(a) says that weekends and holidays do not count when a time period is less than 7 days. 26(c) adds 3 days to a time period that commences with service if service is by mail. There are two possible ways the two provisions may interact: 1) the three days in 26(c) may be added to the original time period to determine whether it is less than 7 days for purposes of 26(a); or 2) 26(a) may operate first to determine the deadline and then the 3 days provided by 26(a) are added to the deadline. The issue is currently unresolved because, as can be seen from the list in part A. of the discussion section, none of the time periods that commence with service are less than 7 days so there are no instances in which both 26(a) and 26(c) are operative. The question would become relevant, however, if the three day period in Rule 27 becomes effective and the 26(c) extension becomes five days. Under the first approach, if a response to a motion were served by mail, the 5 days provided in 26(c) would be added to the 3 days provided in Rule 27 and the reply would be due 8 days after the response making 26(a) inapplicable, meaning that weekends would count. Under the second approach, because the reply is due 3 days after the response and that is less than 7 days, weekends would not count in determining the original due date and then the 5 days would be added to that due date.

normal time limit measured from service, even as extended by 26(c), the court may further enlarge the time.

Given the court's ability to enlarge time to prevent injustice, is it necessary to extend the period following mail service by 5 days in all instances?

The suggestion that the 3-day rule be changed to 5-days was not supported by any evidence indicating that the time of delivery of first-class mail is longer than 3 days in most instances, or that mail delivery is slower today than when the 3-day provision was first adopted in 1967.

D. Coordination with Decisions of the Other Committees

The Advisory Committee on Bankruptcy will recommend no change in its rule. If the Civil and Criminal Advisory Committees similarly agree that no change is warranted, I assume that there are no strong reasons militating that the FRAP rule be changed even though the others remain unchanged.

If, however, the Civil or Criminal Committees approve a change, the Committee should consider its response. Although there may be no compelling reasons to change Rule 26(c), is the Committee willing to go along with the majority of the other committees? In other words, are there strong reasons to retain the current rule in the appellate context?

Agenda Item 1-I

MATERIALS PREVIOUSLY MAILED

Agenda Item II A

ORAL PRESENTATION

Agenda Item II-B

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

FROM: Carol Ann Mooney, Reporter

DATE: October 13, 1994

SUBJECT: Item 93-11, permitting a party to submit draft opinions as an appendix to a brief

The attached letter from Justice Peterson, an associate justice of the Oregon Supreme Court and former member of the Standing Committee, is item 93-11. Justice Peterson's suggestion will be discussed at the upcoming meeting.

93-8

THE SUPREME COURT
Edwin J. Peterson
Justice

1163 State Street
Salem, Oregon 97310
Telephone 378-6026
FAX (503) 373-7536

August 26, 1993

Honorable Kenneth Ripple
U.S. Circuit Court Judge
Seventh Circuit
Federal Building
204 South Main Street
South Bend, Indiana 46601

Re: Suggestion for Appellate Rules Change

Dear Judge Ripple,

I have a suggestion. I confess, however, that I have not been able to convince a majority of our court of its wisdom.

My experience has been that lawyers often don't really understand their case until just before argument. And judges often don't really understand the case until they have to write an opinion.

Because the actual writing of the opinion must be preceded by thoughts concerning the issues, how they relate to each other, and how they should be analyzed and considered, I have long advocated a rule that would permit a party to include, as an appendix to the party's appellate brief, a draft opinion not to exceed ___ pages in length. I believe that this would result (in those cases in which the lawyer includes a draft opinion) in better and shorter briefs and better oral arguments. Another beneficial effect would be that each judge would have a precis of the case in every brief that includes a proposed opinion. Imagine the pride of the lawyer whose opinion proves to be adopted, in whole or in part, by the appellate court.

Perhaps your committee will be no more enthusiastic about my suggestion than a majority of the members of our court. But who is a prophet in one's own country?

Very truly yours,

Edwin J. Peterson
Associate Justice

EJP/cb

Agenda Item #C

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

FROM: Carol Ann Mooney, Reporter

DATE: October 13, 1994

SUBJECT: Item 94-2, prohibiting citation of appellate decisions that lack a clear recitation of jurisdiction.

The attached letter from William Leighton, Esq. is item 94-1. The suggestion will be discussed at the upcoming meeting.

PHONE (212) 255-0001
FAX (212) 255-5899

William Leighton
249 West 11th Street
New York, N.Y. 10014

July 20, 1994

Peter G. McCabe, Esq., Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Washington, D.C. 20544

Re : Proposed addition to the F.R.App.P.

Dear Sir :

The 1991 Amendment to the F.R.App.Proc. has made a welcome addition to Rule 28(a)(2) which now requires the litigants to address the issue of appellate and lower court jurisdiction in their briefs. That Rule does not apply to nonparties that cite appellate decisions in their briefs. In other words, appellate decisions made before the 1991 amendment that do not clearly recite the applicable jurisdictional basis should not be relied upon by the Federal courts. No such provision exists now with the result that erroneous decisions could be made on the basis of older decisions for which no jurisdiction can be found. Surely, a federal court faced with an argument based on an appellate decision should not be expected to determine whether or not there existed appellate jurisdiction for that decision.

I shall illustrate that problem with an actual example. Harris Trust and Savings Bank, et al. v. E-II Holdings and American Brands, 926 F. 2d 636 (1991) was a case decided on February 21, 1991 by the Seventh Circuit Court of Appeals. Rehearing and rehearing en banc was denied on May 3, 1991. Certiorari was denied. The decision was made before the 1991 amendment to the appellate Rules became effective on December 1, 1991.

The decision's only reference to appellate jurisdiction will be found under Note 7 where this statement appears :

> "In light of the fact that complete diversity of citizenship exists between the plaintiffs and the defendants, we do not address the argument that the Act gives rise to a private cause of action."

Thus, the reader of the decision would be inclined to believe that since diversity of jurisdiction had been noted by the appellate court, the basis for federal jurisdiction was diversity of citizenship. With due respect to the learned judges who unanimously signed that decision, I must

point out that by accepting to serve as Trustees under the Indentures, the plaintiffs had expressly waived diversity of citizenship as a predicate for federal court jurisdiction. Section 11.08 of the Indentures (in the record) underlying the Note and Debenture Indentures states, in full :

> The laws of the State of New York shall govern this Indenture and the Securities without regard to principles of conflict of laws. The Trustees, the Company (i.e. E-II), and the Securityholders agree to submit to the jurisdiction of the courts of the State of New York any action or proceeding arising out of or relating to this Indenture or the Securities. (emphasis supplied)

Therefore, since the appellate court proceeded to examine at length other provisions of the Indentures, the question arises why it did so in light of the express language of Section 11.08. Its failure to rule on the applicability of Section 11.08 and its reliance on the diversity clause as the basis for its own and the district court's jurisdiction raises the question whether its opinion and judgment should be relied upon by other courts when faced with similar problems. My suggestion would eliminate this uncertainty by making it clear that an opinion such as Harris should not be relied upon in the future by other federal courts.

Conclusion

A new Rule should be written into the Federal Rules of Appellate Procedure directing the federal courts to disregard federal court opinions that do not clearly recite the basis for Federal court jurisdiction.

Sincerely,

William Leighton

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