APPELLATE RULES COMMITTEE
April 17-18, 1995
Pasadena, California

Agenda
Meeting of the Advisory Committee on Appellate Rules
April 17 & 18, 1995

I. Approval of the minutes of the October 1994 meeting

II. Review of the rules published for comment September 1994

  A. Rule 21 - Mandamus

  B. Rule 25 - Use of a "reliable commercial carrier" for filing a brief or appendix, and for service

  C. Rule 26 - Three-day extension of time for responding after service by a "reliable commercial carrier"

  D. Rule 27 - Motions

  E. Rule 28 - Brief length

  F. Rule 32 - Type and format for a brief or appendix

III. Review with Mr. Garner the rules approved at the October meeting prior to request for publication

IV. Discussion with Mr. Bryan Garner of restylized Rules 1-23, as amended at the October meeting

V. Initial consideration of restylized Rules 24-48

VI. Discussion - long range planning document. The Long Range Planning Committee of the Standing Committee has asked for individual or group reactions.

VII. Schedule fall meeting

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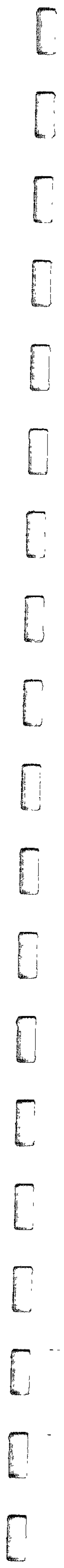

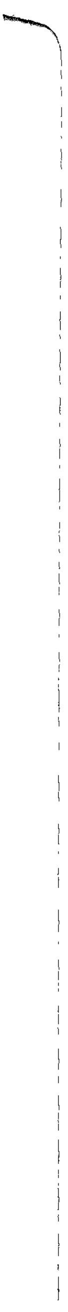
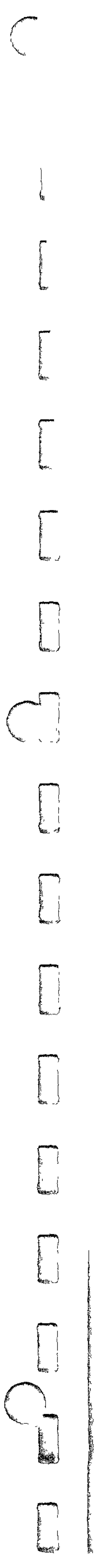

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MINUTES OF THE MEETING
OF THE ADVISORY COMMITTEE ON APPELLATE RULES *approved without objection*
OCTOBER 25, 26, & 27, 1994

Judge James K. Logan called the meeting to order at 8:30 a.m. in the Conference Center of the Thurgood Marshall Federal Judiciary Building in Washington, D.C. In addition to Judge Logan, the Committee Chair, the following Committee members were present: Judge Danny Boggs, Judge Will L. Garwood, Judge Alex Kozinski, Mr. Michael Meehan, Mr. Luther Munford, Mr. John Charles Thomas, and Judge Stephen Williams. Mr. Robert Kopp attended the entire meeting on behalf of Solicitor General Days who was himself present for a portion of Thursday afternoon. Judge Grady Jolly, whose term on the Committee had just expired, was present. Mr. Robert Hoecker, the former Clerk of the Tenth Circuit and the newly named Circuit Executive for that circuit, attended on behalf of the clerks. Professor Daniel Coquillette, the Reporter for the Standing Committee was present, along with Professor Mooney, the Reporter for the Advisory Committee. Mr. Peter McCabe - the Secretary, Mr. John Rabiej - Chief of the Rules Support Office, and Mr. Robert P. Deyling, all of the Administrative Office, were present along with Ms. Judith McKenna of the Federal Judicial Center and Mr. Joseph Spaniol.

Judge Logan welcomed the new members and announced that items D and E on the agenda would be delayed until the afternoon when the Solicitor General would be able to join the Committee.

Judge Logan made introductory remarks for the benefit of the new members about the Committee's work. He noted that the impetus for much of the Committee's recent work came from the Department of Justice and the national law firms both of which have been urging a return to truly uniform federal practice and the elimination of local rules. The other impetus has been the Local Rules Project that was established by the Standing Committee to study local rules and which has urged, among other measures, uniform numbering of local rules, elimination of any local rule that conflicts with the national rules or that merely repeats provisions in the national rules.

Judge Logan noted that the Advisory Committee has tried to add to the national rules some of the ideas that were developed by the circuits and included in the local circuit rules. The Advisory Committee's aims were twofold: to improve the national rules and to eliminate the need for local rules on those topics. The Advisory Committee has now reached a point where most of the changes proposed as a result of the Local Rules Project have been considered.

Judge Logan stated that the next step will be a systematic simplification of the language used in all of the rules. Significant work has already been done on the civil rules by the Style Subcommittee of the Standing Committee and by the

Advisory Committee on Civil Rules. The Style Subcommittee had completed its first draft revision of Rules 1-23 of the appellate rules and those revisions were on the agenda for consideration by the Advisory Committee at the meeting. Judge Logan stated that the Standing Committee hopes that the restyled version of the Appellate Rules will be the first set of restyled rules to be published for public consideration.

Minutes

Judge Logan turned to the first item on the agenda, approval of the minutes of the April meeting. The minutes were approved as written. There was, however, a brief return to the discussion initiated at the April meeting about the content of the minutes. The minutes of the April meeting do not attribute comments made during the meeting to any particular member. One member stated that he believes speakers should be identified by name. Another member pointed out that the omission of names may be noticeable simply because this Committee's minutes are more detailed than those of the other advisory committees. The minutes of other advisory committee meetings do not include as detailed a record of committee discussion and, therefore, do not attribute remarks to individual members. There was consensus that detailed minutes are helpful to the committee. It was pointed out that the meetings are open to the public and that anyone who desires to know the position of individual members is free to attend the meetings. A compromise position was proposed: comments would not be attributable to individual members but votes would be attributed to individuals by name. It was agreed, however, that the reporter would prepare the minutes of this meeting without any names attached either to comments or votes. Mr. Rabiej promised to provide the committee members with samples of other committees' minutes and the Committee agreed to put the topic on the agenda for a fuller discussion at a future meeting.

Standing Committee

The Reporter summarized the action taken by the Standing Committee at its June meeting with regard to proposed amendments to the appellate rules.

The Advisory Committee presented 5 new or amended rules to the Standing Committee with a request that those rules be forwarded to the Judicial Conference for consideration; they were Fed. R. App. P. 4(a)(4), 8, 10, and 47, and proposed new Rule 49. Rules 4(a)(4), 8, and 10 were approved without change. The Standing Committee amended Rule 47, dealing with local rules, by adding a sanctions limitation back into subdivision (b). The Advisory Committee had concluded that in light of other post-publication amendments recommended by the Advisory Committee the sanctions limitation was unnecessary. The Standing Committee decided to reinsert it believing that it would do no harm and

would make the limitation explicit. Rule 47 as amended was approved for submission to the Judicial Conference. The Standing Committee decided not to go forward with Rule 49, dealing with technical amendments, or its corollaries in the other sets of rules.

The Advisory Committee recommended publication of 6 rules, Fed. R. App. P. 21, 25, 26, 27, 28, and 32. Rules 21, 25, and 32 were actually requests for republication because substantial changes had been made following their publication in November 1993. The Standing Committee approved publication of all six rules having first made changes in Rules 25, 26, and 32.

In Rule 25, the proposed amendment published in November 1993 had provided that in order to file a brief or appendix using the mailbox rule, the brief or appendix must be mailed by first-class mail. In light of the public comments, the Advisory Committee proposed further amendment of the rule so that the mailbox rule applies when a brief or appendix is delivered to an "equally reliable commercial carrier." The Standing Committee deleted the word "equally" from "equally reliable commercial carrier." In addition, the Standing Committee made amendments in the subparagraph dealing with electronic filing, so that the language would be consistent with amendments proposed by the bankruptcy committee.

The proposed amendment to Rule 26 makes the three day extension for responding to a document served by mail also applicable when the document is served by an "equally reliable commercial carrier." As with Rule 25, the Standing Committee deleted the word "equally."

When considering the amendment to Rule 25, the Standing Committee discussed the adequacy of the three day extension provided when a party must act within a specified time measured from the date of service and service is accomplished by mail. The Standing Committee asked each of the advisory committees to consider expanding the three days to five days. That issue became Item 94-1 on the Advisory Committee's docket and was on the agenda for the October meeting.

The proposed amendments to Rule 32 deal primarily with typeface issues. The Standing Committee made some minor amendments both in the language of the rule and in the Committee Note and then approved Rule 32 for publication.

<u>Item 91-24, Amicus Briefs</u>

The proposal to amend Rule 29 grew out of the Local Rules Project. In its response to the Local Rules Project Report, the fifth circuit suggested that the

Advisory Committee consider amending Rule 29 to:

1. specify which of the items required by Rule 28 should be included in an amicus brief;
2. establish a page limit; and
3. permit an amicus brief to be filed later than the brief of the party supported.

The fifth circuit believes that permitting later filing of an amicus brief eliminates needless repetition in the amicus brief of the party's arguments.

At the Advisory Committee's September 1993 meeting, the Committee accepted the fifth circuit's first two recommendations, but rejected the third. In addition the Committee decided to include 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. The Committee also decided to insert language similar to that in Sup. Ct. R. 37.4 in order to provide the court with some standards for granting leave to file an amicus brief and a party with a guide for framing a motion for leave to file. In light of those decisions, the Reporter had prepared a new draft for the Committee's consideration.

One member recommended eliminating the rule altogether or limiting its application to technical matters such as length. He noted that the Supreme Court receives many amicus briefs but they are not as common in the courts of appeals. He further stated that he would not require a motion for leave to file an amicus brief. The brief must accompany the motion and as a practical matter the courts rarely refuse to file an amicus brief.

Two members favored retention of the motion. The privilege of filing an amicus brief can be abused. It can become a way to file a longer brief; a party convinces a friend to file an amicus brief in order to present arguments that the party wants to advance but is unwilling to give space to in the party's own brief. Another member noted that preparation of the motion may help the drafter to crystallize the reasons for the amicus brief.

A member noted that this motion, like any other, requires a response. Until the court responds, the parties do not know whether the amicus brief has been accepted and do not know whether they must respond to the arguments advanced by the amicus.

Another member noted that the language in proposed subdivision 29(a), language modeled on Sup. Ct. R. 37.1, could be read as creating a standard that a clerk's office has responsibility for enforcing. He suggested that if the language is retained it should be more cautionary or advisory in tone. Another member noted that it is difficult for an amicus of a court of appeals to honestly state that

the amicus will not discuss matters discussed by the party. Such a representation is more easily made at the Supreme Court because the party has already briefed and argued the case at the court of appeals and the amicus knows the arguments that will be advanced by the party.

Judge Logan noted that some revision of Rule 29 is desirable in order to eliminate some of the matters covered by local rules and to specify the contents of an amicus brief. Two issues had emerged from the discussion so far:

1. should the rule include precatory language, similar to that in Sup. Ct. R. 37.1, stating that the role of an amicus is to bring matters to the attention of the court that are not presented by the parties; and
2. should the rule require a motion for leave to file an amicus brief.

Judge Logan asked the Committee to focus on the first question, whether proposed subdivision 29(a) should be retained, and if so, whether it should be modified. The draft read as follows:

> (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.

One member expressed general approval but suggested that the provision should be amended to permit an amicus brief to discuss matters not brought to the court's attention by the parties, or not adequately elaborated upon by the parties. Another member pointed out that in order for an amicus to make that determination, the amicus brief would have to be filed later than the party's brief and such later filing had been rejected by the Committee at its previous meeting. Another member indicated that ordinarily there is a level of coordination between the party and the amicus that would permit an amicus to make the "not adequately elaborated" determination.

Another member stated that if 29(a) were truly precatory it would be acceptable, but if it could be interpreted as imposing a requirement, it would be problematic. When the government files an amicus brief, it cannot coordinate with a party and could not make the representation "required" by 29(a). Another member pointed out, however, that the government has a right to file an amicus brief and could not be precluded from doing so as a result of 29(a).

Judge Logan asked the Committee to vote on retention of a provision similar in nature to 29(a). A motion to eliminate subdivision (a) and to move the language into the note was made and seconded. Five members voted to eliminate any such provision; three voted to retain it.

Judge Logan then asked the Committee to turn its attention to the motion question.

A member moved that the Committee eliminate the motion requirement and substitute an attorney's certificate that the brief is not filed for purposes of delay but to assist the court. He stated that it typically takes one week to get a response to the motion and the opposing party remains uncertain during that time whether there is a need to respond to the arguments raised by the amicus. The motion was seconded.

During discussion other members questioned whether elimination of the motion requirement entitles everyone to file an amicus brief. Several members felt that the motion requirement is important because it provides the court with a measure of control.

The motion failed by a vote of 4 to 3.

Having decided to retain a motion for leave to file, a member suggested eliminating the requirement in draft Rule 29(c)(2), that the motion state "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." The member suggested substituting language from an earlier draft that would require the motion to state "the reasons why an amicus brief is desirable."

It was pointed out that it would be helpful to include as specific a statement as possible about what makes an amicus brief desirable. Although it was agreed that a variety of reasons in addition to those mentioned in (c)(2) may make an amicus brief desirable, specificity helps practitioners know what should be in the motion.

A motion was made and seconded to substitute the following language for that in paragraph (c)(2) of the draft:

(c)(2) the reasons why an amicus brief is desirable and the relevance of the matters asserted to the disposition of the case.

The motion passed unanimously.

With regard to subdivision (d), dealing with the contents and form of an amicus brief, a motion was made to add a requirement that the brief include "a concise statement of the identity of the amicus and its interest in the case." The requirement would become (d)(2). It was pointed out that although a statement of its interest is required in an amicus's motion for leave to file, the members of panel in the case will not necessarily have the motion. The motion was seconded and passed unanimously.

A motion was made to delete the word "only" on line 30 of the draft. The

sentence in question stated that "[w]ith respect to Rule 28, an amicus brief must include only the following. . ." The word "only" is ambiguous. It is unclear whether the list establishes the minimum required items, or whether it establishes both the minimum and the maximum items. The motion was seconded and passed by a vote of 7 to 1. The member who opposed the deletion believes that the word established both minimum and maximum contents and that deletion of the word "only" would eliminate uniformity.

Subdivision (d) of the draft, at lines 26-29, included a provision requiring the cover of an amicus brief to "identify the party or parties supported or indicate whether the brief supports affirmance or reversal." A motion was made to change the second "or" to "and." The stated reason for the motion was to promote uniformity. The motion was seconded but defeated with 2 votes in favor and 6 in opposition.

To coordinate the length limitation with Rule 32, and to make frequent amendment of Rule 29 unnecessary, a motion was made to change the length limitation from 20 pages to one-half the length of a principal brief as specified in Rule 32. The motion was seconded and unanimously approved. If Rules 32 and 28, which are currently published for comment, are not approved, subdivision (e) should be reexamined.

Subdivision (f) of the draft, deals with the time for filing an amicus brief; it provides that the brief must be filed within the time allowed the party supported, or if the amicus does not support either party, within the time allowed the appellant. When the previous drafts were discussed by the Committee, it accepted that approach. The Committee had rejected the fifth circuit's practice of allowing later filing because it results in extending the time for filing responsive briefs. For example, if an amicus supporting the appellant files a brief 15 days after the appellant, the time for filing the appellee's brief does not begin to run until the filing of the amicus brief.

A motion to accept subdivision (f) as drafted was made and seconded. The motion passed by a vote of 6 to 2.

Subdivision (h) of the draft provides that "[a] motion of an amicus curiae to participate in the oral argument will be granted only for extraordinary reasons." A member suggested that the Committee Note should indicate that if a party is willing to share its argument time with an amicus, the court may permit the amicus to argue without "extraordinary reasons." An amicus would still need to file a motion seeking court approval, but the motion would not need to show extraordinary circumstances. Another member observed that such a rule makes it possible for an amicus to exert inappropriate pressure on a party to share its time. The Committee consensus was to make no change in either the language of the

rule or the note.

Approval of the rule as amended was moved, seconded, and unanimously approved.

In light of the large number of appellate rules currently in the pipeline at various stages of development, the Committee decided that it would not submit the rule to the Standing Committee at the January 1995 meeting. Rather, the Committee decided to submit the amended draft to the Style Subcommittee for its review and take up the Style Subcommittee's suggestions at the spring meeting. A request for publication will be made some time after the spring meeting.

The meeting recessed from noon until 1:15 p.m.

Ninth Circuit Local Rule on Death Cases

At the beginning of the afternoon session Professor Coquillette summarized the status of the ninth circuit local rule on death penalty procedures. On March 11, 1994, 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.

The Chief Justice referred the matter to the Standing Committee, which in turn referred the matter to the Advisory Committee on Appellate Rules. The Advisory Committee report of its April deliberations on the issues was submitted to the Standing Committee and considered at its June meeting. At that meeting, the Standing Committee made no decision on the merits of the issues. Instead, the Standing Committee decided to invite both the states attorneys general and the ninth circuit to submit briefs elaborating on their positions. The Standing Committee will consider the issues at the January meeting.

Professor Coquillette stated that the Standing Committee would appreciate guidance about the appropriate response to a possible determination that one or more provisions of the ninth circuit rule are inconsistent with federal law. Professor Coquillette stated that there are three possible responses; the Standing Committee may recommend to the Judicial Conference that it: 1) modify the rule to make it consistent with federal law; 2) abrogate the entire rule or the inconsistent provisions; or 3) take no action. Professor Coquillette believes that the third option is available because the statute says that the Judicial Conference "may" modify or abrogate. 28 U.S.C. § 331.

A member of the Advisory Committee indicated that he reads the statutory language as requiring the Judicial Conference to either "modify or abrogate" a circuit rule, once the Conference determines that the rule is inconsistent with federal law. Another member disagreed; that member believes that the statutory language permits the Judicial Conference to abstain from acting. He noted that the Judicial Conference is not a court and that if it abrogates a circuit rule there is no review by the Supreme Court. Because the Judicial Conference is not a court before which parties appear, it is not presented with the sort of in depth research and argument that is typical of the adversary process. He believes that the questions can and should be litigated and in that context the issues can be presented to the Supreme Court.

Professor Coquillette invited the members of the Advisory Committee to write to him with their recommendations for the Standing Committee.

Item 93-5. Rule 26.1

Fed. R. App. P. 26.1 requires a corporate party to file a statement "identifying all parent companies, subsidiaries (except wholly-owned subsidiaries), and affiliates that have issued shares to the public." At the Committee's April meeting, 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." As a result of Mr. Spaniol's observation, the Committee determined that it would reconsider the propriety of requiring disclosure of "affiliates."

As a preliminary matter, one of the Committee members asked whether the scope of the rule should be broader; it does not require disclosure of all matters that are cause for recusal under the statute. Some of the circuit rules require disclosure of anyone who has a financial interest in the case. The Reporter indicated that during the process of developing Rule 26.1, the Advisory Committee approved a rather broad draft and circulated it to the circuits. Several circuits had strongly negative reactions to the broad rule. As a result, the Advisory Committee promulgated a rule that requires bare-bones disclosure. The Committee Note indicates that the Advisory Committee realizes that some circuits may wish to require more complete disclosure.

Another member spoke in support of the limited disclosure required by Rule 26.1. It would impose a serious burden to require a party to certify that it has identified all persons who may have a financial interest in the outcome of the case. A corporate party, however, is in a position to know who it controls and by whom it is controlled and it is reasonable to require the party to disclose that information.

Another member spoke in support of an even narrower rule than current Rule 26.1; in his opinion the seventh circuit provision dealing with corporate affiliates is narrower but sufficient. The rule need only require disclosure of corporations that may be adversely affected by a decision in the case. The seventh circuit rule requires a corporate party or amicus to disclose its parent corporation and a list of stockholders which are publicly held companies owning 10% or more of the stock of the party or amicus. That disclosure is appropriate; if a judge owns stock in a parent corporation of the litigant, the judge has an interest in the litigant. The other disclosures required by the current federal rule and many of the circuit rules, however, seem unnecessary. For example, disclosure of subsidiaries may be unnecessary. If the litigant is a part parent of a corporation in which the judge may own stock, the possibility is quite remote that the judge might be biased by the fact that the judge and the litigant are co-owners of a corporation. Similarly, that a judge owns stock in a brother or sister corporation of the litigant is unlikely to create any bias. In short, it may be appropriate to eliminate not only the term affiliate but also the term subsidiaries.

Another member posed a hypothetical that illustrated the possibility of an ethical problem arising from participation of a judge in a case if the judge owns stock in a corporation which is under common control with a party to the case. A judge owns 20% of Joe's Barber Shop; the other 80% is owned by Barber Shops Inc.. Barber Shops Inc. also owns 80% of Mary's Barber Shop. If Mary's Barber Shop is the litigant and is awarded judgment, 80% of that will accrue to the benefit of Barber Shops Inc. Although Barber Shops Inc. does not owe Joe's Barber Shop any of that money, does the fact the Barber Shops Inc. is wealthier effect Joe's Barber Shop and its shareholders (one of whom is the judge in the case)? Does the fact that the judge's co-owner could be richer as the result of the litigation mean that the judge should recuse himself or herself? It might because if Joe's Barber Shop needs cash at some point in the future, Barber Shops Inc. may be in a better position to provide the cash if Mary's Barber Shop is awarded a substantial judgment.

Another member pointed out that what is striking about the hypothetical is that the ownership interests are large and in such cases the judge is likely to be aware of the ownership interests and the disclosure statement would not be necessary to make the judge aware of his or her potential interest. In the typical case the ownership interests of shareholders are minuscule and the impact of a judgment for or against a brother or sister corporation would be negligible upon a judge shareholder.

Another member indicated that the purpose of the rule is to address clear-cut interests. The party's certificate cannot address all possible problems such as persons who are contemplating purchases of interests, etc.

A motion was made and seconded to weave the seventh circuit solution into the rule and to eliminate disclosure of subsidiaries and affiliates. It was pointed out that there may be political reaction to what may be perceived as a narrowing of the disclosure. In response, it was suggested that the Committee Note should explain the change, indicating that a person who owns stock in a subsidiary or an affiliate is not affected by judgment for or against the parent. The publication period provides an opportunity to gauge the public reaction to the proposal.

Specifically the motion was to amend Rule 26.1 to read as follows:

> Any non-governmental corporate party in a civil or bankruptcy case, or agency review proceeding and any non-governmental corporate defendant in a criminal case must file a statement identifying its parent corporation, if any, and a list of stockholders which are publicly held companies owning 10% or more of the stock of the party.

The motion passed by a vote of 6 to 2.

Although the seventh circuit rule requires an amicus that is a corporation to file a similar statement, the Committee decided to treat the amicus question in Rule 29. Specifically, a motion was made to amend draft Rule 29(d) to indicate that "an amicus brief must comply with Rule 32 and, if a non-governmental corporation, file a disclosure statement like that required of a party in Rule 26.1." The motion was seconded and passed unanimously.

<u>Item 93-10, Rule 26.1</u>

At one of the Advisory Committee's recent meetings, the question of the applicability of Rule 26.1 to trade associations was raised. The language of Fed. R. App. P. 26.1 does not address the trade association question. The current rule requires only that a "corporate" party disclose its parent, subsidiaries and affiliates. Under the current rule, a trade association would be required to make disclosure only if it is incorporated and even then it typically would not have anything to disclose; a trade association does not have a parent and the association's members are not subsidiaries or affiliates in the ordinary sense of those words.

Given the decisions just approved under item 93-5, that the only disclosures required are those involving financial interest and, more specifically, only disclosure of parent corporations, the consensus was that no change is needed.

<u>Item 94-1, Rule 26(c)</u>

Fed. R. App. P. 26(c) provides that when the time for action is measured from the date of service and service is accomplished by mailing, three days are

added to the time period. At its June 1994 meeting the Standing Committee asked each of the advisory committees to consider whether the three day extension should be changed to a five day extension because of frequent delays in mail delivery.

The Reporter indicated that the bankruptcy, civil, and criminal advisory committees have all recommended retaining the three day rule. A motion was made to recommend no change. The motion was seconded and passed unanimously.

<u>Item 92-8, Sanctions</u>

Mr. Alan Morrison had written to the Committee asking it to reexamine Rule 38 and consider additional amendments. A subcommittee had been appointed to consider Mr. Morrison's suggestion and to monitor the sanctions question generally.

Judge Boggs, the chair of the subcommittee, reported that about a year and a half ago the subcommittee agreed that in light of the uncertain future of Rule 11 and the proposed changes in Rule 38 regarding notice and opportunity to respond before imposition of sanctions, no further amendment of Rule 38 was advisable at the time. In addition there had been an inquiry by then Chief Judge Breyer asking whether the amendment requiring notice and comment would make court chastisement of counsel too difficult. The Committee responded to that inquiry indicating that there are several means of chastisement that would not require notice and comment.

Since that time the subcommittee has continued to monitor the sanctions area and nothing has transpired that has caused the subcommittee members to change their minds about the need for further amendment of Rule 38.

Mr. Morrison wrote to the Committee again in October 1994. Essentially, he argued that because litigation is uncertain and the Supreme Court sometimes rules contrary to virtually all courts that have previously considered an issue, litigation should seldom be classified as frivolous. Judge Boggs indicated that the subcommittee has not been persuaded that Rule 38 should be reinstated as an action item at this time.

Mr. Morrison offered to come to the Committee to speak about the issue. Judge Logan proposed that the subcommittee be continued, that Rule 38 be placed on the agenda for the next meeting, and that Mr. Morrison be invited to attend the meeting and make a presentation. The Committee consensus was that in light of the amendment of Rule 38 scheduled to become effective on December 1, 1994, (an amendment that provides significant new protection for those who

might be sanctioned) the subcommittee should continue to monitor Rule 38 but that it would be premature to provide Mr. Morrison a hearing at the next meeting.

Judge Logan asked the subcommittee to run a computer search of the cases under Rule 38 and determine whether there are any current problems. The Reporter indicated that she would provide the subcommittee with her background research on the question of frivolous appeals. Judge Logan asked the subcommittee to submit its report at the fall 1995 meeting.

Item 93-11, Draft Opinions

Justice Peterson of the Oregon Supreme Court wrote to the Committee suggesting that the appellate rules be amended to permit a party to include, as an appendix to the party's brief, a draft opinion. After a brief discussion of the proposal, there was a motion to take no further action on the proposal. The motion was seconded and unanimously approved.

Item 94-2, Prohibiting Citation to Appellate Decisions that Lack a Clear Recitation of Jurisdiction

William Leighton, Esq. wrote to Mr. McCabe suggesting that the appellate rules be amended to prohibit citation in a brief to an appellate decision that does not clearly recite the applicable basis for federal court jurisdiction. After brief discussion of the proposal, there was a motion to take no further action on the proposal. The motion was seconded and unanimously approved.

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

Solicitor General Drew Days joined the Committee for discussion of these items and Judge Logan invited him to address the Committee.

Solicitor General Days stated that both he and his predecessor had proposed amending Rule 35 so that intercircuit conflict would be made an explicit ground for granting an in banc hearing. Between July 1, 1993 and June 30, 1994, there were 160 cases in which a federal government agency or division recommended that the government file a suggestion for rehearing in banc. (There were in excess of 500 matters in which the preliminary recommendation was not to request a rehearing in banc.) Of the 160 cases in which an agency recommended requesting a rehearing in banc, the Solicitor General approved the filing of a suggestion for rehearing in banc in only 51% of the cases. A rehearing in banc was granted in approximately 25% of the cases in which suggestions were filed. There were five circuits that did not grant any of the petitions. The

Department of Justice realizes that it should not routinely petition for a rehearing in banc but the department is in a better position than perhaps any other litigant in the country to have an overview of the problem of intercircuit conflicts. Solicitor General Days believes that some conflicts can be avoided by granting an in banc rehearing; if a conflict is avoided, later Supreme Court intervention is unnecessary.

Intercircuit conflicts create problems not only for the Department of Justice but also for the judicial system as a whole. Intercircuit conflicts create the impression that a party's rights depend upon the circuit in which he or she litigates. Intercircuit conflicts also create upward pressure to hear cases in the Supreme Court and additional litigation around the country.

Solicitor General Days stated that the proposed amendment simply makes explicit a matter that is typically part of a circuit's current deliberative process. In many instances, the existence of an intercircuit conflict, or the fact that a panel's decision would create an intercircuit conflict, leads a circuit to treat the case as one of "exceptional importance" and to grant a rehearing in banc. Several circuits make it clear in their local rules that intercircuit conflicts are a special concern and may lead to the granting of a rehearing in banc. But, it would be helpful to litigants to make that clear in the national rule. The proposal would not make it mandatory to convene an in banc court.

The Reporter's memorandum prepared for the meeting included two drafts. Draft one treated intercircuit conflict as grounds for finding that a proceeding involves a question of "exceptional importance." Draft two treated intercircuit conflict as a separate category of cases as to which in banc review may be appropriate. A member of the Committee noted that draft two might be read as more mandatory than draft one. When asked which draft he preferred, Solicitor General Days expressed a slight preference for draft two He further stated he had not thought that draft two created an impression that an in banc hearing might be mandatory, and either draft would be satisfactory.

One member noted that some judges in his circuit only vote for an in banc hearing when there is a conflict within the circuit. In such an instance, those judges feel compelled by the language of Rule 35 to vote for a rehearing in banc. If Rule 35 is amended, as suggested in draft two, to make intercircuit conflict a distinct ground for granting an in banc hearing, it is likely to have a similar impact and to increase the number of cases in which an in banc hearing is granted. The member then asked whether the likelihood of a rehearing in banc would create pressure for a panel to simply follow the lead of the other circuits that have already addressed the issue. In other words, might this change raise the stakes when a circuit is confronted by an issue on which another circuit has already ruled, and perhaps impede the development of the law?

Two members expressed a preference for draft one because making intercircuit conflict one subset of cases of "exceptional importance" does not create an impression that the granting of a rehearing in banc is "mandatory" whenever there is such a conflict; whereas, draft two, which makes intercircuit conflict a separate grounds for granting a rehearing in banc, might create such an impression.

Another member stated his opposition to draft one because he thought that it might result in the narrowing of the range of cases that will be considered of exceptional importance.

A motion to work with draft one was made and seconded. The motion passed by a vote of six to one.

The discussion then turned to the fact that the draft states that a case may present a question of exceptional importance if the panel decision conflicts with the decision of another federal court of appeals. But a rehearing in banc is truly useful only when the panel decision creates an intercircuit conflict. In such a case, the in banc court may prevent the creation of a conflict. When a panel decision does not create a conflict but simply joins one side of an already existing conflict, a rehearing in banc cannot avoid the conflict. It was pointed out, however, that when a conflict was created by a pre-existing decision of the same circuit, the second decision in that circuit which persists in the conflict may also be a strong candidate for a rehearing in banc.

> A motion was made to amend lines 31-39 of draft one to read as follows: A proceeding may present a question of exceptional importance if it involves an issue as to which the panel decision conflicts with the authoritative decisions of every other federal court of appeals that has addressed the issue (citation to the conflicting case or cases is required).

The word "authoritative" was used rather than "published" because in some circuits unpublished opinions may be treated as authoritative. It was noted that the language of the rule encompasses both a case in which the panel decision creates the conflict and also a case in which the panel decision maintains a conflict created by an earlier decision of the same circuit. The language does not include those instances in which a circuit joins one side or other in an already existing conflict. The motion was seconded and approved unanimously.

Although there were additional items on the agenda dealing with Rule 35, consideration of them was postponed to allow the Solicitor General to address the Committee on his proposal to amend Rule 41.

Items 93-3 & 93-6. Mandate

Solicitor General Days had previously proposed that Rule 41 be amended to state that a mandate is effective upon issuance. Judge Logan invited him to discuss his proposal.

The Solicitor General noted that the time at which a mandate becomes effective is not specified in Rule 41. A mandate could be considered effective when it issues, when it is received by the district court or agency to which it is sent, when it is docketed, or when the court or agency acts upon it. The effective date of the mandate is especially important when a court of appeals reverses a district court order granting an injunction. The parties need to know when they can rely on the decision of the court of appeal. The fourth circuit has a local rule stating that the mandate is effective when issued. The Department of Justice believes that incorporating such a provision in the national rule would be helpful.

Judge Logan asked the Solicitor General whether the language at lines 22 and 23 of the draft on page 14 of the Reporter's memorandum would be sufficient. That language stated: "The court's mandate is effective on the day the court issues it." The Solicitor General responded affirmatively. Committee discussion resulted in amendment of the sentence to read as follows: "The mandate is effective when issued."

The Solicitor General stated that there is often a delay in issuing the mandate. The Department would prefer that the rule provide that the mandate is effective on the date that the clerk should issue it, in accordance with the rules, even if it is not issued on that date because of clerical delay.

A member expressed opposition to that position. The mandate should be effective <u>when</u> issued, not when it <u>should</u> issue. A judge may delay issuance of the mandate. If a mandate is not issued on the date established by the rules and the approach advocated by the Department of Justice were accepted, one would have to determine whether the delay was the result of clerical delay or judicial intervention. The effective time should be the time of actual issuance. Such an approach provides an easily applied bright line rule.

A motion was made and seconded to amend the rule to state that "the mandate is effective when issued." The motion was approved unanimously.

Following adoption of that language, discussion turned to the practical implications of the amendment. As previously noted, the time at which a mandate is effective is most crucial in cases involving an injunction. If a court of appeals reverses a district court order granting an injunction, the party can cease compliance with the injunction as soon as the mandate issues. If, however, a

court of appeals reverses a district court order denying an injunction, the entry of the mandate does not result in the imposition of an injunction by the district court. If the court of appeals itself issues a stay or injunction, that injunction would be effective upon issuance of the mandate. If the court of appeals does not issue the injunction but simply says that the district court should have, there is no effective injunction until the district court issues it.

Discussion then turned to Item 93-3, a proposal to amend Rule 41 to expand the 7 day period for issuing the mandate. 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, or if such a petition is filed, 7 days after entry of an order denying the petition.

A recent amendment to Rule 41 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." Because of these new requirements, it may be more difficult than it was previously for a party seeking a stay of mandate to obtain one within the 7 day period. Therefore, the Committee was asked to consider expanding the 7 day period.

One member suggested that the 7 day period after expiration of the time for filing a petition for rehearing is adequate but that the 7 day period after denial of a petition for rehearing is inadequate. A party may not know that the court has denied the petition for rehearing until it arrives in the mail several days after its entry. Therefore, he suggested that the rule should be amended to state that the mandate should be entered 14 days after entry of an order denying a petition for rehearing. Another member suggested that having two different time periods would be confusing.

Rather than expand either of the time periods, a motion was made to adopt draft three. Draft three ensures that the mandate does not issue while a motion for a stay of mandate is pending by providing that the mandate cannot issue while the motion is pending. The motion was seconded and passed unanimously.

It was noted that further amendment of the draft will be needed in light of changes to Rule 35 already approved. Those changes provide that a petition for rehearing in banc will stay the issuance of the mandate just as a petition for panel rehearing does.

<u>Item 93-4, Stay of Mandate</u>

Rule 41 provides that a stay of mandate pending the filing of a petition for writ of certiorari cannot exceed 30 days unless the period is extended for cause

shown. The National Association of Criminal Defense Lawyers pointed out that the 30-day presumptive period for a stay was adopted 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 suggested that the presumptive period also should be expanded to 90 days.

The draft prepared for the Committee's consideration provides that the normal period for a stay will be 90 days but that the period cannot, in any event, exceed the time available to the party to file a petition for a writ of certiorari to the Supreme Court. It was pointed out that a court would remain free to specify a shorter period.

Adoption of the draft without amendment was moved and seconded. Some members expressed preference for the current rule because the 30 day period provides an incentive for the party to move with dispatch and it ensures that the mandate is not stayed for an extended period in a case in which the party may never petition for certiorari.

Another member responded that all the rule does is grant the court broader discretion over the period of the stay. The amendment eliminates the need to find good cause for extending the period to 90 days. Given the fact that the motion for stay must show that a petition for certiorari would present a substantial question and that there is good cause for a stay, the 90 day period is appropriate.

The motion passed by a vote of 6 in favor and 3 opposed.

The Committee then returned to Rule 35 and discussion of the items that had been postponed.

Item 91-25. In Banc Proceedings

As a result of suggestions made by the Local Rules Project and the fifth circuit, the Advisory Committee had previously decided to amend Rule 35 to provide:

1. a petition for in banc consideration must demonstrate that in banc consideration is appropriate;
2. a limit on the length of a petition for in banc consideration;
3. a change in the caption for subdivision (a); and
4. a senior judge or a judge sitting by designation may not call for a vote on a request for rehearing in banc unless the judge was a member of the panel whose decision is sought to be reviewed.

With regard to the page limitation the draft under consideration stated that a petition "may not exceed 15 pages unless the court provides otherwise by local rule or by order in a particular case." A member suggested that the local rule option should be eliminated. Another member inquired whether the published version of Rule 32 continued to permit the circuits to shorten the maximum length of briefs and the member suggested that Rule 35 should be consistent with Rule 32. Rule 32 does not permit the circuits to shorten the maximum length other than on a case by case basis. Therefore, the language at lines 40-43 was altered to read as follows: "Except by permission of the court, a petition for in banc hearing or rehearing may not exceed 15 pages."

With regard to using page limits rather than a word count similar to that in proposed Rule 32, the Committee had previously decided to retain page limits in documents such as motions and petitions. The Committee judgment was that there was not a serious enough problem to justify importing the word count and typeface requirements applicable to briefs into other contexts.

The next sentence of the draft, beginning at line 43 of the draft, established a page limit for a combined petition for panel rehearing and petition for rehearing in banc. Because it dealt with a petition for panel rehearing, something generally not addressed in Rule 35, it was suggested that the distinction might be clearer if that sentence constituted a separate numbered paragraph. In that event, however, the next sentence (providing that "[m]aterial excluded by Rule 32(a)(6) does not count" toward the page limits) would have to be dealt with in a manner making it clear that it applies to both of the preceding sentences. The Committee delegated the task of reorganizing the structure of the rule to the Reporter. The Committee approved the substance of those changes.

The meeting recessed at 5:30 p.m.

The meeting resumed at 8:30 a.m. on October 28.

Item 91-25, In Banc Proceedings (continued)

Line 64 of the draft was amended to change the word "filed" to "due." That change having been approved, a motion was made to adopt draft one as amended. The motion passed unanimously.

Style Revisions

The Style Subcommittee's suggested revisions of Rules 1 through 23 were circulated prior to the meeting to the members of the Committee for their consideration. Judge Logan also had appointed two subcommittees and assigned Rules 1 through 12 to the first of the subcommittees and Rules 13 through 23 to

Paragraph (a)(7) states that a judgment or order is entered for purposes of Rule 4(a) "when it is entered in compliance with Rule 58 and 79(a) of the Federal Rules of Civil Procedure." A substantive question was raised: Does Rule 58 require entry of a separate order when a court denies a new trial? It is possible to read (a)(7) as abolishing the collateral order doctrine. Rule 4(a)(7) should be substantively reviewed.

Item (b)(1)(B)(ii) states that the time for the government to file an appeal runs from the later of the entry of the judgment or order or any defendant's filing of a notice of appeal. A substantive question is left unanswered. Does the time begin to run from the filing of the first notice of appeal or from the last if more than one notice of appeal is filed? The statute may be dispositive.

Subparagraph (b)(1)(D) of the Style Subcommittee's draft, subparagraph (b)(3)(A) of the Advisory Committee's redraft, begins with the words "[i]f a defendant timely makes one of the following motions." The criminal rules should be consulted to determine whether the criminal rules require the "filing" of such motions in a manner that would make the use of the verb "files" appropriate in (b)(1)(D).

Paragraph (b)(3) of the Style Subcommittee's draft, paragraph (b)(5) of the Advisory Committee's redraft, permits a district court to extend the time for filing a notice of appeal, either before or after the time has expired, upon a showing of excusable neglect. It was pointed out that if a motion for extension of time is filed before the period has expired, there should be no need to show neglect. It was suggested, therefore, that the rule should permit a district court to extend the time for "good cause" as well as excusable neglect. The Committee approved adding the words "good cause" but decided that the Committee Note should identify that addition as a possible substantive change. The Committee postponed consideration of whether there possibly should be a difference between the grounds available for extension when the application is made before time expires and the grounds available when the application is made after the time has expired.

Paragraph (c)(2) states when an inmate uses the Houston v. Lack filing provisions, the time for filing a notice of cross-appeal runs from the date the district court "receives" the first notice of appeal. Because "receives" is not clear enough, the Committee voted to change the work to "dockets." A court may "receive" a paper when its mail is delivered to it even if the mail is not opened for a day or two. "Docketing" is an easily identified event. The Committee Note must disclose the change.

Rule 5

The term "leave to appeal" was changed back to the term used in the existing rule -- "permission to appeal." Use of the term "permission" is consistent with the caption and with the statute which says that a court of appeals may "permit" an interlocutory appeal.

Rule 5.1

The caption of Rule 5.1 was changed from appeal by "permission" to appeal by "leave." The term "leave to appeal" is used in subdivision (a) of Rule 5.1 and in the statute, 28 U.S.C. § 636(c)(5).

Rule 6

Item (b)(2)(A)(2) of the Style Subcommittee's draft, item (b)(2)(A)(ii) of the Advisory Committee redraft, was amended to conform to Rule 4(a)(4). The amendment provides that a party intending to challenge an altered or amended judgment order or decree must file "a notice or amended notice of appeal." The Committee Note must identify the conforming change.

Rule 8

Paragraph (a)(3) of the Style Subcommittee's draft, subparagraph (a)(2)(D) of the Advisory Committee's redraft, says that a motion for a stay pending appeal that is made to a court of appeals is "filed with the clerk" and normally is considered by a panel of the court, but in exceptional circumstances such a motion may be made to and considered by a single judge of the court. Several substantive questions were raised in connection with this provision. First, does a single judge have power either under statute or Rule 25 to "file" a motion presented directly to him or her? Can a party apply to a single judge in other exigent circumstances? Does this rule limit a judge's power? The Committee indicated that it would like to discuss these questions at its next meeting.

Subdivision (b) provides that the grant of a stay may be conditioned upon a party's "filing" a bond. Whether there is a substantive difference between "giving" and "filing" a bond is a question that was noted for future discussion.

Rule 9

Paragraph (a)(1) requires a district court to state in writing the reasons for its order regarding release or detention of a defendant in a criminal case. The question was raised whether such an order to a district court would be better placed in the criminal rules. It was noted that Rule 22(b) dealing with habeas

corpus imposes a similar requirement upon a district judge.

Rule 10

Paragraph (d) permits the use of an agreed statement as the record on appeal. Given its infrequent use, it was suggested that the Committee consider abrogating the provision.

The Committee recessed for the evening at 6:00 p.m..

The meeting resumed at 8:30 a.m. on October 27.

Rule 15

The Committee discussed the use of the terms "petition" for review in subdivision (a) and "application" for enforcement in subdivision (b). The Committee decided that use of the different terms helps to distinguish the two proceedings. As a result the Committee decided to retain the use of the term "application" in subdivision (b) even though the Committee had earlier discussed the general desirability of abandoning the term "application."

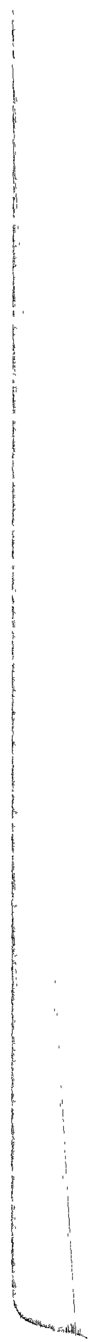
Rule 15(c) requires the circuit clerk to serve a copy of a petition for review, or an application to enforce an agency order, on each respondent. Similarly, Rule 3(d) requires the district clerk to serve a copy of a notice of appeal on the other parties. The Committee decided that at a later time it would discuss the possibility of amending subdivision (c), as well as Rule 3, to require that the appellant or petitioner serve the copies rather than imposing that burden on the clerk.

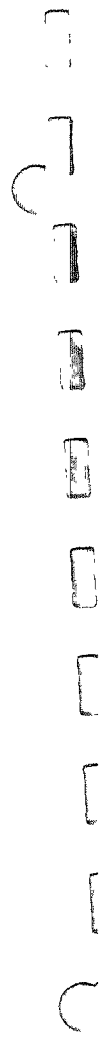
Rule 18

Rule 18 permits a party to move for a stay of an agency order pending review of the agency's decision or order. It was pointed out that there is no corollary provision authorizing the agency to move during the pendency of an appeal for enforcement of its order. Rule 8 permits a party to litigation in a district court to move for an order "restoring or granting an injunction during the pendency of an appeal" but that provision is not applicable (see Rule 20) in the agency context. Because this is a matter not addressed by the existing rules, the Committee concluded that it would place the question on the list of substantive questions for later consideration.

Rule 21

The Advisory Committee did not consider the Style Subcommittee's draft





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movant to both reply to the response, and respond to the new request for affirmative relief, two separate documents may be used or a request for additional pages may be made.

Paragraph (4) is unchanged.

Subdivision (e). This new provision makes it clear that there is no right to oral argument on a motion. Seven circuits have local rules stating that oral argument of motions will not be held unless the court orders it.

to request reconsideration. The opposing party may have mailed a response about the time of the ruling and be uncertain whether the court has considered it.

Subdivision (c). The changes in the subdivision are stylistic only. No substantive changes are intended.

Subdivision (d). This subdivision has been substantially revised. Paragraph (1) states that a motion must be in writing unless the court permits otherwise. The writing requirement has been implicit in the rule; the Committee decided to make it explicit. There are, however, instances in which a court may permit oral motions. Perhaps the most common such instance would be a motion made during oral argument in the presence of opposing counsel; for example, a request for permission to submit a supplemental brief on an issue raised by the court for the first time at oral argument. Rather than limit oral motions to those made during oral argument or, conversely, assume the propriety of making even extremely complex motions orally during argument, the Committee decided that it is better to leave the determination of the propriety of an oral motion to the court's discretion. The provision also would not disturb the practice in those circuits that permit certain procedural motions, such as a motion for extension of time for filing a brief, to be made by telephone and ruled upon by the clerk.

The format requirements have been moved from Rule 32(b) to this rule. No cover is required, but a caption is needed as well as a descriptive title indicating the purpose of the motion and identifying the party or parties for whom it is filed.

Paragraph (3) establishes page limits; twenty pages for a motion or a response, and ten pages for a reply. Three circuits have established page limits by local rule. The rule does not establish special page limits for those instances in which a party combines a response to a motion with a new request for affirmative relief. Because a combined document most often will be used when there is substantial overlap in the argument in opposition to the motion and in the argument for the affirmative relief, twenty pages may be sufficient in most instances. If it is not, the party may request additional pages. If ten pages is insufficient for the original

notice of motion required.

Paragraph (3) continues the provisions of the old rule concerning the filing of a response to a motion. ~~Although not directly addressed in the rule, a~~ A party filing a response in opposition to a motion may also request affirmative relief. It is the Committee's judgment that it is permissible to combine the response and the new motion in the same document. Indeed, because there may be substantial overlap of arguments in the response and in the request for affirmative relief, a combined document may be preferable. If a request for relief is combined with a response, the caption of the document must alert the court to the request for relief. The time for a response to such a new request and for reply to that response are governed by the general rules regulating responses and replies.

Paragraph (4) is new. It permits the filing of a reply to a response. Two circuits currently have rules authorizing a reply. If there is urgency to decide the motion, the moving party may waive the right to reply or may file the reply very quickly. As a general matter, a reply must not "reargue propositions presented in the motion or present matters that do not reply to the response." Sometimes, matters relevant to the motion arise after the motion is filed; treatment of such matters in the reply is appropriate even though strictly speaking they may not reply to the response.

Subdivision (b). This subdivision remains substantively unchanged except to clarify that one may file a motion for reconsideration, etc., of a disposition by either the court or the clerk. A new sentence is added indicating that if a motion is granted in whole or in part before the filing of timely opposition to the motion, the filing of the opposition is not treated as a request for reconsideration, etc. A party wishing to have the court reconsider, vacate, or modify the disposition must file a new motion that addresses the order granting the motion.

Although the rule does not require a court to do so, it would be helpful if, whenever a motion is disposed of before receipt of any response from the opposing party, the ruling indicates that it was issued without awaiting a response. Such a statement will aid the opposing party in deciding whether

175 of a different number by local
176 rule or by order in a particular
177 case.
178 (e) *Oral Argument.* A motion will be
179 decided without oral argument unless the
180 court orders otherwise.

Committee Note

The rule has been entirely rewritten.

Subdivision (a). Paragraph (1) retains the language from the old rule indicating that an application for an order or other relief is made by filing a motion unless another form is required by some other provision in the rules.

Paragraph (2) outlines the content of a motion. It begins with the general requirement from the old rule that a motion must state with particularity the grounds supporting it and the relief requested. It adds a requirement that all legal arguments should be presented in the body of the motion; a separate brief or memorandum supporting or responding to a motion must not be filed. The Supreme Court uses this single document approach. Sup. Ct. R. 21.1. In furtherance of the requirement that all legal argument must be contained in the body of the motion, paragraph (2) also states that an affidavit that is attached to a motion should contain only factual information and not legal argument.

Paragraph (2) further states that whenever a motion requests substantive relief, a copy of the lower court opinion or agency decision must be attached.

Although it is common to present a district court with a proposed order along with the motion requesting relief, that is not the practice in the courts of appeals. A proposed order is not required and is not expected or desired. Nor is a

153 (D) A cover is not required but
154 there must be a caption
155 that includes the case
156 number, the name of the
157 court, the title of the case,
158 and a brief descriptive title
159 indicating the purpose of
160 the motion and identifying
161 the party or parties for
162 whom it is filed.
163 (3) *Page limits.* A motion or a
164 response to a motion must not
165 exceed twenty pages, exclusive of
166 the corporate disclosure statement
167 and accompanying documents
168 authorized by Rule 27(a)(2)(B),
169 unless the court permits or directs
170 otherwise. A reply to a response
171 must not exceed ten pages.
172 (4) *Number of Copies.* An original
173 and three copies must be filed
174 unless the court requires the filing

131 any duplicating or copying
132 process that produces a
133 clear black image on white
134 paper. The paper must be
135 opaque, unglazed paper, 8-
136 1/2 by 11 inches. Carbon
137 copies must not be used
138 without the court's
139 permission except by pro
140 se persons proceeding in
141 forma pauperis.
142 (B) The text must not exceed
143 6-1/2 by 9-1/2 inches and
144 must be double spaced.
145 Quotations more than two
146 lines long may be indented
147 and single-spaced.
148 Headings and footnotes
149 may be single-spaced.
150 (C) The pages must be stapled
151 or bound at the upper-left-
152 hand corner.

109 filed.

110 (c) *Power of a Single Judge to Entertain a*

111 *Motion.* A single judge of a court of

112 appeals may act on any request for relief

113 that under these rules may properly be

114 sought by motion, but a single judge

115 must not dismiss or otherwise determine

116 an appeal or other proceeding. A court

117 of appeals may provide by rule or by

118 order in a particular case that any

119 motion or class of motions must be acted

120 upon by the court. The action of a

121 single judge may be reviewed by the

122 court.

123 (d) *Form of Papers, Page Limits, and Number*

124 *of Copies.*

125 (1) *In Writing.* A motion must be in

126 writing unless the court permits

127 otherwise.

128 (2) *Format.*

129 (A) A motion, response, or

130 reply may be produced by

87 propositions presented in the
88 motion or present matters that do
89 not reply to the response.
90 (b) *Determination of a Motion for a* Disposition (4-0)
91 *Procedural Order.* A motion for a
92 procedural order -- including any motion
93 under Rule 26(b) -- may be acted upon
94 at any time without awaiting a response,
95 thereto. A court may, by rule or by
96 order in a particular case, authorize the
97 clerk to dispose of motions for specified
98 types of procedural orders. A party
99 adversely affected by the court's, or the
100 clerk's, disposition may file a motion
101 requesting reconsideration, vacation, or
102 modification of such action. Timely
103 opposition to a motion that is filed after
104 the motion is granted in whole or in part
105 does not constitute a request the to
106 reconsideration, vacation, or
107 modification of the disposition; a
108 motion requesting that relief must be

65 upon after

66 reasonable notice.

67 (B) A response may include a

68 request for affirmative

69 relief. The time for

70 response to the new

71 request, and for reply to

72 that response, are

73 governed by the general

74 rules in paragraphs (3)(A)

75 and (4) of this subdivision.

76 The title of the response

77 must, under subparagraph

78 (d)(2)(D), alert the court

79 to the request for relief.

80 (4) *Reply to Response.* The moving

81 party may file a reply to a

82 response. A reply must be filed

83 no later than 3 days after service

84 of the response, unless the court

85 shortens or extends the time. A

86 reply must not reargue

filed.

43 (ii) A notice of motion

44 is not required.

45 (iii) A proposed order is

46 not required.

47 (3) *Response.*

48 (A) Any party may file a

49 response to a motion. The

50 provisions of (2) apply to a

51 response. The response

52 must be filed within 7 10 days

53 after service of the motion

54 unless the court shortens

55 or extends the time, but with the following exceptions:

56 (i) a motion for a

57 procedural order is

58 governed by Rule 27 (b);

59 ~~subdivision (b) of~~

60 ~~this rule~~ and

61 (ii) a motion authorized

62 by Rules 8, 9, 18, or

63 41 may be acted

64

Rule 27(a)(2)

approved 5-3

21 (i) Only affidavits and
22 papers necessary for
23 the determination of
24 the motion may be
25 attached.
26 (ii) An affidavit may
27 contain only factual
28 information, and not
29 legal argument.
30 (iii) A motion seeking
31 substantive relief
32 must include a copy
33 of the lower court
34 opinion or agency
35 decision as a
36 separately identified
37 exhibit.
38 (C) *Documents not required.*
39 (i) A separate brief
40 supporting or
41 responding to a
42 motion must not be

Redraft - March 1995

Rule 27. Motions

1 (a) *In General.*

2 (1) *Application for Relief.* An

3 application for an order or other

4 relief is made by motion unless these rules prescribe

5 another form. ~~is prescribed by~~

6 ~~these rules.~~

7 (2) *Content of a Motion.*

8 (A) *Grounds and relief sought.*

9 A motion must state with

10 particularity the grounds

11 for the motion and the

12 relief sought. The motion

13 must contain the legal

14 argument necessary to

15 support it.

16 (B) *Accompanying documents.*

17 If a motion is supported by

18 affidavits or other papers,

19 they must be served and

20 filed with the motion.

f. Including a copy of the lower court decision

Two commentators question the requirement that a copy of the lower court
opinion or agency decision must be attached to a motion seeking substantive
relief. Both note that the court may already have received a copy either with the
record or an earlier motion. The Committee had discussed this prior to
publication of the draft but decided that the motion packet should be self-
contained and that the absence of the opinion from the packet could substantially
delay action on the motion. The redraft makes no change.

g. Language of subparagraph (a)(2)(C)

One commentator questions the use of mandatory language prohibiting use
of a supporting brief ("a separate brief . . . must not be filed") and permissive
language indicating that a notice of motion or a proposed order "are not
required." The minutes of the Committee's September 1993 discussion of the
draft indicate that the language difference was advertent. The Committee's intent
was to discourage submission of proposed orders but to prohibit use of a separate
brief. If the Committee now believes that it would be better to be consistent, the
subparagraph could be amended to state that the following documents "must not
be filed" and list a separate brief, a notice of motion, and a proposed order.

h. Page limits

The Committee had previously rejected importing the complex provisions
governing length contained in proposed Rule 32 into Rule 27, preferring to use
simple page limitations unless, and until, it becomes clear that it is necessary to
do so. The redraft continues to use page limits.

i. Local rules re: number of copies

This provision became effective December 1, 1994.

c. Opposition to a motion for a procedural order

The existing rule and the draft both permit a court to act upon a motion for a procedural order without awaiting a response from the opposing party. Although two commentators oppose that provision, the redraft suggests that the provision remain fundamentally unchanged. Probably the vast majority of motions made to a court of appeals involve requests for extension of time or permission to exceed brief limits. It would be cumbersome to wait before ruling until the expiration of the time for filing opposition to each such motion. Indeed, having to do so would often make the granting of such motions meaningless as the original due date would arrive before the ruling on the motion and the document for which an extension of time or permission to submit a longer document was sought would already have been filed.

The redraft has been amended, however, to state directly that a party must file a new motion to have the court reconsider, vacate, or modify the disposition of a procedural ruling entered prior to the filing of timely opposition. Although it may be helpful to the opposing party to know whether the court has ruled with or without consideration of the response, the redraft of the rule does not include any such requirement. A suggestion to that effect has, however, been added to the Committee Note.

d. Including a request for affirmative relief in a response.

The redraft, like the Department of Justice's original draft, includes express authorization to include a request for affirmative relief in a response. Unlike the original DOJ draft, however, the redraft does not provide a special time table for such instances. The DOJ draft stated that if a response includes a motion for affirmative relief, "the reply may be joined in the same pleading with a response to that motion for affirmative relief and that pleading may be filed within 7 days of service of the motion for affirmative relief." I am uncertain which approach is better, but I adopted the ABA suggestion as it is consistent with the approach the Committee described in its Committee Note (when it decided to treat this subject in the note rather than the text).

e. Content of a reply

The redraft continues the language of the published rule stating that the reply "must not reargue propositions presented in the motion or present matters that do not reply to the response." The Committee Note, however, has been amended to indicate that addressing matters that have arisen since the filing of the motion that are relevant to the motion is acceptable.

e. Page limits

The amended rule establishes page limits for a motion, response, and reply. None of the commentators object to the limits. The following suggestions, however, were made:

i. that tables and cover pages should be excluded from the page count; (one commentator)

ii. that the length of motions is not a problem but that if limits are to be included and if Rule 32 adopts a word limit rather than a page limit, Rule 27 should also use a word limit; (one commentator) and

ii. that the font size, type style, and words per page specifications in Rule 32 should be included in Rule 27, or at least cross-referenced (two commentators).

3. Possible Changes

a. Time period for responsive pleadings

If it is the Committee's judgment that the time for responsive pleadings should be expanded that can be easily accomplished without otherwise disturbing the draft. If, however, the Committee decides to create different time periods for dispositive motions, that will require additional changes. As discussed below, the redraft does not make any special mention of, or provision for, dispositive motions other than the existing distinctions made for "procedural" orders.

b. Dispositive Motions

The Committee discussions about amended Rule 27 included recognition that dispositive motions are not uncommon and that when a dispositive motion is made to a court of appeals, the court may need to grant both extensions of time and permission to file longer documents. The Committee's judgment was that it would be better to handle those matters on an *ad hoc* basis rather than complicate the rule by attempting to fashion different rule provisions governing different types of motions. On the assumption that the Committee's judgment remains unchanged, the redraft does not include any such changes. Nor does the redraft include any specific reference to types of dispositive motions. It is not clear that including reference to them would accomplish anything other than a possible increase in such motions. It is outside the rulemaking authority to have the rule establish the substantive basis for granting any such motion (which I take to be the major thrust of the commentator's suggestion).

supporting or opposing the amendments offered the following suggestions:

a. Including a request for affirmative relief in a response

The American Bar Association Section of Litigation approves the amendments but recommends that paragraph (a)(3) be amended. Paragraph (a)(3) governs a response to a motion. The section recommends that the rule:

i. state that a party filing a response in opposition to a motion may request affirmative relief in the response;
ii. require that the title of the document alert the court to the request for relief; and
iii. provide that the time for a response to such a new request and for a reply to that response be governed by the general rules regulating responses and replies.

b. Request for reconsideration following ex parte ruling

The American Bar Association Section of Litigation and Public Citizen both recommend that subdivision (b) state directly that a party must file a new motion to have the court reconsider, vacate, or modify the disposition of a procedural ruling entered prior to the filing of timely opposition.

The Los Angeles County Bar Association Appellate Courts Committee suggests that the rule should require the court to state whether the initial order was granted without considering any opposition. If the court indicates whether it has considered the opposition papers, the party who filed the opposition will know whether its papers were considered and can then decide whether to request reconsideration.

c. Dispositive motions

One commentator suggests that the rule should address the two main kinds of motions for substantive relief: 1) a motion for summary affirmance or denial, which he says should be granted only "when the position of one party is so clearly correct as a matter of law that no substantial question regarding the outcome of the appeal exists;" and 2) an appellee's motion to dismiss the appeal for lack of appellate jurisdiction.

d. Content of a reply

Proposed paragraph 27(a)(4) states that a reply "must not reargue propositions presented in the motion or present matters that do not reply to the response." One commentator finds that language too restrictive. He argues that a reply should be able to address matters that arise after the motion is filed.

of the rule.

Three commentators, Public Citizen, the Assistant Attorney General of Alaska, and Leslie R. Weatherhead, Esq., object to portions of subdivision (b). Subdivision (b) states that if a motion for a procedural order is decided before the time for filing a response has expired, the timely filing of an opposing response is not considered a request for reconsideration. The assistant attorney general states that the timely filing of opposition should require de novo reconsideration of the motion and the opposing party should not be required to file a motion for reconsideration.

Public Citizen poses a more fundamental objection, that the rule should not permit a court to rule on a motion before the opposing party responds. Public Citizen states that once a ruling is made, the burden effectively shifts to the opposing party to show why it should not have issued even though, ordinarily, the burden would be on the party seeking the motion. Public Citizen suggests that an ex parte ruling should be permitted only if the party filing the motion has sought the consent of the other party. In those instances in which the other party refuses to consent, the rule should require the movant to serve the opposing party by telecopier or overnight delivery and a ruling should be permitted only after a set amount of time (less than the ordinary 7 days), sufficient to allow the adversary to deliver a quick response.

Another commentator joins Public Citizen stating that in all non-exigent circumstances, a court should not render a decision without giving both sides an opportunity to be heard. She too states that if, by not waiting, a court makes an erroneous ruling, the wronged party has the burden to change the status quo.

c. Local rules re: number of copies

Public Citizen also opposes the provision in (d)(4) permitting local rules on the number of copies of a motion that must be filed. The American Bar Association Section of Litigation also recommends deletion of that provision.

2. Support and miscellaneous suggestions

Five commentators provide unqualified support; five others support the amendment but suggest some adjustments. The general sentiment of those supporting the amendments are that they make the rule clearer and more in keeping with modern practice.

Those who support the amendments, or make no general statement either

ISSUES AND CHANGES - RULE 27

Of the 18 commentators on the amended rule, five express unqualified support, another five support the amendments but offer suggestions for further improvement. Three commentators do not indicate either general support or opposition, but provide suggestions for further amendment. Only one commentator opposes the suggested revisions as a whole; three others express opposition to one or more provisions in the amended rule.

1. Opposition

Only one commentator states that Rule 27 should stay "as is." He believes that motion practice in the courts of appeals should not be encouraged. He also specifically opposes the requirement that a copy of the lower court decision accompany the motion because it may be lengthy and part of the joint appendix. He also notes that the use of a typewriter, now permitted in Rule 27(d), is not carried forward to the proposed rule.

Other commentators expressed opposition to specific portions of the amended rule.

a. Time period for responsive pleadings

The State Bar of Arizona believes that the time periods for responding to a motion (7 days) and for replying to a response (3 days) are too short. The association suggests that those time periods be raised to 10 days for a response to a motion and 5 days for a reply to a response. The association notes that the deadlines apply to substantive motions and that a motion for extension of time is not adequate because a decision on a motion for extension may not be rendered until after the time limits in the rule have passed.

Another commentator who expresses general support for the proposed amendments "strongly urges" that the 7-day period for filing a response to a motion be expanded to 21 days when the motion is a dispositive motion for summary affirmance or reversal. The commentator states that 7 days is sufficient for non-dispositive motions.

b. Procedural rulings made without waiting for response

Subdivision (b) of Rule 27 currently provides that a motion for a procedural order may be acted on without awaiting a response. A party who is adversely affected by such action may request reconsideration, vacation, or modification of the action. Those provisions are retained in the published version

18. Leslie R. Weatherhead
Witherspoon, Kelley, Davenport & Toole
422 West Riverside, Suite 1100
Spokane, Washington 99201-0390

Ms. Weatherhead supports the change that requires all matters relating to a motion to be contained in a single document.

Ms. Weatherhead, however, opposes that portion of the rule (also found in the current rule) that authorizes rulings to be made routinely based on only one party's showing. She states that the rule in <u>all</u> non-exigent cases should be that a court does not decide until both adversaries have been heard. If, by not waiting to hear both sides, a court makes an erroneous ruling, the wronged party has the burden to change the status quo via a rehearing.

earlier motions. Public Citizen also suggests that there is no need to require service of a copy of the decision below on each party because the parties presumably already have a copy of the decision.

Public Citizen opposes the portion of the rule allowing a procedural ruling without waiting for a response (a provision that exists in the current rule). Public Citizen believes that issuing a ruling subject to reversal on reconsideration may effectively place the burden on the party seeking to have the decision reversed, even if ordinarily the burden of obtaining the ruling would be on the movant. Public Citizen suggests that an ex parte ruling should be permitted only if the party filing the motion has sought the consent of the other party and, if consent is refused, the motion is served by telecopier or overnight delivery. A ruling should be made in such instances (subject to reconsideration) only after a set amount of time (less than the full 7 days) sufficient to allow the adversary to deliver a quick response.

The last paragraph of subdivision (b) appears to require a separate motion to reconsider. If that is correct, Public Citizens suggests that the rule state so expressly. Public Citizen, however, opposes such a requirement especially when a ruling and a response cross in the mail.

Public Citizen does not believe that the length of motions is a problem but states that if the length limits for a brief is to be expressed in number of words, Public Citizen sees no reason for stating the limit for a motion in number of pages.

Public Citizen opposes the provision in (d) (4) encouraging adoption of local rules on the number of copies of motions to be filed.

17. James A. Shapiro, Esquire
1660 North LaSalle, #2401
Chicago, Illinois 60614

Mr. Shapiro suggests that Rule 27 should directly address the two main kinds of motions for substantive relief: 1) a motion for summary affirmance or reversal; and 2) an appellee's motion to dismiss the appeal. The rule should clearly authorize substantive appellate motions. Summary disposition should be appropriate "when the position of one party is so clearly correct as a matter of law that no substantial question regarding the outcome of the appeal exists." *Williams v. Chrans*, 1994 WL 709027 (7th Cir. Dec. 22, 1994). A motion to dismiss an appeal is appropriate only when the court of appeals does not have appellate jurisdiction. Mr. Shapiro provides draft language.

12. John S. Moore, Esquire
Valikanje, Moore & Shore, Inc., P.S.
405 East Lincoln Avenue
P.O. Box C2550
Yakima, Washington 98907

Mr. Moore approves of the proposed amendments without further comment.

13. National Association of Criminal Defense Lawyers
1627 K Street, N.W.
Washington, D. C. 20006

The association states that the proposed "uniform, modern approach is highly commendable."

14. New Jersey State Bar Association
One Constitution Square
New Brunswick, New Jersey 08901-1500

The association states that the amended rule is a helpful clarification and simplification of the current rule and is basically consistent with motion procedures already employed in the third circuit.

15. Ninth Circuit Senior Advisory Board
comments forwarded by Mr. Mark Mendenhall
Assistant Circuit Executive
United States Courts for the Ninth Circuit
121 Spear Street, Suite 204
Post Office Box 193846
San Francisco, California 94119-3846

The Senior Advisory Board is a body of distinguished, experienced senior counsel who provide advice and guidance to the Ninth Circuit Judicial Council and the Ninth Circuit Judicial Conference. The board supports the amendments because they make the rule clearer and easier to follow.

16. Public Citizen Litigation Group
2000 P. Street, N.W., Suite 700
Washington, D.C. 20036

Public Citizen suggests that the rule need not require that a motion be accompanied by a copy of the decision if the decision has already been received by the court of appeals whether with the record itself or with

9. Honorable Cornelia G. Kennedy
United States Circuit Judge
U.S. Courthouse
Detroit, Michigan 48226

Judge Kennedy asks whether Rule 27 should have a cross-reference to the words-per-page requirement of Rule 32(a)(6). She believes that with only the page limitation and the word processor's ability to reduce spacing, one may need a magnifying glass to read the words.

10. Los Angeles County Bar Association
Appellate Courts Committee
617 South Olive Street
Los Angeles, California 90014-1605

The Appellate Courts Committee unanimously approves the proposed amendments but suggests that the rule should require the court to state whether the initial order was granted without considering any opposition filed. The suggestion is made in light of the last sentence of subdivision (b) which states that "timely opposition to a motion that is filed after the motion is granted in whole or in part does not constitute a request for reconsideration, vacation, or modification of the disposition." If the court indicates that the motion was made without consideration of the opposition, the party who filed the opposition will know that its papers were not considered and can then decide whether to request reconsideration.

11. Gordon MacDougall, Esquire
1025 Connecticut Avenue, N.W.
Washington, D.C. 20036

Mr. MacDougall states that Rule 27 should stay "as is." He states that motion practice in the courts of appeals should not be encouraged. He opposes the requirement that a copy of the lower court decision be included because it may be lengthy and part of a joint appendix. He also notes that the use of a typewriter, now permitted in Rule 27(d), is not carried over to the proposed rule.

6. Mary S. Elcano, Esquire
Senior Vice President, General Counsel
United States Postal Service
475 L'Enfant Plaza, S.W.
Washington, D.C. 20260-1100

The postal service notes that format requirements have been moved to this rule from Rule 32 and that the proposed amendments establish a 20 page limit for motions and responses but that the font size and words per page limits in proposed Rule 32 are neither incorporated by reference or explicitly states in this rule. The service suggests that Rule 27 include font size, type style, and number of word specifications consistent with Rule 32.

7. Honorable Cynthia M. Hora
Assistant Attorney General
Office of Special Prosecutions and Appeals
310 K. Street, Suite 308
Anchorage, Alaska 99501-2064

Ms. Hora objects to that portion of subdivision (b) which states if a motion for a procedural order is decided before the time for filing a response has expired, the timely filing of an opposing response is not considered a request for reconsideration. She suggests that the filing of timely opposition should require de novo reconsideration of the motion. If her suggestion were adopted, the opposing party would not need to file a motion for reconsideration.

8. P. Michael Jung, Esquire
Strasburger & Price, L.L.P.
901 Main Street, Suite 4300
Dallas, Texas 73202

Mr. Jung points out that events occur during the pendency of an appellate motion that are material to the disposition of the motion. 27(a)(4) states that a reply "must not reargue propositions presented in the motion or present matters that do not reply to the response." Mr. June states that 27(a)(4) should permit a reply to reference matters that arise after the motion is filed. He gives an example: If a movant seeks to stay an appeal due to a bankruptcy filing, the respondent may oppose the motion on the ground that it anticipates the stay will be lifted; the movant should be able to reply that the bankruptcy court has denied the motion to lift the stay.

the rule have passed. The association suggests the timetable in the Arizona appellate rules that requires a response within 10 days after service of a motion and a reply within 5 days after service of the response.

The association also questions to language in subdivision (c). Subdivision (c) says that a "separate brief . . . must not be filed" whereas a "notice of motion" and a "proposed order" are "not required." Why is mandatory language used for supporting brief while permissive language is used for notices of motion and proposed orders?

3. District of Columbia Bar
   Section on Courts, Lawyers and the Administration of Justice
   Anthony C. Epstein, Co-chair
   Jenner & Block
   601 Thirteenth Street, N.W., Suite 1200
   Washington, D. C. 20005

   The section generally supports the proposed amendments but "strongly urge[s]" one additional change. The proposed revision leaves unchanged the current requirement that opposition to a motion is due seven days after service of the motion. The section states that the 7-day period is adequate for non-dispositive motions but not for dispositive motions for summary affirmance or reversal. The section states that "[m]any circuits now resolve a substantial percentage of appeals on motions for summary affirmance or reversal." They suggest that the time to respond to dispositive motions should be 21 days. The time to respond to other motions (for example a motion for a stay) would continue to be 7 days.

4. The State Bar of California
   The Committee on Appellate Courts
   555 Franklin Street
   San Francisco, California 94102-4498

   The committee supports the proposed change as long as tables and cover pages are excluded from the page count.

5. The State Bar of California
   The Committee on Federal Courts
   555 Franklin Street
   San Francisco, California 94102-4498

   The committee endorses the amendments.

COMMENTS ON PROPOSED AMENDMENT OF FED. R. APP. P. 27

Rule 27 is entirely rewritten. The amendments require that any legal argument necessary to support the motion must be contained in the motion; no separate brief is permitted. The amendments also make it clear that a reply to a response may be filed. A motion or a response to a motion must not exceed 20 pages and a reply to a response may not exceed 10 pages. The form requirements are moved from Rule 32(b) to subdivision (d) of this rule. Subdivision (e) makes it clear that a motion will be decided without oral argument unless the court orders otherwise.

1. American Bar Association
Section of Litigation
750 North Lake Shore Drive
Chicago, Illinois 60611

The section approves the amendments subject to criticisms of subdivisions (a)(3) and (b).

The section recommends amendment of (a)(3) to state expressly that (1) a party filing a response in opposition to a motion may also request affirmative relief in the response document; (2) the title of the document should alert the court to the request for relief; and (3) the time for a response to such a new request and for reply to that response is governed by the general rules regulating responses and replies.

The section also recommends amendment of subdivision (b) to state directly that a party must file a new motion to have the court reconsider, vacate, or modify the disposition of a procedural ruling prior to the filing of timely opposition.

The section also recommends that (d)(4) be amended to delete the ability of a circuit to change the 3 copies requirement by local rule.

2. State Bar of Arizona
111 West Monroe, Suite 1800
Phoenix, Arizona 85003-1742

The State Bar of Arizona opposes the time deadlines for responding to a motion (7 days) and for replying to a response (3 days). The deadlines apply even to substantive motions such as a motion to dismiss for lack of subject matter jurisdiction. The association does not believe that a motion for extension of time adequately meets the objection because a party may not receive a decision of a motion for extension before the time limits in

used or a request for additional pages may be made.

Paragraph (4) is unchanged.

Subdivision (e). This new provision makes it clear that there is no right to oral argument on a motion. Seven circuits have local rules stating that oral argument of motions will not be held unless the court orders it.

granting the motion.

Subdivision (c). The changes in the subdivision are stylistic only. No substantive changes are intended.

Subdivision (d). This subdivision has been substantially revised. Paragraph (1) states that a motion must be in writing unless the court permits otherwise. The writing requirement has been implicit in the rule; the Committee decided to make it explicit. There are, however, instances in which a court may permit oral motions. Perhaps the most common such instance would be a motion made during oral argument in the presence of opposing counsel; for example, a request for permission to submit a supplemental brief on an issue raised by the court for the first time at oral argument. Rather than limit oral motions to those made during oral argument or, conversely, assume the propriety of making even extremely complex motions orally during argument, the Committee decided that it is better to leave the determination of the propriety of an oral motion to the court's discretion. The provision also would not disturb the practice in those circuits that permit certain procedural motions, such as a motion for extension of time for filing a brief, to be made by telephone and ruled upon by the clerk.

The format requirements have been moved from Rule 32(b) to this rule. No cover is required, but a caption is needed as well as a descriptive title indicating the purpose of the motion and identifying the party or parties for whom it is filed.

Paragraph (3) establishes page limits; twenty pages for a motion or a response, and ten pages for a reply. Three circuits have established page limits by local rule. The rule does not establish special page limits for those instances in which a party combines a response to a motion with a new request for affirmative relief. Because a combined document most often will be used when there is substantial overlap in the argument in opposition to the motion and in the argument for the affirmative relief, twenty pages may be sufficient in most instances. If it is not, the party may request additional pages. If ten pages is insufficient for the original movant to both reply to the response, and respond to the new request for affirmative relief, two separate documents may be

in the body of the motion, paragraph (2) also states that an affidavit that is attached to a motion should contain only factual information and not legal argument.

Paragraph (2) further states that whenever a motion requests substantive relief, a copy of the lower court opinion or agency decision must be attached.

Although it is common to present a district court with a proposed order along with the motion requesting relief, that is not the practice in the courts of appeals. A proposed order is not required and is not expected or desired. Nor is a notice of motion required.

Paragraph (3) continues the provisions of the old rule concerning the filing of a response to a motion. Although not directly addressed in the rule, a party filing a response in opposition to a motion may also request affirmative relief. It is the Committee's judgment that it is permissible to combine the response and the new motion in the same document. Indeed, because there may be substantial overlap of arguments in the response and in the request for affirmative relief, a combined document may be preferable. If a request for relief is combined with a response, the caption of the document should alert the court to the request for relief. The time for a response to such a new request and for reply to that response are governed by the general rules regulating responses and replies.

Paragraph (4) is new. It permits the filing of a reply to a response. Two circuits currently have rules authorizing a reply. If there is urgency to decide the motion, the moving party may waive the right to reply or may file the reply very quickly.

Subdivision (b). This subdivision remains substantively unchanged except to clarify that one may file a motion for reconsideration, etc., of a disposition by either the court or the clerk. A new sentence is added indicating that if a motion is granted in whole or in part before the filing of timely opposition to the motion, the filing of the opposition is not treated as a request for reconsideration, etc. A party wishing to have the court reconsider, vacate, or modify the disposition must file a new motion that addresses the order

197 unless the court permits or directs
198 otherwise. A reply to a response
199 must not exceed ten pages.
200 (4) *Number of Copies.* An original
201 and three copies must be filed
202 unless the court requires the filing
203 of a different number by local
204 rule or by order in a particular
205 case.
206 (e) *Oral Argument.* A motion will be
207 decided without oral argument unless the
208 court orders otherwise.

Committee Note

The rule has been entirely rewritten.

Subdivision (a). Paragraph (1) retains the language from the old rule indicating that an application for an order or other relief is made by filing a motion unless another form is required by some other provision in the rules.

Paragraph (2) outlines the content of a motion. It begins with the general requirement from the old rule that a motion must state with particularity the grounds supporting it and the relief requested. It adds a requirement that all legal arguments should be presented in the body of the motion; a separate brief or memorandum supporting or responding to a motion must not be filed. The Supreme Court uses this single document approach. Sup. Ct. R. 21.1. In furtherance of the requirement that all legal argument must be contained

175 and single-spaced.
176 Headings and footnotes
177 may be single-spaced.
178 (C) The pages must be stapled
179 or bound at the upper-left-
180 hand corner.
181 (D) A cover is not required but
182 there must be a caption
183 that includes the case
184 number, the name of the
185 court, the title of the case,
186 and a brief descriptive title
187 indicating the purpose of
188 the motion and identifying
189 the party or parties for
190 whom it is filed.
191 (3) *Page limits.* A motion or a
192 response to a motion must not
193 exceed twenty pages, exclusive of
194 the corporate disclosure statement
195 and accompanying documents
196 authorized by Rule 27(a)(2)(B).

153 (1) *In Writing.* A motion must be in
154 writing unless the court permits
155 otherwise.
156 (2) *Format.*
157 (A) A motion, response, or
158 reply may be produced by
159 any duplicating or copying
160 process that produces a
161 clear black image on white
162 paper. The paper must be
163 opaque, unglazed paper, 8-
164 1/2 by 11 inches. Carbon
165 copies must not be used
166 without the court's
167 permission except by pro
168 se persons proceeding in
169 forma pauperis.
170 (B) The text must not exceed
171 6-1/2 by 9-1/2 inches and
172 must be double spaced.
173 Quotations more than two
174 lines long may be indented

131 requesting reconsideration, vacation, or
132 modification of such action. Timely
133 opposition to a motion that is filed after
134 the motion is granted in whole or in part
135 does not constitute a request for
136 reconsideration, vacation, or
137 modification of the disposition.
138 (c) *Power of a Single Judge to Entertain a*
139 *Motion.* A single judge of a court of
140 appeals may act on any request for relief
141 that under these rules may properly be
142 sought by motion, but a single judge
143 must not dismiss or otherwise determine
144 an appeal or other proceeding. A court
145 of appeals may provide by rule or by
146 order in a particular case that any
147 motion or class of motions must be acted
148 upon by the court. The action of a
149 single judge may be reviewed by the
150 court.
151 (d) *Form of Papers, Page Limits, and Number*
152 *of Copies.*

109 reasonable notice.

110 (4) *Reply to Response.* The moving
111 party may file a reply to a
112 response. A reply must be filed
113 no later than 3 days after service
114 of the response, unless the court
115 shortens or extends the time. A
116 reply must not reargue
117 propositions presented in the
118 motion or present matters that do
119 not reply to the response.

120 (b) *Determination of a Motion for a*
121 *Procedural Order.* A motion for a
122 procedural order -- including any motion
123 under Rule 26(b) -- may be acted upon
124 at any time without awaiting a response
125 thereto. A court may, by rule or by
126 order in a particular case, authorize the
127 clerk to dispose of motions for specified
128 types of procedural orders. A party
129 adversely affected by the court's, or the
130 clerk's, disposition may file a motion

87 supporting or
88 responding to a
89 motion must not be
90 filed.
91 (ii) A notice of motion
92 is not required.
93 (iii) A proposed order is
94 not required.
95 (3) *Response.* Any party may file a
96 response to a motion. The
97 provisions of (2) apply to a
98 response. The response must be
99 filed within 7 days after service of
100 the motion unless the court
101 shortens or extends the time, but
102 (A) a motion for a procedural
103 order is governed by
104 subdivision (b) of this rule;
105 and
106 (B) a motion authorized by
107 Rules 8, 9, 18, or 41 may
108 be acted upon after

65 affidavits or other papers,
66 they must be served and
67 filed with the motion.
68 (i) Only affidavits and
69 papers necessary for
70 the determination of
71 the motion may be
72 attached.
73 (ii) An affidavit may
74 contain only factual
75 information and not
76 legal argument.
77 (iii) A motion seeking
78 substantive relief
79 must include a copy
80 of the lower court
81 opinion or agency
82 decision as a
83 separately identified
84 exhibit.
85 (C) *Documents not required.*
86 (i) A separate brief

44 ~~original and three copies must be filed unless the~~
45 ~~court requires the filing of a different number by local~~
46 ~~rule or by order in a particular case.~~

47 **Rule 27. Motions**

48 (a) *In General.*

49 (1) *Application for Relief.* An
50 application for an order or other
51 relief is made by motion unless
52 another form is prescribed by
53 these rules.

54 (2) *Content of a Motion.*

55 (A) *Grounds and relief sought.*
56 A motion must state with
57 particularity the grounds
58 for the motion and the
59 relief sought. The motion
60 must contain the legal
61 argument necessary to
62 support it.

63 (B) *Accompanying documents.*
64 If a motion is supported by

22 ~~Rule 27 as to motions generally, motions for~~
23 ~~procedural orders, including any motion under Rule~~
24 ~~26(b), may be acted upon at any time, without~~
25 ~~awaiting a response thereto, and pursuant to rule or~~
26 ~~order of the court, motions for specified types of~~
27 ~~procedural orders may be disposed of by the clerk.~~
28 ~~Any party adversely affected by such action may by~~
29 ~~application to the court request consideration, vacation~~
30 ~~or modification of such action.~~
31 ~~(c) *Power of a single judge to entertain motions.*~~
32 ~~In addition to the authority expressly conferred by~~
33 ~~these rules or by law, a single judge of a court of~~
34 ~~appeals may entertain and may grant or deny any~~
35 ~~request for relief which under these rules may properly~~
36 ~~be sought by motion, except that a single judge may~~
37 ~~not dismiss or otherwise determine an appeal or other~~
38 ~~proceeding, and except that a court of appeals may~~
39 ~~provide by order or rule that any motion or class of~~
40 ~~motions must be acted upon by the court. The action~~
41 ~~of a single judge may be reviewed by the court.~~
42 ~~(d) *Form of Papers; Number of Copies.* All~~
43 ~~papers relating to a motion may be typewritten. An~~

~~**Rule 27. Motions**~~

1 ~~(a) *Content of motions; response.* Unless~~
2 ~~another form is elsewhere prescribed by these rules,~~
3 ~~an application for an order or other relief shall be~~
4 ~~made by filing a motion for such order or other relief~~
5 ~~with proof of service on all other parties. The motion~~
6 ~~shall contain or be accompanied by any matter~~
7 ~~required by a specific provision of these rules~~
8 ~~governing such a motion, shall state with particularity~~
9 ~~the grounds on which it is based, and shall set forth~~
10 ~~the order or relief sought. If a motion is supported by~~
11 ~~briefs, affidavits or other papers, they shall be served~~
12 ~~and filed with the motion. Any party may file a~~
13 ~~response in opposition to a motion other than one for~~
14 ~~a procedural order [for which see subdivision (b)]~~
15 ~~within 7 days after service of the motion, but motions~~
16 ~~authorized by Rules 8, 9, 18 and 41 may be acted~~
17 ~~upon after reasonable notice, and the court may~~
18 ~~shorten or extend the time for responding to any~~
19 ~~motion.~~
20 ~~(b) *Determination of motions for procedural*~~
21 ~~*orders.* Notwithstanding the provisions of (a) of this~~

Three ~~3~~ calendar days are added to the prescribed period when a party is required or permitted to do an act w/i a prescribed period after service of a paper upon that party unless ....

~~being served with a paper~~

Rule 26. Computation and Extension of Time

* * * * *

1 (c) *Additional Time after Service by Mail or*
2 *Commercial Carrier.* Whenever a party is required or
3 permitted to do an act within a prescribed period after
4 service of a paper upon that party and the paper is
5 served by mail, 3 days shall be are added to the
6 prescribed period. If a paper is served by next-day
service provided by a reliable commercial carrier, one
day is added to the prescribed period. For purposes
of computing time under this subdivision, Saturdays,
Sundays, and legal holidays are counted.

Committee Note

The amendment is a companion to the proposed amendments to Rule 25 that permit service on a party by commercial carrier. If a commercial carrier is used, Rule 25 requires the use of next-day delivery service. The amendment to this rule, therefore, provides a one day extension for responding to a paper served by commercial carrier.

Next-day service is required to provide symmetry with the amendment to Rule 26 providing a one-day extension when a party is required to respond within a fixed number of days after service and the service is by commercial carrier. Service by commercial carrier is complete upon delivery of a document to the carrier in a time and manner that permits the carrier to make next-day delivery. The language "delivery of a document to a carrier" is broad enough to permit a party to deposit a document in a carrier's drop-box rather than personally delivering it to a carrier's agent, as long as the time and manner of delivery to the carrier permits the carrier to make next-day delivery.

The amendment also expresses a desire that when reasonable, service on a party be accomplished by a manner as expeditious as the manner used to file the paper with the court. When a brief or motion is filed with the court by hand delivering the paper to the clerk's office, or by overnight courier, the copies should be served on the other parties by an equally expeditious manner -- meaning either by personal service, if distance permits, or by overnight courier, if mail delivery to the party is not ordinarily accomplished overnight. The reasonableness standard is included so that if a paper is hand delivered to the clerk's office for filing but the other parties must be served in a different city, state, or region, personal service on them ordinarily will not be expected. It might be expected, however, if the filing attorney's firm has a branch office in the other city. If use of an equally expeditious manner of service is not reasonable, use of the next most expeditious manner may be. For example, if the paper is filed by hand delivery to the clerk's office but the other parties reside in distant cities, service on them need not be personal but in most instances should be by overnight courier. Even that may not be required, however, if the number of parties that must be served would make the use of overnight service too costly.

Revised draft - March 1995

Rule 25. Filing and Service

* * * * *

1 (c) *Manner of Service.* Service may be
2 personal, ~~or~~ by mail, or by next-day
3 service provided by a reliable
4 commercial carrier. ~~When reasonable,~~
5 ~~considering such factors as distance and~~
6 ~~cost, service on a party must be by a~~
7 ~~manner at least as expeditious as the~~
8 ~~manner used to file the paper with the~~
9 ~~court.~~ Personal service includes delivery
10 of the copy to a ~~clerk or other~~
11 responsible person at the office of
12 counsel. Service by mail is complete on
13 mailing. Service by commercial carrier
14 is complete upon delivery to the carrier
15 in a manner and time that permits the
16 carrier to make next-day delivery.

Committee Note

Subdivision (c). The amendment permits service by "next-day service provided by a reliable commercial carrier."

3 days after service. But the existence of such a provision still will not bring the question from the realm of theory to that of pragmatic difficulty because whether the 3-day extension is added to the 3 day response period or not the time for responding is less than 7 days. So, if a response to a motion is served on a Thursday, the reply will be due the following Friday without regard to whether the due date is computed as 3 days after service (Tuesday because weekend days do not count when the period is less than 7 days) plus the 3-day extension (bringing the due date to Friday) or 6 days after service (Friday because the weekend days do not count because the period is less than 7 days). Although none of the existing rules and none of the proposed amendments raise a genuine conflict of this sort, it may still be advisable to clarify the interrelationship of the two sections. The time period in subdivision (a) could be defined as less than 7 days including any days added by subdivision (c). Alternatively, the rule could provide that weekends and holidays do not count if "the period of time prescribed or allowed, excluding any days added by subdivision (c), is less than 7 days."

There is another ambiguity created by subdivisions (a) and (c). The question is whether the 3-day extension provided by subdivision (c) is itself a period of less than 7 days for purposes of subdivision (a). In other words, if the time for responding after service is 30 days and service is by mail, does the party served have 33 days in which to respond, or 30 days plus 3 days and, as to the latter 3 days, do weekends and holidays count? Consider the following example. An appellant serves its principal brief by mail on a Wednesday. If the appellee's brief is due 33 days later, it is due on Monday. If, however, the appellee's brief is due 30 days later, plus a separate 3 day period because of the mailing, it is due Wednesday (30 days ends on Friday, then the additional 3-day period is computed excluding weekend days.) Although one court, applying a similar agency regulation, adopted the latter interpretation, *Kessler Institute for Rehabilitation v. NLRB*, 669 F.2d 138 (3d Cir. 1982), I doubt that is the result intended. Language could be added to subdivision (c) indicating that for purposes of the three-day extension, weekend and holidays are counted.

Although I believe that these ambiguities should be addressed, since subdivision (a) has not been published, I suggest that these ambiguities be addressed at the time of style revision. I suggest that the less than 7-day period in subdivision (a) should be computed excluding any days added by subdivision (c); but that the 3 day period in subdivision (c) should include weekends and holidays.

The suggestion made by Public Citizen that the 3-day extension is insufficient for documents served by mail was considered by all of the Advisory Committee's last fall and none of them, including this Committee, suggested any change.

the party, the party's attorney, or some other member or employee of the attorney's law firm, may be too restrictive. Would it require a law firm in a large city to have its own messengers rather than permitting the firm to use an outside messenger service? While that may not be a hardship for a large firm, it certainly could be for a small firm. Might the definition undercut the requirement in Rule 25 that, when reasonable, service be accomplished in as expeditious a manner as filing with the court. If a motion is filed by hand delivering it to the clerk's office, service might easily be accomplished by faxing the motion to a "friendly" law firm in the opposing party's community for the purpose of having someone in that firm deliver a copy of the motion to the party or the party's attorney. Although pragmatically that method is probably as expeditious as personal service will it matter that it is not personal service?

The fourth alternative, seems the only realistic one. It would require an amendment not only of Rule 26, but also of Rule 25. Rule 25 would be amended to authorize service by "next-day service provided by a reliable commercial carrier." Such service would be complete upon "delivery to the carrier in a manner and time that permits the carrier to make next-day delivery." Rule 26 would be amended to provide a one-day extension when service is by "overnight service provided by a reliable commercial carrier."

Other suggestions for refinement of the rule involve eliminating the adjective "reliable" or defining it. If the Committee concurs, the adjective may be easily deleted. Defining it is a daunting matter as to which I have no suggestions.

One of the commentators suggests that the interrelationship between 25(a) and 26(c) should be clarified. This is a matter that the Committee has discussed in the past, but has not as yet taken any steps toward amendment. It is not clear how the 3-day extension provided by 26(c) interacts with the less than 7-day rule in 26(a). Rule 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 accomplished by mail.

There are at least two ambiguities created by subdivisions (a) and (c). The first is whether the 3-day extension provided by (c) is added to the original time period for purposes of determining whether the responsive time is less than 7 days for purposes of subdivision (a). Two responses are possible: 1) the three days in 26(c) are added to the original time period to determine whether it is less than 7 days for purposes of 26(a); or 2) 26(a) operates first to determine the deadline and then the 3 days provided by 26(c) are added to the deadline. The issue is currently unresolved because 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. If, however, the proposed amendments to Rule 27(a)(4) become effective with regard to motion practice, a reply to a response will be due

firm.
4. if a commercial carrier is used, require use of overnight service and
provide a one-day extension.

Eliminating the three day extension when service is by commercial carrier
has some appeal. Some of the commentators note that service by commercial
carrier is common even though not currently sanctioned by the rules. If that is
true and the three-day extension has not been available in such instances, it may
be unnecessary. I hesitate, however, to come to that conclusion. Once the rule
recognizes service by commercial carrier, if the rule does not also provide an
extension of the reply time, there will be the opportunity to "play games" that
would have the effect of cutting short the opposing party's time for response. If
service by commercial carrier is complete at the time the document is given to the
carrier and the recipient is not afforded an extension, the serving party's use of a
carrier that promises delivery no sooner than 3 days after receipt of a package,
would cut short the recipient's usable reply time.

The second alternative is having the time for filing a responsive document
run from the date of receipt of the document without regard to whether service is
personal or by commercial carrier. That alternative might leave the clerk's office
ignorant of the time within which the responsive document must be filed. The
serving party might prepare a proof of service certificate stating nothing more
than the date on which the party delivered the document to the carrier. The
Committee discussed similar problems in connection with mail service upon
prisoners and decided that running time from the prisoner's receipt of a document
would be largely unworkable.

The commentator suggests running the time from the date of receipt if a
"reliable indication" of the date of such receipt can be obtained. If the party
being served obtains such a "reliable indicator," it will be irrelevant whether
service is personal or by carrier; the party served will know that the responsive
document must be filed within the time measured from receipt. The party being
served would have an incentive to obtain the proof if absent possession of such
proof, the time for responding runs from the date of delivery to the carrier, rather
than the date of receipt by the party being served. But if the sender is unable to
obtain such proof, and obtaining it may depend upon the carrier's policies --
choice of carrier and its policies is outside the control of the recipient -- the
recipient is left once again with the need to determine whether service has been
personal or by commercial carrier. Furthermore, while possession of such a
reliable indicator by either party would supply proof of the date from which time
runs, the clerk's office would not have that proof and would not know when to
expect the responsive pleading.

The third alternative, requiring that personal service be accomplished by

attorney's agent, it is arguable that service by the commercial carrier is "personal" under 25(c).

It may also be true that who signs the proof of service may be the only way to determine whether service is personal or by "reliable commercial carrier." The language in Rule 25(d) does not directly make the identity of the signer of a proof of service relevant to the type of service. Rule 25(d) does not prescribe a specific type of proof of service for each type of service. There are two alternatives: 1) acknowledgment of service by the person served, and 2) a certificate signed by the person making service stating the date and manner of service. A certificate of service is used for both personal service and mail service. Although an acknowledgment of service is currently associated with personal service; if a "reliable commercial carrier" were to obtain a signed acknowledgment of service at the time of delivery, nothing in the rule would indicate that the type of service would become "personal" because of the existence of the acknowledgment.

It is not surprising that current Rule 25 does not make any clear distinctions between the types of service, because nothing in that rule turns on the distinction. Rule 26(c) makes the distinctions relevant because the 3-day extension is not available when service is personal. The current rule provides a 3-day extension only when service is by mail. The distinction between personal service and service by mail is fairly obvious; if the document arrives via the United States Mail, the 3-day extension is available.

The proposed amendment to 26(c) provides, however, that three days are added to the time for response after service of a paper if "the paper is served by mail, <u>or by reliable commercial carrier</u>." The distinction between personal service and service by "reliable commercial carrier" is not as clear. If a paper arrives via Federal Express, it probably is served by commercial carrier. But, if a paper is delivered by Joe's Messenger Service, is it personally served or served by reliable commercial carrier? It may be that the only way to tell is to examine the proof of service. If the certificate of service states that the signer delivered the paper to a carrier instructing the carrier to make delivery; then service is by "carrier." But if the signer states that s/he delivered the paper to a responsible person in the opposing attorney's office, it is "personal." How will the recipient know whether the extension is available or not?

Four possible ways to deal with the lack of distinction between personal service and service by commercial carrier occur to me; they are to:

1. eliminate the three-day extension when service is by commercial carrier;
2. make the time for responding run from the date of receipt of a document, however, served;
3. define personal service so that it is limited to service by the party, the party's attorney, or some other member or employee of the attorney's law

package in a private carrier's pick-up box counts as "delivery to the carrier" or whether the package must be taken to the carrier's office. He also suggests clarifying the interrelationship of subdivisions (a) and (c).

2. Support

Five commentators support the proposed amendments without qualification and three others express support but suggest additional refinements. Many of the commentators note that even though it is not authorized by the existing rules, service by commercial carriers is common.

The commentators who support the change but offer suggestions for further revision suggest the following:

a. The adjective "reliable" should be dropped from the reference to commercial carriers as it can be misunderstood and misinterpreted.
b. That it is unnecessary to add 3 days rather than 1 or 2 if service is made by overnight or second-day carrier.
c. The rule should define "reliable commercial carrier."

3. Miscellaneous

One commentator suggests that the 3-day extension is not enough time to add to the deadline for responding to a paper that is served by mail. The commentator states that mail from the west coast to Washington often takes five days.

4. Possible Changes

The amendment of this rule gives a party who must respond within a specified time after service of a document three additional days to respond when service is by a "reliable commercial carrier," just as a party has a 3-day extension when service is by "mail." Assuming that the Committee affirms its decision that Rule 25 should permit service by a "reliable commercial carrier" the only issues that need to be addressed here are those relating to the 3-day extension.

The most troubling of the opposing comments is the one arguing that the line between personal service and other kinds of service is unclear and that the distinction will depend upon who signs the certificate of service.

It may be true that the proposed amendments blur the distinction between the types of service. Rule 25(c) defines "personal" service as "delivery of the copy to a clerk or other responsible person at the office of counsel." Such delivery is seldom performed by the party or the party's attorney, but typically by the attorney's employee or agent. Viewing the "reliable commercial carrier" as the

ISSUES AND CHANGES - RULE 26

The amendment of this rule gives a party who must respond within a specified time after service of a document three additional days to respond when service is by a "reliable commercial carrier," just as a party has a 3-day extension when service is by "mail." Of the twelve commentators on the proposed amendment to Rule 26, five support the amendments without qualification and three support the amendments but suggest further refinement of them. Three commentators oppose the amendments and one suggests that the three day extension provided for a response when service is by mail is insufficient.

1. Opposition

The United States Postal Service suggests that the Committee should delete the provision making the three-day extension applicable when a document is served by a "reliable commercial carrier." In fact, the Postal Service opposes not only the applicability of the extension but service by commercial carriers. See the preceding discussion about Rule 25. The Postal Service believes that the provision will spawn satellite litigation dealing with the "reliability" of a carrier and the relevance of a parties assumption about a carrier's reliability and that the change is not necessary. Another commentator concurs; he opposes the reference to a "reliable commercial carrier" as ambiguous and unnecessary.

A third commentator opposes the amendment stating that the proposal highlights the fact that there is no clear dividing line between personal service and other kinds of service. He uses the following example. If a lawyer uses a messenger to serve a brief or motion on a party and the messenger either signs a certification under Rule 25(d) or obtains an "acknowledgment of service," service is personal. If a lawyer gives a brief to a private courier service instructing that it be delivered the next day and, having done so, the agent signs a statement certifying that [s]he left the document at the opposing attorney's office with a "clerk or other responsible person," is not that also personal service? The commentator suggests that the real difference between "personal" service, and service by "mail" or by "commercial carrier" rests upon who signs the certificate of service. In all instances someone personally delivers the paper. If it is true that the hallmark of personal service is that the certificate of service is signed by the person who personally delivered the document to the opposing party or his/her counsel, the commentator asks how a recipient of the document will know whether the 3 day extension is available.

The third commentator notes that adding 3 days will discourage the use of overnight service. He suggests adding one 1 day and requiring use of one-day service, or measuring the time for responding from the date of receipt if some reliable indication of such receipt can be obtained. He asks whether dropping a

be willing to sign such forms.

Mr. Rosman suggests that the difference between "personal" service or service "by mail" or "by commercial carrier" rests upon who signs the certificate of service. In all instances <u>someone</u> personally delivers the paper.

The amendment gives a party three additional days to respond to a document served by commercial carrier. Mr. Rosman asks how the attorney receiving the paper will know whether the clerk who gave the brief to the Federal Express or UPS agent has signed the statement certifying service, or whether the Fed Ex or UPS deliverer is going to sign it. Mr. Rosman additionally asks whether the recipient's signing for the package may be used as an acknowledgment of service?

He further notes that adding 3 days will discourage the use of overnight service because it will provide an opponent with 2 more days to respond than if service had been personal.

He suggests either:

a. adding only one (1) day to the time permitted and requiring use of one-day service; or

b. measuring the time for responding from the date of receipt when some reliable indication of such receipt can be obtained, as it frequently can with commercial carriers.

He notes that there is an ambiguity in the proposed rule. The amendment states that "[s]ervice by mail or by commercial carrier is complete upon mailing or delivery to the carrier." Does dropping a package in a Federal Express pick-up box count as "delivery to the carrier" or must the package be taken to the carrier's office?

Mr. Rosman also suggests that the rule should clarify the interrelationship of subdivisions (a) and (c).

10. Ninth Circuit Senior Advisory Board
comments forwarded by Mr. Mark Mendenhall
Assistant Circuit Executive
United States Courts for the Ninth Circuit
121 Spear Street, Suite 204
Post Office Box 193846
San Francisco, California 94119-3846

The Senior Advisory Board is a body of distinguished, experienced senior counsel who provide advice and guidance to the Ninth Circuit Judicial Council and the Ninth Circuit Judicial Conference. The board supports the amendment but reiterates its suggestion that the rule should define "reliable commercial carrier."

11. Public Citizen Litigation Group
2000 P. Street, N.W., Suite 700
Washington, D.C. 20036

Public Citizen suggests that the 3-day extension may not be enough time to add to the deadline for responding to a paper that is served by mail -- mail from the West Coast to Washington, D.C., often takes five days. With motion, a party may have only 7 days or 3 days to file an opposition or a reply, and the three day extension can be insufficient.

12. Michael E. Rosman, Esquire
Associate General Counsel
Center for Individual Rights
1300 Nineteenth Street, N.W.
Suite 260
Washington, D.C. 20036

Mr. Rosman opposes the amendment that would add three days to the time for responding to a brief or motion if it is served by a reliable commercial carrier. Mr. Rosman notes that permitting service by "reliable commercial carrier" makes it clear that there is no clear dividing line between personal service and other kinds of service. Service is "personal" if a lawyer sends a messenger down the block to serve a brief or motion and the messenger obtains an "acknowledgment of service" or signs a certification pursuant to Rule 25(d). Isn't service personal if a brief is given to a Federal Express agent who is instructed to deliver the brief the next day and the Federal Express agent signs a statement certifying that [s]he left the documents at an attorney's office with a "clerk or other responsible person" (Rule 25(c)? isn't that also personal service? Commercial carriers, in their competitive effort to obtain business, might

"reliable" and also about the relevance of a filer's assumption that a particular carrier is "reliable."

6. Los Angeles County Bar Association
Appellate Courts Committee
617 South Olive Street
Los Angeles, California 90014-1605

The Appellate Courts Committee unanimously approves the proposed amendment but recommends deleting the adjective "reliable" because it can be misunderstood or misinterpreted.

7. Gordon P. MacDougall, Esquire
1025 Connecticut Avenue, N.W.
Washington, D.C. 20036

Mr. MacDougall opposes the reference to "reliable commercial carrier" as ambiguous and unnecessary.

8. John S. Moore, Esquire
Valikanje, Moore & Shore, Inc., P.S.
405 East Lincoln Avenue
P.O. Box C2550
Yakima, Washington 98907

Mr. Moore approves of the proposed amendments without further comment.

9. National Association of Criminal Defense Lawyers
1627 K Street, N.W.
Washington, D. C. 20006

The association does not oppose the rule but does not see why 3 days should be added, rather than 1 (or 2) if delivery is made by overnight (or second-day) carrier.

COMMENTS ON PROPOSED AMENDMENT OF FED. R. APP. P. 26

The proposed amendment makes the three day extension for responding to a document served by mail also applicable when the document is served by a commercial carrier.

1. American Bar Association
   Section of Litigation
   750 North Lake Shore Drive
   Chicago, Illinois 60611

   The section supports the proposed amendment as a practical recognition of the widespread use of commercial carriers.

2. State Bar of Arizona
   111 West Monroe, Suite 1800
   Phoenix, Arizona 85003-1742

   The State Bar of Arizona has no objections to and foresees no particular difficulties with the proposed amendments.

3. The State Bar of California
   The Committee on Appellate Courts
   555 Franklin Street
   San Francisco, California 94102-4498

   The committee supports the proposed change.

4. The State Bar of California
   The Committee on Federal Courts
   555 Franklin Street
   San Francisco, California 94102-4498

   The committee endorses the amendments.

5. Mary S. Elcano, Esquire
   Senior Vice President, General Counsel
   United States Postal Service
   475 L'Enfant Plaza, S.W.
   Washington, D.C. 20260-1100

   The postal service suggests deleting the change relating to the use of a "reliable commercial carrier." The service believes that collateral litigation will arise concerning whether a particular carrier should be considered

Rule 26. Computation and Extension of Time

* * * * *

1 (c) *Additional Time after Service by Mail or*

2 *Commercial Carrier.* Whenever a party is required or

3 permitted to do an act within a prescribed period after

4 service of a paper upon that party and the paper is

5 served by mail, or by reliable commercial carrier, 3

6 days ~~shall be~~ are added to the prescribed period.

Committee Note

The amendment is a companion to the proposed amendments to Rule 25 that permit service on a party by commercial carrier. The amendment to this rule makes the three day extension for responding to a paper served by mail also applicable when the paper is served by commercial carrier.

may not be required, however, if the number of parties that must be served would make the use of overnight service too costly.

Committee Note

Subdivision (a). The amendment deletes the language requiring a party to use "the most expeditious form of delivery by mail, except special delivery" in order to file a brief using the mailbox rule. That language was adopted before the Postal Service offered Express Mail and other expedited delivery services. The amendment makes it clear that it is sufficient to use First-Class Mail. Other equally or more expeditious classes of mail service, such as Express Mail, also may be used. In addition, the amendment permits the use of other reliable commercial carriers. The use of private, overnight courier services has become commonplace in law practice. Expedited services offered by commercial carriers often provide faster delivery than first-class mail; therefore, there should be no objection to the use of commercial carriers as long as they are reliable. The amendment adds a requirement that there must be a certificate stating that the brief or appendix was mailed or delivered to the private carrier on or before the last day for filing.

Subdivision (c). The amendment permits service by "reliable commercial carrier." The amendment also expresses a desire that when reasonable, service on a party be accomplished by a manner as expeditious as the manner used to file the paper with the court. When a brief or motion is filed with the court by hand delivering the paper to the clerk's office, or by overnight courier, the copies should be served on the other parties by an equally expeditious manner -- meaning either by personal service, if distance permits, or by overnight courier, if mail delivery to the party is not ordinarily accomplished overnight. The reasonableness standard is included so that if a paper is hand delivered to the clerk's office for filing but the other parties must be served in a different city, state, or region, personal service on them ordinarily will not be expected. It might be expected, however, if the filing attorney's firm has a branch office in the other city. If use of an equally expeditious manner of service is not reasonable, use of the next most expeditious manner may be. For example, if the paper is filed by hand delivery to the clerk's office but the other parties reside in distant cities, service on them need not be personal but in most instances should be by overnight courier. Even that

deletion 8-0

87 The clerk must not refuse to
88 accept for filing any paper
89 presented for that purpose solely
90 because it is not presented in
91 proper form as required by these
92 rules or by any local rules or
93 practices.

* * * * *

94 (c) *Manner of Service.* Service may be
95 personal, ~~or~~ by mail, or by ~~reliable~~ 3rd party commercial carrier for delivery w/i 3 calendar days (9-0)
96 commercial carrier. ~~When reasonable,~~
97 ~~considering such factors as~~ the immediacy of the relief sought, ~~distance and~~
98 ~~cost, service on a party must be by a~~
99 ~~manner at least as expeditious as the~~
100 ~~manner used to file the paper with the~~
101 ~~court.~~ Personal service includes delivery
102 of the copy to a ~~clerk or other~~
103 responsible person at the office of
104 counsel. Service by mail or by
105 commercial carrier is complete on
106 mailing or delivery to the carrier.
107 * * * * * (d) Proof of Service; Filing
108

When a brief or appendix is filed by mailing or dispatch under Rule 25(a)(2)(B)... Mumford amendment.

7-0

Hea.

65 electronic means in
66 accordance with this rule
67 constitutes a written paper
68 for the purpose of applying
69 these rules.

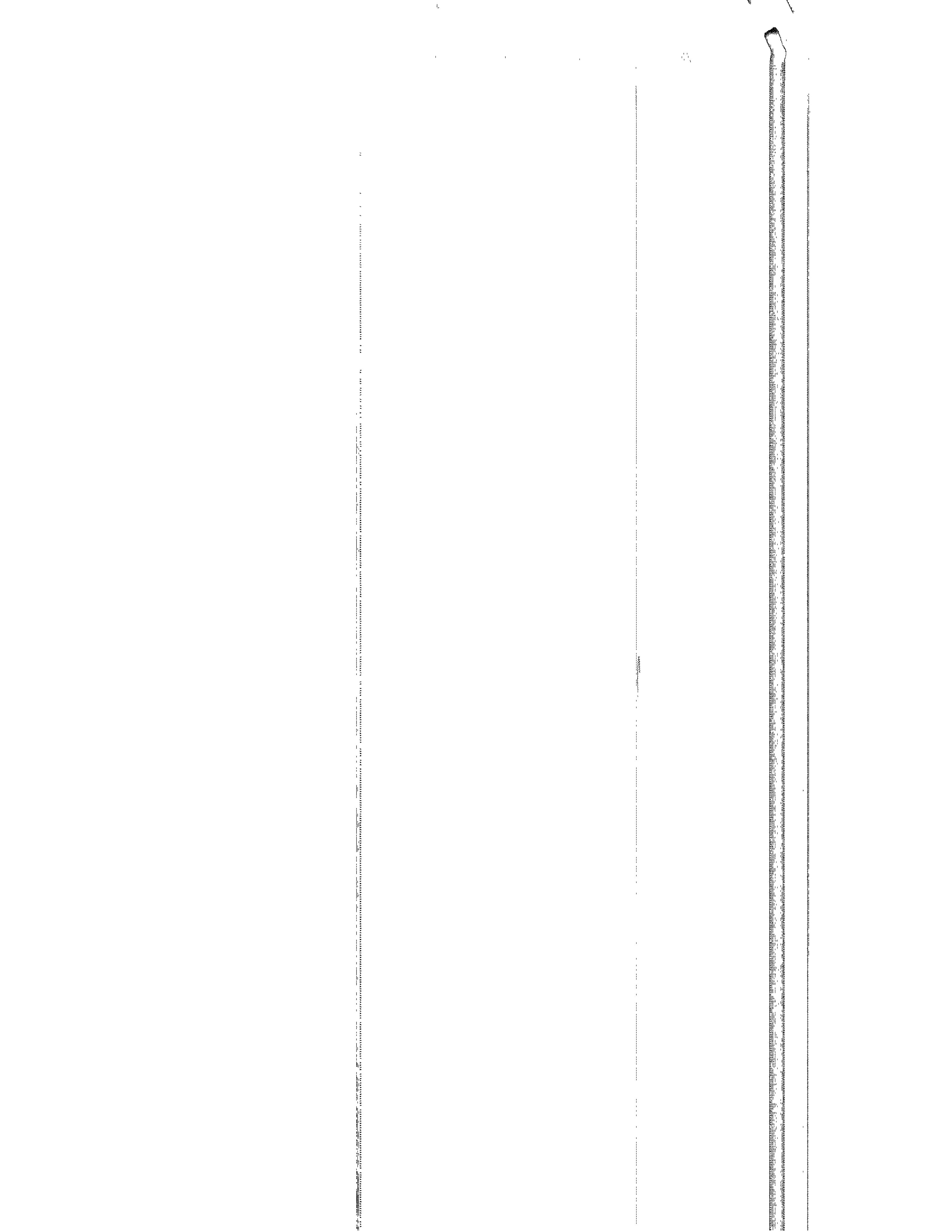
70 (3) *Filing a Motion with a Judge.* If a
71 motion requests relief that may be
72 granted by a single judge, the
73 judge may permit the motion to
74 be filed with the judge~~, in which~~
75 ~~event~~ the judge ~~shall~~ must note
76 ~~thereon~~ the filing date on the
77 motion and ~~thereafter~~ give it to
78 the clerk. ~~A court of appeals~~
79 ~~may, by local rule, permit papers~~
80 ~~to be filed by facsimile or other~~
81 ~~electronic means, provided such~~
82 ~~means are authorized by and~~
83 ~~consistent with standards~~
84 ~~established by the Judicial~~
85 ~~Conference of the United States.~~

86 (4) *Clerk's Refusal of Documents.*

43 system on or before the
44 last day for filing. Timely
45 filing of ~~papers~~ a paper by
46 an inmate confined in an
47 institution may be shown
48 by a notarized statement or
49 declaration (in compliance
50 with 28 U.S.C. § 1746)
51 setting forth the date of
52 deposit and stating that
53 first-class postage has been
54 prepaid.
55 (D) *Electronic filing.* A court of
56 appeals may, by local rule,
57 permit papers to be filed
58 or signed by electronic
59 means, ~~provided such~~
60 means are consistent with
61 technical standards, if any,
62 established by the Judicial
63 Conference of the United
64 States. A paper filed by

STET

No change. Standing Committee shld address "provided" language.



21 ~~special delivery, is used~~ A
22 brief or appendix is timely
23 filed, however, if
24 accompanied by a
25 certification that on or
26 before the last day for
27 filing, it was either:
28 (i) mailed to the clerk
29 by First-Class Mail
30 or other class of
31 mail that is at least
32 as expeditious,
33 postage prepaid; or
34 (ii) dispatched to the
35 clerk by a reliable
36 commercial carrier.
37 (C) *Inmate filing.* ~~Papers~~ A
38 paper filed by an inmate
39 confined in an institution
40 ~~are~~ is timely filed if
41 deposited in the
42 institution's internal mail

7-1

Revised draft - March 1995

Changes approved 7-2

Rule 25. Filing ~~and~~ Service Proof of Filing; Proof of Service

1 (a) *Filing.*

2 (1) *Filing with the Clerk.* A paper
3 required or permitted to be filed
4 in a court of appeals must be
5 filed with the clerk.

6 (2) *Filing: Method and Timeliness.*

7 (A) *In general.* Filing may be
8 accomplished by mail
9 addressed to the clerk, but
10 filing is not timely unless
11 the clerk receives the
12 papers within the time
13 fixed for filing. ~~, except~~
14 ~~that~~

15 (B) *A brief or appendix.* ~~briefs~~
16 ~~and appendices are treated~~
17 ~~as filed on the day of~~
18 ~~mailing if the most~~
19 ~~expeditious form of~~
20 ~~delivery by mail, except~~

submit the certificate of service after filing. When the two can be done simultaneously, I am not certain that any authorization is needed from the rule.

The committee has previously rejected any suggestion to extend the mailbox rule to other documents. Indeed, the court of appeals clerks periodically request that the mailbox rule be repealed for briefs and appendices.

With regard to the notion of a "service attorney," none of the other sets of rules has adopted the practice. I do not think that the appellate rules are the proper place to initiate such an idea. If the Committee supports the idea, it may wish to refer the suggestion to the Advisory Committee on Civil Rules.

With regard to the electronic filing provision, history cautions against tinkering with the language in the published proposals. Those members who have been with the Committee since its October 1993 meeting will recall that much of that meeting was consumed by consideration of proposed "fax filing guidelines" that had been presented to the Judicial Conference for adoption at its September 1993 meeting. The Conference did not adopt the guidelines but requested rapid response from the Advisory Committees. Those guidelines dealt with a variety of matters that the Advisory Committee thought were governed by the Rules Enabling Act and therefore should be subject to the procedures for promulgation and amendment of rules. In the end, the Advisory Committee's recommendation was that the Judicial Conference should establish technical standards, governing such matters as equipment, but that any information concerning the conduct of litigation should be in a rule rather than guidelines adopted by the Judicial Conference.

Unlike the earlier guidelines, the proposal from the Association of the Bar of the City of New York would not involve any violation of the Rules Enabling Act because the association's proposal is that the national rule should require any local rule to address certain fundamental concerns. However, it is my clear impression that neither the Advisory Committee nor the Standing Committee is eager to dive into the complexity of electronic filing matters or feels confident of its abilities to adequately frame the issues.

recommends that the rule be amended to require that any local rule must provide for such things as public access to files, accuracy of electronically stored documents, and security and integrity of the files.

3. Possible Changes

The amendments generally have the support of the commentators. The only portion of the amendments to receive significant opposition is the provision requiring service in as expeditious a manner as the manner used to file the paper with the court; even that provision has more support than opposition. It is true that the time for responding to most documents runs from the date of service and that if service is not personal, Rule 26(c) provides a three day extension. The discussion at the Advisory Committee meeting that led to the proposed language, however, seemed premised upon the fact that the three day extension is sometimes insufficient and that opposing counsel can and do play "games" with service. The Advisory Committee on Appellate Rules, like the other advisory committees, rejected a proposal to extend the 3-day period in Rule 26(c). This proposed amendment to Rule 25, however, has had general committee support. Assuming that the proposal continues to have that support, the draft below makes only minor changes in the language of both the rule and the text. At lines 97-102 I have added language making the requirement applicable "when reasonable considering such factors as distance and extraordinary cost" rather than "when feasible." I chose that language because it is closer to the committee's original intent than the suggestion that the rule should not require comparable service if filing is accomplished by hand delivering the paper to the clerk's office. Indeed, there will be many times when hand delivery to the opposing party or opposing counsel is not an onerous task.

The draft is amended to make the mailbox rule applicable to First-Class Mail and "other classes of mail that are at least equally expeditious." I chose the general language rather than making a reference to Express Mail to try to avoid an obsolescence problem as the Postal Service implements new types of service. I also thought it best to make it clear that any form of mail less than First-Class is not acceptable.

The new draft leaves the "reliable commercial carrier" language unchanged in spite of the opposition. I'm not certain it would be helpful to define "reliable" in the manner one commentator suggested by limiting the rule to those carriers that "guarantee delivery as quickly as First-Class Mail." Nor have I independently thought of a better way.

The draft does not implement any of the miscellaneous suggestions. As for consolidating the certification of mailing and the certificate of service, that is often impossible. Depending upon the method of service, it is often necessary to

Although they support that amendment of subdivision (c), two of those four commentators along with two others suggest refinement of that provision.

- One commentator states that the language of the rule is unclear and that it would be better to state that service must be accomplished "in the same manner" as filing with the court. The same commentator suggests deleting the word "feasible" because it can be misunderstood and misinterpreted.
- One commentator suggests that the standard should be more precise and suggests that the rule require as expeditious service not simply "when feasible" but "when feasible and reasonable, considering such things as distance and extraordinary cost . . .."
- Another commentator opposes requiring personal service when a brief or motion is filed with a clerk of court by hand delivery. The commentator points out that hand delivery on a party or attorney residing in a different state, city, or region may be both difficult and costly to arrange. The commentator suggests amending the language to make it applicable "[w]hen filing with the court is made by mail or commercial carrier, service on a party must be by a manner at least as expeditious . . .."
- A fourth commentator does not oppose requiring personal service when a paper is filed by hand delivering it to the court but suggests amending the committee note to state that when a "brief or motion is filed with the court by hand or by overnight courier, the copies . . ."

d. Miscellaneous

One commentator suggests that the rule should permit the consolidation of the certification of mailing with the certificate of service.

Another commentator suggests that the mailbox rule should be extended to a paper filed in connection with a motion or a petition for rehearing.

Another commentator notes that subdivision (b) requires service "on counsel" if a party is represented by counsel. The commentator suggests that if a party is represented by two or more different firms, that one of them should be designated as the "service attorney" and an opposing party need only serve the "service attorney."

The Association of the Bar of the City of New York is concerned about the proposed language in 25(a)(2)(D) authorizing local rules governing electronic filing. (The language is virtually identical to that in proposed amendments to Civil Rule 5(e), and Bankruptcy Rule 5005(a)(2).) The association is concerned that the proposed amendment does not impose any controls on the rule local courts may develop and that there is no provision for monitoring local rules that are implemented to determine which are most effective. The committee

warrant the costs of the proposal but that if such a change is made it should be confined to instances in which the party seeks immediate action.

2. Support

Four commentators support the proposed amendments without qualification. Seven commentators are supportive of the amendments but suggest additional revisions.

a. Type of mail service

The current rule provides that a brief is treated as filed on the day of mailing "if the most expeditious form of delivery by mail, except special delivery, is used." That language was adopted before the Postal Service offered Express Mail and other expedited delivery services. The Committee wanted to make it clear that use of First-Class Mail is sufficient. The amendment provides that a brief is timely filed if, on or before the day for filing, it is mailed by First-Class Mail. Three commentators point out that a literal reading of the rule would make the "mailbox rule" inapplicable if the party mailed its brief to the court by Express Mail. Since Express Mail and two-day mail service are generally more expeditious than First-Class Mail, the rule should not preclude their use. The United States Postal Service recommends either adding the term Express Mail to the proposed rule or replacing "First-Class Mail" with "United States Mail." Another commentator suggests making the mailbox rule applicable to First-Class Mail and "other classes of mail that are at least equally expeditious."

b. Reliable commercial carriers

The amendment makes the mailbox rule applicable when a brief or appendix is delivered to a "reliable commercial carrier." While most of the commentators support the change, four noted that disputes about the reliability of a carrier are likely to arise. The United States Postal Service notes that the provision does not violate the Private Express Statutes but because of the satellite litigation it believes likely to arise concerning "reliability," the Postal Service suggests deleting the provision in its entirety. The other three commentators suggest either deleting the adjective "reliable" or defining it. For example, a "reliable" carrier might be one that guarantees delivery as quickly as First-Class Mail.

c. Service

The amendments to subdivision (c) require that "when feasible," service on a party be accomplished "by a manner at least as expeditious as the manner of filing." Four commentators expressed their support for that specific change.

ISSUES AND CHANGES - RULE 25

Of the 16 commentators on the published rule, four support the published amendments without qualification and seven generally support the amendments but suggest further revision. Only one commentator expresses general opposition to the amendments while four express opposition to the requirement that service on other parties be by a manner at least as expeditious as the manner of filing with the court.

1. Opposition

a. General

One commentator opposes extending the "mailbox rule" (applicable to the filing of a brief or appendix) to the use of a "reliable commercial carrier." The commentator believes that this and other changes to Rule 25 inappropriately place the emphasis upon the receipt of a brief by the clerk rather than upon what the commentator believes is the more critical time, the receipt of a brief by opposing counsel.

b. Service

The proposed amendments to subdivision (c) permit service by "reliable commercial carrier" in addition to the current methods of personal service or mailing. The amendments also state that "[w]hen feasible, service on a party must be by a manner at least as expeditious as the manner of filing with the court." Four commentators oppose requiring service in as expeditious a manner as the manner of filing with the court.[2]

- One of those commentators states that the rule treats all methods of service as equivalent and there is no justification for placing a limitation on the use of any method.
- Another states that the change is unnecessary because the time for serving and filing a responding brief or motion paper runs from the time of service and is, therefore, subject to the Rule 26(c) extension whenever service is other than personal.
- A third believes that the rule is unclear; he asks if service may be accomplished by First-Class Mail on an opposing party who lives out of state if the paper is personally delivered to the clerk's office for filing. He suggests deleting the sentence.
- A fourth commentator states that there is not a sufficient problem to

[2] As will be discussed below, four commentators state their specific support for the requirement.

citing supplemental authority under Rule 28(j), when the court may rule at any time. Public Citizen states that a cautionary note in the Committee Note may be sufficient but that if a rule change is made it should be confined to cases in which an immediate decision has been sought.

16. Michael E. Rosman, Esquire
Associate General Counsel
Center for Individual Rights
1300 Nineteenth Street, N.W.
Suite 260
Washington, D.C. 20036

Mr. Rosman supports the extension of the "mailbox rule" (under which a brief is deemed filed on the day of mailing) to delivery to a reliable commercial carrier. He also "heartily support[s]" the proposal to permit service by a reliable commercial carrier noting that the limitation in current Rule 25(c) which only permits service by mail or personal service is routinely ignored by both practitioners and the courts.

Mr. Rosman objects to the statement that "[w]hen feasible, service on a party must be by a manner at least as expeditious as the manner of filing with the court." He does not see any legitimate reason for the rule because the time for serving and filing a responding brief or motion paper runs from the time of service and is, therefore, subject to the Rule 26(c) extension when service is other than personal.

Mr. Rosman suggests that the committee incorporate the following additional amendments:

a. Subdivision (b) requires service "on counsel" if a party is represented by counsel. If a party is represented by two or more different firms, Mr. Rosman suggests that one of them must be designated as the "service attorney" and the opposing attorney need only serve papers on the "service attorney."
b. He suggests that electronic service should be permitted; i.e. service by facsimile, modem transfer of files, or other electronic means.

c) compatibility with generally available systems for electronic transmission and retrieval of data; and

d) maintenance of the security and integrity of the files.

The committee urges that some form of monitoring of the local experiments be undertaken with the goal of deriving meaningful and objective data as to the experience of the various courts using different systems and procedures.

14. Ninth Circuit Senior Advisory Board
comments forwarded by Mr. Mark Mendenhall
Assistant Circuit Executive
United States Courts for the Ninth Circuit
121 Spear Street, Suite 204
Post Office Box 193846
San Francisco, California 94119-3846

The Senior Advisory Board is a body of distinguished, experienced senior counsel who provide advice and guidance to the Ninth Circuit Judicial Council and the Ninth Circuit Judicial Conference. The board suggests that defining the term "reliable commercial carrier" could help avoid ambiguity and disputes between counsel, particularly with regard to "reliability."

15. Public Citizen Litigation Group
2000 P. Street, N.W., Suite 700
Washington, D.C. 20036

Public Citizen suggests that the mailbox rule in 25(a)(2)(B) should extend to a paper filed in connection with motion or a petition for rehearing.

With regard to 24(a)(2)(B)(ii), Public Citizen suggests that the rule should allow use of any mail service that guarantees delivery as quickly as first-class mail. That would permit use of Express Mail or two-day mail and limit use of commercial carriers to those that deliver at least that fast. Public Citizen states that use of the term "reliable" is likely to produce more disputes than it will resolve and should be deleted.

With regard to 25(c) (the service provision) Public Citizen states that there is not a sufficient problem to warrant the costs of the proposal. If filing is accomplished by over-night mail, service must be by overnight mail regardless of whether the party being served is likely to, or even has a right to, file a response. Public Citizen states that expeditious service should be required only with respect to matters on which the party filing a paper seeks immediate action or for post-argument submissions (such as letters

rule seems to preclude "other classes of mail that are at least equally expeditious." The section suggests that the Advisory Committee consider adding the last quoted language to the rule.

The association states that the certification requirement is better than the last proposal's reliance upon the postmark. The association suggests that the rule should permit consolidation of the certification of mailing with the certificate of service under 25(d).

The association supports the requirement that service be made, when feasible, in a manner at least as expeditious as that used for filing. The association says that such a requirement is a "welcome response to petty gamesmanship." The association recommends amending the committee note to state that when a "brief or motion is filed with the court <u>by hand or</u> by overnight courier, the copies .... [etc.]"

The association supports the progress toward electronic filing.

13. Association of the Bar of the City of New York
Committee on Federal Courts
Patricia M. Hynes, Chair
Milberg Weiss Bershad Hynes & Lerach
One Pennsylvania Plaza
New York, New York 10119-0165

The committee comments on the proposed 25(a)(2)(D), specifically on the provision allowing local rules governing electronic filing without prior approval by the Judicial Conference and without any requirement that the Conference first develop standards to govern the rules. Given the minimal experience that state and federal courts have had with electronic filing and the developing state of technology, the committee agrees that a period of experimentation and at least some temporary diversity is justified. The committee is concerned, however, that the proposed amendment does not impose any controls on the rules local courts may develop. The committee makes several recommendations many of which are based upon the assumption that electronic filing will be used to reduce the courts' burden of document storage and will result, therefore, in electronic filing of documents that will not be subsequently embodied in an officially filed hard copy. The committee recommends that the rule require that any local rule must provide

a) reasonable access to court files by both parties and non-party members of the public;
b) assurance of the identity of filers and accuracy of the electronically stored document;

9. Los Angeles County Bar Association
Appellate Courts Committee
617 South Olive Street
Los Angeles, California 90014-1605

The Appellate Courts Committee unanimously approves the proposed amendment but recommends deleting the adjectives "reliable" and "feasible" because they can be misunderstood or misinterpreted. The committee also suggests that the language requiring that service "be by a manner at least as expeditious as the manner of filing with the court" is unclear. It would be more clear to say that service must be in the same manner as filing with the court. At a minimum, the committee suggests that the committee note should provide some illustration of how the rule should be applied.

10. Gordon P. MacDougall, Esquire
1025 Connecticut Avenue, N.W.
Washington, D.C. 20036

Mr. MacDougall sees no need to permit delivery by "reliable commercial carrier." He also opposes the revision because it places "emphasis on receipt of briefs by the Clerk, when it is receipt of briefs by opposing counsel which is more critical." Mr. MacDougall also opposes the style revisions because he believes they make "filing" paramount to "service"; he believes that under the current rule the primary emphasis is on "service" and that "filing" has a lesser role. He states that there is not a good reason for separate subsections on electronic filing or inmate filing.

11. John S. Moore, Esquire
Valikanje, Moore & Shore, Inc., P.S.
405 East Lincoln Avenue
P.O. Box C2550
Yakima, Washington 98907

Mr. Moore approves of the proposed amendments without further comment.

12. National Association of Criminal Defense Lawyers
1627 K Street, N.W.
Washington, D. C. 20006

The association supports the amendments. The association points out, however, that in addition to first class mail, the rule should authorize priority mail and express mail. Although first class mail is "sufficient," the

6. Joseph W. Halpern, Elizabeth A. Phelan, & Heather R. Hanneman, Esquires
Holland & Hart
555 Seventeenth Street, Suite 2900
Denver, Colorado 80202-3979

Mr. Halpern, Ms. Phelan, and Ms. Hanneman agree that when a party files a brief or motion with a court by overnight courier that service on an opposing party should be by a method that is at least as expeditious as overnight delivery. They oppose requiring service by hand delivery when a brief or motion is filed with a clerk of court by hand delivery. Hand delivery on parties or attorneys residing in different states, cities, or regions may be both difficult and costly to arrange. They suggest that the second sentence of 25(c) should state: "When filing with the court is made by mail or commercial carrier, service on a party must be by a manner at least as expeditious as the manner of filing with the court whenever feasible."

7. Honorable Paul J. Kelly, Jr.
United States Circuit Judge
P.O. Box 10113
Santa Fe, New Mexico 87504-6113

Judge Kelly is troubled by the provision that "when feasible, service on a party must be by a manner at least as expeditious as the manner of filing with the court." He believes that the language creates ambiguity. He asks whether personal delivery of papers to the clerk's office for filing may be followed by first-class mail to the opposing party who lives out of state? If a document is hand delivered to the clerk's office for filing, is personal delivery to lawyers within the same city required? He states that there should not be litigation over what was "feasible." He suggests deleting the sentence.

8. Honorable Cornelia G. Kennedy
United States Circuit Judge
U.S. Courthouse
Detroit, Michigan 48226

Judge Kennedy questions the need to have service effected in at least as expeditious a manner as that used to file with the court. Having once decided that all the methods of service should be allowed because they are equivalent, she sees no justification for placing this limitation on the use of one method or the other.

4. The State Bar of California
The Committee on Federal Courts
555 Franklin Street
San Francisco, California 94102-4498

The committee endorses the amendments including the requirement that service be by a manner at least as expeditious as the manner of filing. The committee suggests, however, that subdivision (c) set a more precise standard and state that "when feasible and reasonable, considering such things as distance and extraordinary cost, service on a party must be by a manner at least as expeditious ...."

5. Mary S. Elcano, Esquire
Senior Vice President, General Counsel
United States Postal Service
475 L'Enfant Plaza, S.W.
Washington, D.C. 20260-1100

The postal service notes that inasmuch as 39 C.F.R. § 310.1(a)(7)(iii) excludes "papers filed in lawsuits . . . and orders of courts" from the definition of "letter," the private carriage proposed by the amendments would not violate the Private Express Statutes. The service states however, that a literal reading of the rule would give litigants only two choices: First-Class Mail or a "reliable commercial carrier," making Express Mail an unsafe option. The service suggests either adding the term Express Mail to the proposed rule or replacing "First-Class Mail" with "United States Mail." The service states that the second option would eliminate confusion as to whether Priority Mail service could be used. Priority Mail service literally is First-Class Mail but public perception is that it is a distinct service and may lead some litigants to erroneously conclude that the rule does not permit use of Priority Mail.

The postal service, however, suggests deleting the change relating to the use of a "reliable commercial carrier." The service believes that collateral litigation will arise concerning whether a particular carrier should be considered "reliable" and also about the relevance of a filer's assumption that a particular carrier is "reliable."

The service also notes that the proposed rule uses the term "first-class mail" but that correct usage calls for initial caps: i.e. "First-Class Mail."

COMMENTS ON PROPOSED AMENDMENT OF FED. R. APP. P. 25

The proposed amendments provide that in order to file a brief or appendix using the mailbox rule, the brief or appendix must be mailed by first-class mail or delivered to a "reliable commercial carrier." The amendments also require a certificate stating that the document was mailed or delivered to the carrier on or before the last day for filing. Subdivision (c) is also amended to permit service on other parties by a "reliable commercial carrier." Amended subdivision (c) further provides that whenever feasible, service on other parties shall be by a manner at least as expeditious as the manner of filing.

1. American Bar Association
   Section of Litigation
   750 North Lake Shore Drive
   Chicago, Illinois 60611

   The section supports the recognition that most lawyers use commercial carriers.

   The section supports and encourages the adoption of local rules to permit filing by electronic means.

   The section supports the requirement that, when feasible, service be by a manner at least as expeditious as the manner of filing with the court.

2. State Bar of Arizona
   111 West Monroe, Suite 1800
   Phoenix, Arizona 85003-1742

   The State Bar of Arizona has no objections to and foresees no particular difficulties with the proposed amendments.

3. The State Bar of California
   The Committee on Appellate Courts
   555 Franklin Street
   San Francisco, California 94102-4498

   The committee supports the proposed change.

brief or appendix was mailed or delivered to the private carrier on or before the last day for filing.

Subdivision (c). The amendment permits service by "reliable commercial carrier." The amendment also expresses a desire that when feasible, service on a party be accomplished by a manner at least as expeditious as the manner of filing. When a brief or motion is filed with the court by overnight courier, the copies should be served on the other parties in as expeditious a manner -- meaning either by personal service, if distance permits, or by overnight courier, if mail delivery to the party is not ordinarily accomplished overnight.

88 * * * * *

89 (c) *Manner of Service.* Service may be

90 personal, ~~or~~ by mail, or by reliable

91 commercial carrier. When feasible,

92 service on a party must be by a manner at

93 least as expeditious as the manner of filing

94 with the court. Personal service includes

95 delivery of the copy to a clerk or other

96 responsible person at the office of counsel.

97 Service by mail or by commercial carrier

98 is complete on mailing or delivery to the

99 carrier.

100 * * * * *

Committee Note

Subdivision (a). The amendment deletes the language requiring a party to use "the most expeditious form of delivery by mail, except special delivery" in order to file a brief using the mailbox rule. That language was adopted before the Postal Service offered Express Mail and other expedited delivery services. The amendment makes it clear that it is sufficient to use first-class mail. In addition, the amendment permits the use of other reliable commercial carriers. The use of private, overnight courier services has become commonplace in law practice. Expedited services offered by commercial carriers often provide faster delivery than first-class mail; therefore, there should be no objection to the use of commercial carriers as long as they are reliable. The amendment adds a requirement that there must be a certificate stating that the

66 motion requests relief that may be
67 granted by a single judge, the judge
68 may permit the motion to be filed
69 with the judge~~,~~; ~~in which event~~ the
70 judge ~~shall~~ must note ~~thereon~~ the
71 filing date on the motion and
72 ~~thereafter~~ give it to the clerk. ~~A~~
73 ~~court of appeals may, by local rule,~~
74 ~~permit papers to be filed by~~
75 ~~facsimile or other electronic means,~~
76 ~~provided such means are~~
77 ~~authorized by and consistent with~~
78 ~~standards established by the~~
79 ~~Judicial Conference of the United~~
80 ~~States.~~
81 (4) *Clerk's Refusal of Documents.* The
82 clerk must not refuse to accept for
83 filing any paper presented for that
84 purpose solely because it is not
85 presented in proper form as
86 required by these rules or by any
87 local rules or practices.

44 declaration (in compliance
45 with 28 U.S.C. § 1746)
46 setting forth the date of
47 deposit and stating that
48 first-class postage has been
49 prepaid.
50 (D) *Electronic filing.* A court of
51 appeals may, by local rule,
52 permit papers to be filed or
53 signed by electronic means,
54 provided such means are
55 consistent with technical
56 standards, if any, established
57 by the Judicial Conference
58 of the United States. A
59 paper filed by electronic
60 means in accordance with
61 this rule constitutes a
62 written paper for the
63 purpose of applying these
64 rules.
65 (3) *Filing a Motion with a Judge.* If a

22 however, if accompanied by
23 a certification that on or
24 before the last day for filing,
25 it was
26 (i) mailed to the clerk
27 by first-class mail,
28 postage prepaid; or
29 (ii) dispatched to the
30 clerk by a reliable
31 commercial carrier.
32 (C) *Inmate filing.* ~~Papers~~ A
33 paper filed by an inmate
34 confined in an institution
35 ~~are~~ is timely filed if
36 deposited in the institution's
37 internal mail system on or
38 before the last day for filing.
39 Timely filing of ~~papers~~ a
40 paper by an inmate
41 confined in an institution
42 may be shown by a
43 notarized statement or

Rule 25. Filing and Service

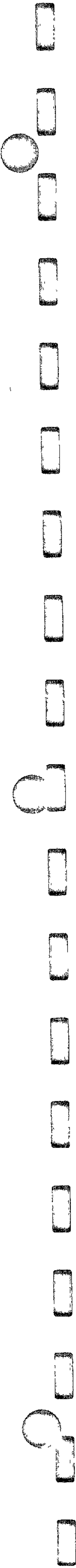
(a) *Filing.*

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

(2) *Filing: Method and Timeliness.*

(A) *In general.* Filing may be accomplished by mail addressed to the clerk, but filing is not timely unless the clerk receives the papers within the time fixed for filing. ~~, except that~~

(B) *A brief or appendix.* ~~briefs and appendices are treated as filed on the day of mailing if the most expeditious form of delivery by mail, except special delivery, is used~~ A brief or appendix is timely filed,



Subdivision (b). The amendment provides that even if relief is requested of a particular judge, the judge may not respond unless the court invites or orders the judge to respond.

The court of appeals ordinarily will be adequately informed not only by the opinions or statements made by the trial court judge contemporaneously with the entry of the challenged order but also by the arguments made on behalf of the party opposing the relief. The latter does not create an attorney-client relationship between the party's attorney and the judge whose action is challenged, nor does it give rise to any right to compensation from the judge.

If the court of appeals desires to hear from the trial court judge, however, the court may invite or order the judge to respond. In some instances, especially those involving court administration or the failure of a judge to act, it may be that no one other than the judge can provide a thorough explanation of the matters at issue. Because it is ordinarily undesirable to place the trial court judge, even temporarily, in an adversarial posture with a litigant, the rule permits a court of appeals to invite an *amicus curiae* to provide a response to the petition. In those instances in which the respondent does not oppose issuance of the writ or does not have sufficient perspective on the issue to provide an adequate response, participation of an *amicus* may avoid the need for the trial judge to participate.

107 procedure prescribed in subdivisions (a)
108 and (b) of this rule.
109 (d) *Form of Papers; Number of Copies.*-- All
110 papers may be typewritten. An original
111 and three copies must be filed unless the
112 court requires the filing of a different
113 number by local rule or by order in a
114 particular case.

Do NOT change to shall. Per BAG

Committee Note

In most instances, a writ of mandamus or prohibition is not actually directed to a judge in any more personal way than is an order reversing a court's judgment. Most often a petition for a writ of mandamus seeks review of the intrinsic merits of a judge's action and is in reality an adversary proceeding between the parties. See, *e.g., Walker v. Columbia Broadcasting System, Inc.*, 443 F.2d 33 (7th Cir. 1971). In order to change the tone of the rule and of mandamus proceedings generally, the rule is amended so that the judge is not treated as a respondent. The caption and subdivision (a) are amended by deleting the reference to the writs as being "directed to a judge or judges."

Subdivision (a). Subdivision (a) applies to writs of mandamus or prohibition directed to a court, but it is amended so that a petition for a writ of mandamus or prohibition does not bear the name of the judge. The amendments to subdivision (a) speak, however, about mandamus or prohibition "directed to a court." This language is inserted to distinguish subdivision (a) from subdivision (c). Subdivision (c) governs all other extraordinary writs, including a writ of mandamus or prohibition directed to an administrative agency rather than to a court and a writ of habeas corpus.

85 (4) Two or more respondents may
86 answer jointly.
87 (5) If briefs or oral argument are
88 required, ~~T~~ the clerk ~~shall~~ must
89 advise the parties, and when
90 appropriate, the trial court judge or
91 amicus curiae. ~~of the dates on~~
92 ~~which briefs are to be filed, if~~
93 ~~briefs are required, and of the date~~
94 ~~of oral argument.~~
95 (6) The proceeding ~~shall~~ must be given
96 preference over ordinary civil
97 cases.
98 (c) *Other Extraordinary Writs.* Application for
99 an extraordinary writs other than one of
100 those provided for in subdivisions (a) and
101 (b) of this rule ~~shall~~ must be made by
102 petition filed with the clerk of the court of
103 appeals with proof of service on the
104 ~~parties named as~~ respondents.
105 Proceedings on such application ~~shall~~ must
106 conform, so far as is practicable, to the

63 ~~other than the petitioner shall also be~~
64 ~~deemed respondents for all purposes.~~
65 ~~Two or more respondents may answer~~
66 ~~jointly. If the judge or judges named~~
67 ~~respondents do not desire to appear in the~~
68 ~~proceeding, they may so advise the clerk~~
69 ~~and all parties by letter, but the petition~~
70 ~~shall not thereby be taken as admitted.~~
71 (1) The court may deny the petition
72 without an answer. Otherwise, it
73 must order the respondent, if any,
74 to answer within a fixed time.
75 4 ~~(2)~~ The court of appeals may invite or
76 order the trial court judge to
77 respond or may invite an amicus
78 curiae to do so. The trial court
79 judge may not respond unless
80 invited or ordered to do so by the
81 court of appeals.
82 2 ~~(3)~~ The clerk must serve the order to
83 respond on all persons directed to
84 respond.

added language approved 7-2.

The petition must

41 (C) include copies of any order
42 or opinion or parts of the
43 record ~~which~~ that may be
44 essential to ~~an~~
45 understand~~ing of~~ the
46 matters set forth in the
47 petition.
48 (3) ~~Upon receipt of~~ When the clerk
49 receives the prescribed docket fee,
50 the clerk ~~shall~~ must docket the
51 petition and submit it to the court.
52 (b) *Denial; Order Directing Answer; Briefs;*
53 *Precedence.*
54 ~~If the court is of the opinion that the writ~~
55 ~~should not be granted, it shall deny the~~
56 ~~petition. Otherwise, it shall order that an~~
57 ~~answer to the petition be filed by the~~
58 ~~respondents within the time fixed by the~~
59 ~~order. The order shall be served by the~~
60 ~~clerk on the judge or judges named~~
61 ~~respondents and on all other parties to the~~
62 ~~action in the trial court. All parties below~~

19 (2) ~~The petition shall contain a~~
20 ~~statement of the facts necessary to~~
21 ~~an understanding of the issues~~
22 ~~presented by the application; a~~
23 ~~statement of the issues presented~~
24 ~~and of the relief sought; a~~
25 ~~statement of the reasons why the~~
26 ~~writ should issue; and~~
27 (A) The petition must:
28 ~~(A)~~ be titled "In re [name of
29 petitioner]."
30 (B) The petition must ~~(B)~~ state:
31 A (i) the relief sought;
32 B (ii) the issues presented;
33 C (iii) the facts necessary to
34 understand the issues
35 presented by the
36 ~~application~~ petition;
37 and
38 D (iv) the reasons why the
39 writ should issue.
40 ~~and~~

Revised draft - March 1995

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

1 (a) ~~*Mandamus or prohibition to a judge or*~~
2 ~~*judges; petition for writ; service and filing.*~~
3 *Mandamus or Prohibition to a Court:*
4 *Petition, Filing, Service, and Docketing.*
5 (1) ~~Application for a writ of~~
6 ~~mandamus or of prohibition~~
7 ~~directed to a judge or judges shall~~
8 ~~be made by filing~~ A party
9 petitioning for a writ of mandamus
10 or prohibition directed to a court
11 SHALL ~~must~~ file a petition ~~therefor~~ with
12 the circuit clerk ~~of the court of~~
13 ~~appeals~~ with proof of service on
14 ~~the respondent judge or judges and~~
14 ~~on~~ all parties to the ~~action~~
15 proceeding in the trial court. All
16 parties to the proceeding in the
17 trial court other than the petitioner
18 are respondents for all purposes.

The party also shall file a copy with the clerk of the trial court. (approved 8-0)

The suggestions that the rule more fully address the procedures for use of an *amicus curiae* call for a level of detail that may not be warranted by the likely infrequency with which an amicus will be used. At the Advisory Committee's April 1994 meeting there was discussion about the proper role of the amicus. At that time the Committee consensus was that the rule need not address the issue that a role would naturally evolve over time or an amicus could seek guidance from the court. The same would seem true of the instances in which the court might involve an amicus or the manner of notifying the petitioner about the participation of the amicus, etc.

It was suggested that the rule should permit a reply to a response. The existing rule does not permit a reply and that does not appear to be current practice.

The provision in subdivision (d) permitting a circuit to require more than 3 copies "by local rule or by order in a particular case" already became effective on December 1, 1994.

The following draft makes the changes noted above and some minor stylistic changes. All changes since publication are shaded.

iii. Subdivision (b)(2) should explain:
- the procedure for identification and invitation of an amicus curiae;
- how and when the petitioner will be notified of the amicus' participation; and
- how the involvement of an amicus will affect the timing of the decision.

iv. Subdivision (b) should be amended to delete the ability of a circuit to adopt a local rule requiring a party to file other than 3 copies of a petition.

c. The United States Postal Service also supports the amendment but expresses a concern similar to the ABA Section of Litigation's third suggestion. The postal service states that the rule should provide guidance concerning the circumstances in which a court should invite an amicus to participate. The postal service suggests that a court should involve an amicus only in "those instances in which the respondent does not oppose issuance of the writ or does not have sufficient perspective on the issue to provide an adequate response." The postal service also suggests that the rule should address the qualifications of those who may be asked to serve as an amicus.

3. Possible Changes

In the event that the Committee considers returning to the earlier draft in order to give the trial judge the right to respond, the Committee will need to address a problem with the preceding draft which was surfaced during the earlier comment period. It is not unusual for a court of appeals to convert, *sua sponte*, an interlocutory appeal into a petition for mandamus; in such an instance a special procedure must be created so that the judge will have notice and the opportunity to respond. The earlier draft did not treat the trial judge as a respondent but required the petitioner in a mandamus proceeding to transmit a copy of the petition to the trial judge at the time of filing. If, however, the court of appeals converts an appeal to a mandamus action, the transmittal at the time of filing provision would not be sufficient to give the trial judge notice and the judge might miss the opportunity to respond.

If the Committee decides to stay with the current draft, the changes suggested by the supporting commentators should be considered. Two of the suggestions seem highly desirable. The rule should state directly that the trial judge may not respond unless requested to do so by the court of appeals. It also seems desirable to authorize a court of appeals to "invite" the judge's participation as well as order it. Both changes are made in the new draft below.

rather than by appeal.

On the other hand, there are distinctions between an appeal and a mandamus proceeding. An appeal normally is filed following final judgment and the trial judge is no longer active in the case; jurisdiction over the case, in fact, shifts to the court of appeals. Does that provide a distinction making it fair to say that an appeal is taken from the judgment of the "court" whereas mandamus is against the "judge" who still has control over the case? In the latter, jurisdiction over the case is still in the trial court. (Where does an interlocutory appeal fit in?) An appeal ordinarily is commenced by filing a notice of appeal with the district court. For purposes of Mr. Hoffheimer's argument, can one say, therefore, that the "court" is "served?" Whereas a petition for mandamus is filed directly with a court of appeals and unless the judge (who still has control of the case) is "served," no one is. While these issues may be of interest when discussing the theory that jurisdiction over a case can be in only one court at a time, it seems a strange muddling of notions of jurisdiction over a case and personal jurisdiction. The same seems to be true of the question of whether a court can issue alternative writs if the "party" has not been joined. The motivation for the amendments is that in a mandamus action the judge ordinarily is not the real party in interest and to treat the judge as a respondent is a fiction.

2. Support

Seven commentators support the amendments without qualification. Three others support them but make suggestions for improvement.

The suggestions for improvement are as follows:

a. The New Jersey State Bar Association notes that the rule authorizes a court of appeals to "order" the trial judge to respond. The association recommends that the rule also authorize court to "invite" the trial judge to participate. Such an amendment would permit a court of appeals to give the trial judge the option to participate while not requiring the judge to become involved. The association also suggests that a copy of the petition should be mailed to the trial judge so that the judge has notice of the filing.

b. The American Bar Association (ABA) Section of Litigation supports the amendments but suggests that the rule be amended in the following ways:
   i. The Committee Note states that a trial judge may not respond to a petition for mandamus unless the court orders the judge to respond. The sections recommends that if such a prohibition is intended, it should be clearly stated in the text of the rule.
   ii. A reply to a response should be permitted.

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. Minutes of April 25 & 26 meeting at 5-6.

b. Other issues

Professor Hoffheimer opposes even deleting the judge as a respondent because Professor Hoffheimer believes that the need to serve the judge may serve to discourage the commencement of the proceedings and they should be rare.

Professor Hoffheimer also states that the judge has an interest in receiving notice of the petition and that there may be a jurisdictional problem in enforcing specific relief directed against a trial judge who has not been served. Professor Hoffheimer further notes that the proposed amendments may be incompatible with the statutory grant of jurisdiction under 28 U.S.C. § 1651(b) to issue alternative writs. He asks whether an alternative writ can be granted if the party has not been joined. He believes that the changes are so radical that they would be better made by Congress.

Professor Hoffheimer's issues have not been previously discussed. His belief that there may be a jurisdictional problem in enforcing specific relief directed against a trial judge who has not been served is troubling but unclear. Because Professor Hoffheimer is concerned about lack of service, I assume that his concern is with personal jurisdiction rather than subject matter jurisdiction. With regard to the need to "serve" the judge, it is not clear how a typical writ of mandamus -- such as one ordering a trial court to act -- differs from a judgment on appeal reversing a trial court judgment or order and remanding the case for further proceedings on specific issues. Why is service on a judge necessary in the former situation but not the latter? In both instances, as a result of exercising its power to review actions of the trial court, the court of appeals orders the trial court to perform some action. In a mandamus action the trial judge is involved not a private citizen but as an officer of the court and the ordinary notions of personal jurisdiction do not seem apt. As long as the court of appeals has subject matter jurisdiction to issue the writ, it is not clear why service on the trial judge is necessary because the proceeding is by mandamus

ISSUES AND CHANGES - RULE 21

Of the 14 commentators on the published rule, 7 support the rule without qualification. Three other commentators support the proposed amendments but suggest revisions. Four commentators oppose the revisions.

1. Opposition

Three of the four commentators who oppose the rule amendments do so because they believe that the trial judge should have the right to participate in a mandamus proceeding. The fourth person states that he sees no need for the change.

a. The trial judge's right to respond

Specifically Judge Duff states that removing the trial judge may allow the parties to ignore the institutional interests of the district court, to misrepresent the facts to the appellate court, and to impugn the reputation of the trial judge. Judge Will emphasizes that the judge may be the principal or only party with an interest in opposing the mandamus. If the judge is not a party to the proceeding, Judge Will asks whether the judge will have standing to petition for certiorari in the event that mandamus is granted. Neither Judge Will nor Judge Duff object to deleting the trial judge's name from the title of the case, but they are concerned with precluding the judge from receiving notice of the filing of a petition, from responding to the petition, and from having standing to seek review of the issuance of the writ.

The arguments presented by Judges Duff and Will in opposition to the amendments are the same as those that led to the publication in October 1993 of the preceding draft. The earlier published draft required service on the judge and permitted the judge to participate whenever the judge thought it appropriate. At its April 1994 meeting, following publication of that draft and based upon the comments received at that time, the Advisory Committee by divided vote decided to publish the current draft that permits a trial judge to respond to a petition for mandamus only when ordered to do so by the court of appeals.

The pertinent portion of the minutes of the April 1994 meeting state:

> 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

14. Honorable Hubert L. Will
Senior Judge
United States District Court
219 South Dearborn Street
Chicago, Illinois 60604

Judge Will is concerned about the proposed change that would preclude a district judge from participating as a party in a mandamus proceeding brought against him or her and that the judge will not even be served with a copy of the petition. Judge Will recounts his experience in two mandamus cases that were ultimately decided by the Supreme Court, Will v. United States, 389 U.S. 90 (1967) and Will v. Calvert Fire Insurance Co., 437 U.S. 655 (1978). In the latter case he was the principal or only party with an interest in opposing the mandamus. He states that in some instances "judicial prerogatives and process may have more interest in the mandamus proceedings than the non-petitioning nominal parties." Judge Will questions whether the judge would have standing under the proposed rule to petition for certiorari, as he did in the Calvert Insurance case because the judge would not be a party.

Judge Will does not object to deleting the judge's name from the title of the case, but he does object to precluding the judge from receiving notice of the filing of a petition, from responding to the petition, and from having standing to appeal the issuance of the writ.

10. Los Angeles County Bar Association
Appellate Courts Committee
617 South Olive Street
Los Angeles, California 90014-1605

The Appellate Courts Committee of the Los Angeles County Bar Association unanimously approves the proposed amendments.

11. National Association of Criminal Defense Lawyers
1627 K Street, N.W.
Washington, D. C. 20006

The association supports the amendments.

12. New Jersey State Bar Association
One Constitution Square
New Brunswick, New Jersey 08901-1500

The association approves the amendment that eliminates the naming of the district judge as a respondent but recommends that the rule be modified to permit a court of appeals to "invite" the trial court judge to respond as well as to order the judge to respond. In other words, the court of appeals should be permitted to give the district judge the option to provide additional information while not requiring the judge to become involved. The association also suggests that a copy of the petition should be mailed to the trial court judge so that the judge has notice of the filing. (Draft language is provided.)

13. Ninth Circuit Senior Advisory Board
comments forwarded by Mr. Mark Mendenhall
Assistant Circuit Executive
United States Courts for the Ninth Circuit
121 Spear Street, Suite 204
Post Office Box 193846
San Francisco, California 94119-3846

The Senior Advisory Board is a body of distinguished, experienced senior counsel who provide advice and guidance to the Ninth Circuit Judicial Council and the Ninth Circuit Judicial Conference. The board had no stated objections or concerns.

7. Mary S. Elcano, Esquire
Senior Vice President, General Counsel
United States Postal Service
475 L'Enfant Plaza, S.W.
Washington, D.C. 20260-1100

The postal service is concerned about the lack of guidance concerning the circumstances under which a court should invite participation by an amicus and about the qualifications or limitation upon who should serve as an amicus. The postal service suggests that a invitation to an amicus should be limited to "those instances in which respondent does not oppose issuance of the writ or does not have sufficient perspective on the issue to provide an adequate response."

8. Bruce Comly French, Esquire
165 Tolowa Trail
Lima, Ohio 45805-4124

Mr. French believes that the trial judge should be named in the petition. He sees no need for the change.

9. Associate Professor Michael H. Hoffheimer
Law Center
The University of Mississippi
University, Mississippi 38677

Professor Hoffheimer disagrees with removing the trial judge from mandamus and prohibition proceedings for the following reasons:

1. Such proceedings are disfavored. Treating the trial judge as a respondent who must be served, etc., may indirectly, and appropriately, discourage the commencement of such proceedings.
2. Because relief in such proceedings is normally predicated upon a showing that the trial court has refused to do some ministerial act, a trial judge has an interest in receiving notice of such allegation.
3. There may be a jurisdictional problem in enforcing specific relief directed against a trial judge who has not been served.
4. The proposed amendment may be incompatible with the statutory grant of jurisdiction, under 28 U.S.C. § 1651(b), to issue alternative writs. He asks whether an alternative writ can be granted if the party has not been joined.

Professor Hoffheimer suggests that the amendments so radically alter practices followed since the Judiciary Act of 1789 that they may exceed the scope of rulemaking authority and that it would be better for the proposed change to be enacted by Congress.

3. The State Bar of California
The Committee on Appellate Courts
555 Franklin Street
San Francisco, California 94102-4498

The committee supports the proposed change.

4. The State Bar of California
The Committee on Federal Courts
555 Franklin Street
San Francisco, California 94102-4498

The committee endorses the amendments.

5. District of Columbia Bar
Section on Courts, Lawyers and the Administration of Justice
Anthony C. Epstein, Co-chair
Jenner & Block
601 Thirteenth Street, N.W., Suite 1200
Washington, D. C. 20005

The section supports the amendments. The section agrees that a trial judge should not be given the option to participate and that if an appellate court believes that the prevailing party below cannot adequately defend the challenged decision, the court should appoint an amicus.

6. Honorable Brian Barnett Duff
United States District Judge
219 South Dearborn Street
Chicago, Illinois 60604

Judge Duff opposes the change that would deprive a trial court judge of the right to participate in a mandamus proceeding to which the court is a party. He cited two instances illustrating that removing the trial judge may allow the parties to ignore the institutional interests of the district court, to misrepresent to the appellate court facts leading to the mandamus proceeding, and to impugn the reputation of the trial judge.

COMMENTS ON PROPOSED AMENDMENTS OF FED. R. APP. P. 21

The rule is amended so that the trial judge is not named in the petition and is not treated as a respondent. The judge is permitted to appear to oppose issuance of the writ only if the court of appeals orders the judge to do so. The proposed amendments also permit a court of appeals to invite an amicus curiae to respond to the petition.

1. American Bar Association
   Section of Litigation
   750 North Lake Shore Drive
   Chicago, Illinois 60611

   The section supports the proposed amendment which conforms the rule to actual mandamus practice in many circuits. The section, however, makes several suggestions and observations.

   a. Neither subdivision (b)(2) nor the Committee Note explains the procedure for the identification and invitation of an amicus curiae, nor how or when the petitioner will be notified of the amicus' participation, nor how the involvement of an amicus will affect the timing of the decision. The section recommends amendment of subdivision (b) to make the procedures clear.
   b. The Committee Note states that the trial judge may not respond unless the court orders the judge to respond, but the text of the rule does not contain any such express prohibition. The section recommends that if such a prohibition is intended, it should be clearly stated in the text of the rule.
   c. The section recommends that a reply to a response should be allowed in the same manner as in proposed rule 27(a)(4).
   d. The section also recommends that subdivision (b) be amended to delete the ability of a circuit to change the 3 copies requirement by local rule.

2. State Bar of Arizona
   111 West Monroe, Suite 1800
   Phoenix, Arizona 85003-1742

   The State Bar of Arizona has no objections to and foresees no particular difficulties with the proposed amendments.

attorney-client relationship between the party's attorney and the judge whose action is challenged, nor does it give rise to any right to compensation from the judge.

If the court of appeals desires to hear from the trial court judge, however, the court may order the judge to respond. In some instances, especially those involving court administration or the failure of a judge to act, it may be that no one other than the judge can provide a thorough explanation of the matters at issue. Because it is ordinarily undesirable to place the trial court judge, even temporarily, in an adversarial posture with a litigant, the rule permits a court of appeals to invite an *amicus curiae* to provide a response to the petition. In those instances in which the respondent does not oppose issuance of the writ or does not have sufficient perspective on the issue to provide an adequate response, participation of an *amicus* may avoid the need for the trial judge to participate.

107 court requires the filing of a different
108 number by local rule or by order in a
109 particular case.

Committee Note

In most instances, a writ of mandamus or prohibition is not actually directed to a judge in any more personal way than is an order reversing a court's judgment. Most often a petition for a writ of mandamus seeks review of the intrinsic merits of a judge's action and is in reality an adversary proceeding between the parties. See, *e.g.*, *Walker v. Columbia Broadcasting System, Inc.*, 443 F.2d 33 (7th Cir. 1971). In order to change the tone of the rule and of mandamus proceedings generally, the rule is amended so that the judge is not treated as a respondent. The caption and subdivision (a) are amended by deleting the reference to the writs as being "directed to a judge or judges."

Subdivision (a). Subdivision (a) applies to writs of mandamus or prohibition directed to a court, but it is amended so that a petition for a writ of mandamus or prohibition does not bear the name of the judge. The amendments to subdivision (a) speak, however, about mandamus or prohibition "directed to a court." This language is inserted to distinguish subdivision (a) from subdivision (c). Subdivision (c) governs all other extraordinary writs, including a writ of mandamus or prohibition directed to an administrative agency rather than to a court and a writ of habeas corpus.

Subdivision (b). The amendment provides that even if relief is requested of a particular judge, the judge may not respond unless the court orders the judge to respond.

The court of appeals ordinarily will be adequately informed not only by the opinions or statements made by the trial court judge contemporaneously with the entry of the challenged order but also by the arguments made on behalf of the party opposing the relief. The latter does not create an

advise the parties, and when appropriate, the trial court judge or amicus curiae. ~~of the dates on which briefs are to be filed, if briefs are required, and of the date of oral argument.~~

(6) The proceeding ~~shall~~ must be given preference over ordinary civil cases.

(c) *Other Extraordinary Writs.* Application for extraordinary writs other than those provided for in subdivisions (a) and (b) of this rule ~~shall~~ must be made by petition filed with the clerk of the court of appeals with proof of service on the parties named as respondents. Proceedings on such application ~~shall~~ must conform, so far as is practicable, to the procedure prescribed in subdivisions (a) and (b) of this rule.

(d) *Form of Papers; Number of Copies.*-- All papers may be typewritten. An original and three copies must be filed unless the

63 ~~other than the petitioner shall also be~~
64 ~~deemed respondents for all purposes.~~
65 ~~Two or more respondents may answer~~
66 ~~jointly. If the judge or judges named~~
67 ~~respondents do not desire to appear in the~~
68 ~~proceeding, they may so advise the clerk~~
69 ~~and all parties by letter, but the petition~~
70 ~~shall not thereby be taken as admitted.~~
71 (1) The court may deny the petition
72 without an answer. Otherwise, it
73 must order the respondent, if any,
74 to answer within a fixed time.
75 (2) The court of appeals may order the
76 trial court judge to respond or may
77 invite an amicus curiae to do so.
78 (3) The clerk must serve the order to
79 respond on all persons directed to
80 respond.
81 (4) Two or more respondents may
82 answer jointly.
83 (5) If briefs or oral argument are
84 required, ~~T~~ the clerk ~~shall~~ must

(C) include copies of any order or opinion or parts of the record ~~which~~ that may be essential to ~~an~~ understand~~ing of~~ the matters set forth in the petition.

(3) ~~Upon receipt of~~ When the clerk receives the prescribed docket fee, the clerk ~~shall~~ must docket the petition and submit it to the court.

(b) *Denial; Order Directing Answer; Briefs; Precedence.*

~~If the court is of the opinion that the writ should not be granted, it shall deny the petition. Otherwise, it shall order that an answer to the petition be filed by the respondents within the time fixed by the order. The order shall be served by the clerk on the judge or judges named respondents and on all other parties to the action in the trial court. All parties below~~

for all purposes.

(2) ~~The petition shall contain a statement of the facts necessary to an understanding of the issues presented by the application; a statement of the issues presented and of the relief sought; a statement of the reasons why the writ should issue; and~~

The petition must:

(A) be titled In re [name of petitioner];

(B) state

(i) the relief sought;

(ii) the issues presented;

(iii) the facts necessary to understand the issues presented by the application; and

(iv) the reasons why the writ should issue; and

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

(a) ~~*Mandamus or prohibition to a judge or judges; petition for writ; service and filing.*~~ *Mandamus or Prohibition to a Court: Petition, Filing, Service, and Docketing.*

(1) ~~Application for a writ of mandamus or of prohibition directed to a judge or judges shall be made by filing~~ A party petitioning for a writ of mandamus or prohibition directed to a court must file a petition ~~therefor~~ with the clerk of the court of appeals with proof of service on ~~the respondent judge or judges and on~~ all parties to the ~~action~~ proceeding in the trial court. All parties to the proceeding in the trial court other than the petitioner are respondents

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

General Comments on the Proposed Amendments

1. Arkansas Bar Association
   Robert L. Jones III, President
   P.O. Box 2023
   Fort Smith, Arkansas 72902

   The Arkansas Bar Association "agree[s] with the proposed amendments to the Federal Rules of Appellate Procedure."

2. Gordon P. MacDougall, Esquire
   1025 Connecticut Avenue, N.W.
   Washington, D.C. 20036

   Mr. MacDougall suggests that the entire process of annual rule revision be reexamined; he suggests that it is a misallocation of resources.

3. Public Citizen Litigation Group
   2000 P Street, N.W., Suite 700
   Washington, D.C. 20036

   Public Citizen urges that whatever timing and form requirements are included in the FRAP, such as length, format, type, covers, etc. the federal provisions should preempt different requirements imposed by local rules in the circuits. Public Citizen welcomes the statement in the Committee Note accompanying Rule 32(a) that circuits should restrict themselves to the length and format requirements in the Federal Rules, and should revoke any local rules that differ. But Public Citizen believes that the note is not firm enough and not broad enough because it pertains only to briefs. Public Citizen suggests that Rules 27 and 32 should state that all inconsistent local rules existing at the time the amendments take effect are invalid and that thereafter the adoption of new local variations are forbidden without the express consent of the Judicial Conference.

4. John W. Witt, Esquire
   The City Attorney, City of San Diego
   202 C Street
   San Diego, California 92101-3863

   Following review, the city attorneys office concludes that there is nothing in the proposed amendments that would impact seriously enough their fields of practice to justify any comment.

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

FROM: Carol Ann Mooney, Reporter

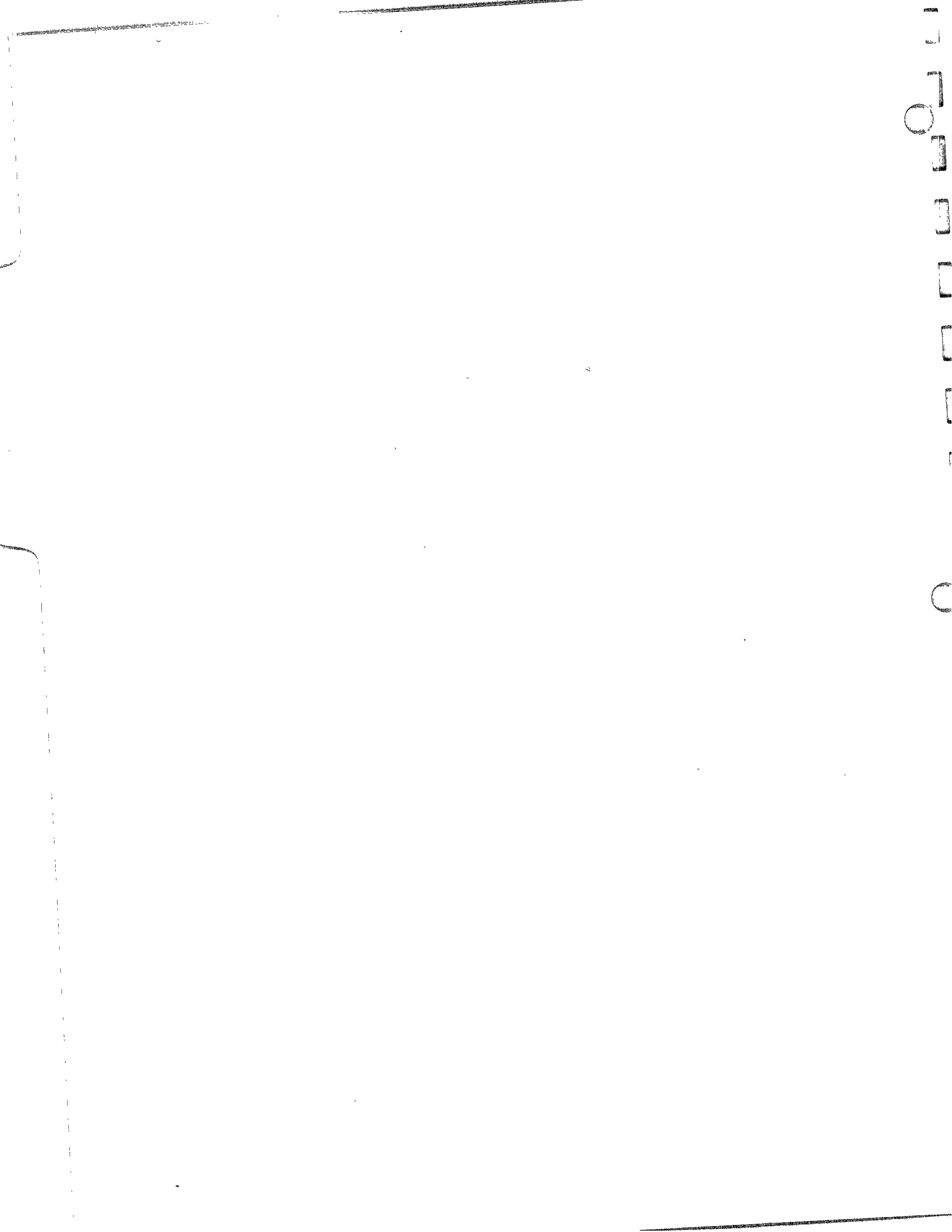
DATE: March 31, 1995

SUBJECT: Gap Report concerning the proposed amendments to the Federal Rules of Appellate Procedure published September 1, 1994

On September 1, 1994, the Standing Committee published a packet of proposed amendments to the Federal Rules of Appellate Procedure. The period for public comment closed on February 28, 1995. At the Advisory Committee's meeting on April 17 and 18 the Committee must consider all the comments and decide whether to amend the published rules. If the Committee decides to make amendments, the Committee has the further task of deciding whether the amendments are substantial. If substantial amendments are made, it is necessary to republish the rule(s). If only minor amendments are made, republication is not necessary.

Each rule, as published, is set forth below and is followed by a summary of the comments submitted concerning that specific rule. Following the summary is a segment labeled "Issues and Changes." In that segment, I discuss the issues raised by the commentators and outline the changes that are made in the new draft prepared for your consideration. The new draft concludes the treatment of each rule.

General comments, applicable to all of the rules, are summarized first.



II-A

FRAP Item	Proposal	Source	Current Status
94-2	Amend Rule 28(a) to prohibit citation of appellate decisions without clear recitation of jurisdiction.	Wm. Leighton, Esq.	No further action deemed appropriate 10/94

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 Approved by Judicial Conference 9/94
93-3	Amend Rule 41 re: 7-day period for issuance of mandate.	Advisory Committee	Draft approved 10/94 to be submitted to Style Subcommittee
93-4	Amend Rule 41 re: length of time for stay of mandate.	Advisory Committee	Draft approved 10/94 to be submitted to Style Subcommittee
93-5	Amend Rule 26.1 to delete use of term "affiliate."	Mr. Joseph Spaniol	Draft approved 10/94 to be submitted to Style Subcommittee
93-6	Amend Rule 41 re: effective date of mandate.	Solicitor General Days	Draft approved 10/94 to be submitted to Style Subcommittee
93-10	Applicability of Rule 26.1 to trade assoc.	Advisory Committee	No further action deemed appropriate 10/94
93-11	Rule permitting party to submit draft opinions as appendix to brief.	Hon. E. Peterson (Sup. Ct. OR)	No further action deemed appropriate 10/94
94-1	Amend Rule 26(c) re: length of time for responding when service is by mail.	Standing Committee	No further action deemed appropriate 10/94

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 Approved by Judicial Conference 9/94
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 Approved by Judicial Conference 9/94
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: inter-locutory 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
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 Draft approved 10/94 to be submitted to Style Subcommittee
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 Published 9/94
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 Subcommittee reported; new chair to be approved 10/94

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 Approved by Judicial Conference 9/94
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
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 Effective 12/1/94
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 Published 9/94

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 Draft approved 10/94 to be submitted to Style Subcommittee
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 Draft approved 10/94 to be submitted to Style Subcommittee
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 Effective 12/1/94

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 <u>pro forma</u> 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 Published 9/94
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 Effective 12/1/94

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 Effective 12/1/94
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 Effective 12/1/94

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 Effective 12/1/94
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 6/93 but not forwarded to the Judicial Conference, republished along with other changes to Rule 32 under item 91-4 Published 11/93 Republished 9/94
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 Effective 12/1/94

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 Published 9/94
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 Effective 12/1/94

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 Effective 12/1/94

Advisory Committee on the Federal Appellate Rules
Table of Agenda Items -- Revised December 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 Effective 12/1/94
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

that the order is in effect until something else is done. The use of the phrase "shall govern review" is especially odd when applied to an order regarding release. The order regarding release will not govern review of the case. The restyling may be clarifying an existing ambiguity. The Committee decided that the issue should be flagged in the Committee Note.

Judge Logan thanked the Committee for its hard work.

The next meeting of the Committee was tentatively scheduled for April 27 and 28 in Pasadena.

The meeting adjourned at noon.

Respectfully submitted,

Carol Ann Mooney
Reporter

The Committee realized that the Style Subcommittee placed a hyphen between the words habeas corpus in the caption and elsewhere in the rule when habeas corpus is used as a compound adjective. The Committee decided, however, to delete the hyphens.

Rule 23

Rule 23 was modeled on Supreme Court Rule 36, and the Committee believed that the rule should retain its similarity to the Supreme Court Rule. As a result, the Advisory Committee rejected several of the proposed revisions and returned to the original rule, making slight modifications therein in order to improve comprehension.

Subdivision (a) prohibits a person having custody of a prisoner from transferring custody, pending review of a decision in a habeas corpus proceeding brought by the prisoner. A question was raised concerning how a warden of a state prison is made aware of this provision in the federal rules.

Subdivision (b) deals with review of a decision denying a prisoner's petition for habeas corpus. It provides that, pending review of that decision, the prisoner may be detained in the custody from which release is sought, <u>in other appropriate custody</u>, or released. Subdivision (c) deals with review of a decision to grant the writ. In contrast to subdivision (b), it provides that the prisoner must be released "unless the court or justice or judge rendering the decision or the court of appeals or the Supreme Court, or a judge or justice of either court shall otherwise order." Subdivision (b) permits release of the prisoner to a half-way house ("other appropriate custody"), but no similar authorization is included in subdivision (c). It appears anomalous to permit release to an institution such a half-way house pending review of a decision not to grant the writ, but not to authorize release to "other appropriate custody" pending review of a decision to grant the writ. The anomaly may be more apparent than real. In subdivision (c) the presumption is that the prisoner will be released on personal recognizance, but numerous persons and entities have the ability to "otherwise order." It may well be that the order not to release on personal recognizance can order release to a half-way house. The Committee placed this question on its list of substantive questions to be considered at a later time.

In Subdivision (d) the existing rule says that the initial order respecting custody "shall govern review" in the court of appeals unless it is modified for special reasons. The Style Subcommittee's revision says that the initial order "continues in effect" unless it is modified for special reasons. A member asked whether the change is substantive. The provision that an order "shall govern review" is an unusual one and could be read as establishing the law of the case and that the order is not alterable. The words "continue in effect" implies only

of Rule 21 because a significantly altered version of Rule 21 has been published for comment. The Committee decided that it would be better to work with Rule 21 after the close of the comment period.

Judge Logan offered a comment on the published version of the rule. On page 9 of the pamphlet at line 37 the proposed rule uses the word "application." In light of the discussions at this meeting, Judge Logan suggested that the word probably should be changed to "petition." The Committee agreed, however, the use of the word "application" on page 12 at line 94 was appropriate. On page 13 at lines 99-100, the published draft says that a petition must be served on "the parties named as respondents." A member suggested that the words "the parties named as" should be deleted.

Rule 22

The use of the word "original" in the caption of subdivision (a) was discussed. One member suggested that it indicates that subdivision (a) deals with a party's first application for the writ. Another member pointed out that subdivision (a) does not apply only when a party applies for a first writ, but also when a party first applies for even for a subsequent writ. Another possible interpretation is that subdivision (a) deals with application for the "original" common law writ, as contrasted with application under the statutory provisions, sections 2054 and 2055. Given the Committee's confusion about its meaning, the Committee decided to change the caption to: "Application for Writ."

The word "application" was retained because that is the word used in the statute.

The Committee changed the word "must" to "shall" in the first sentence of subdivision (a). Because this Rule governs the procedure for the constitutionally preserved writ, it is not appropriate to require -- by use of the word "must" -- application to a district court. The second sentence of subdivision (a) makes it clear that one may apply first to a circuit judge. A circuit judge ordinarily transfers the application to a district court, but a circuit judge may grant the writ in an appropriate circumstance. The Committee considered but decided not to use the word "should" in place of the word "must" (an application for a writ of habeas corpus "should" be made to the appropriate district court) because "should" might imply greater openness to an application to a circuit judge than exists. The Committee voted to return to the word "shall;" the word used in the existing rule. Although "shall" is ambiguous, the Committee was more comfortable with that ambiguity than any of the alternatives. "Shall" might mean either "must" or "should" but the ambiguity preserves the proper tension. In fact, the Committee Note accompanying the rule upon its original promulgation, can be read to say that the ambiguity was deliberate.

21 forma pauperis. ~~All printed~~
22 ~~matter must appear in at least 11~~
23 ~~point type on opaque, unglazed~~
24 ~~paper. Briefs and appendices~~
25 ~~produced by the standard~~
26 ~~typographic process shall be~~
27 ~~bound in volumes having pages 6-~~
28 ~~1/8 by 9-1/4 inches and type~~
29 ~~matter 4-1/6 by 7-1/6 inches.~~
30 ~~Those produced by any other~~
31 ~~process shall be bound in volumes~~
32 ~~having pages 8-1/2 by 11 inches~~
33 ~~and type matter not exceeding 6-~~
34 ~~1/2 by 9-1/2 inches with double~~
35 ~~spacing between each line of text.~~
36 ~~In patent cases the pages of briefs~~
37 ~~and appendices may be of such~~
38 ~~size as is necessary to utilize~~
39 ~~copies of patent documents.~~
40 <u>(2) *Typeface.* Either a</u>
41 <u>proportionately spaced typeface</u>
42 <u>or a monospaced typeface may be</u>

Draft One - March 1995

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

1 (a) *Form of a Briefs and the an Appendix.*
2 (1) *In General.* Briefs and
3 appendices A brief may be
4 produced by standard typographic
5 typing, printing, or by any
6 duplicating or copying process
7 which that produces a clear black
8 image on white paper. with a
9 resolution of 300 dots per inch or
10 more. The paper must be
11 opaque, unglazed paper. ; both
12 sides of the paper may be used if
13 the resulting document is clear
14 and legible. Carbon copies of
15 briefs and appendices may not be
16 submitted without may be used
17 only with the court's permission of
18 the court, except in behalf of
19 parties allowed to proceed or by
20 pro se persons proceeding in

2. Possible Changes

Given the variety of responses, it is impossible to prepare a single redraft that will take into account all of the strong objections that have been raised. Three drafts follow.

The first draft retains the basic approach used in the published draft but alters the provisions that garnered the most opposition. Specifically, it deletes the provision allowing double-sided printing. (Is that sufficient, or should single-sided printing be required?) It removes the preference for proportional type. It requires 14 point proportional type and monospaced type of no more than 10-1/2 characters per inch. It raises the word limits as suggested by the commentators.

The second draft is a more substantial rewrite along the lines of the draft suggested by the Ninth Circuit Advisory Committee, but with some of the refinements suggested by Judge Easterbrook.

The third draft returns to page limits rather than using word limitations. In order to prevent the "cheating" on the page limits that can currently be done using proportional type, the rule requires that a brief be prepared in courier with no more than 10-1/2 characters per inch. Most of you will recall that the Committee published such a rule in December, 1992. (It attracted almost no attention!) But both the Advisory Committee and the Standing Committee thought that use of proportional type was desirable and as a result the proposal currently under consideration was prepared and published.

Seven commentators object to what they believe is a shortening of brief length. They state that the word limitations in the published rule shorten briefs. The Ninth Circuit Advisory Committee on Rules and the Los Angeles County Bar Association Appellate Courts Committee, both recommend that the total number of words be raised to 14,000 for a principal brief and 7,000 for a reply brief, but that the average number of words per page remain at no more than 280. Judge Easterbrook recommends that the total number of words be increased to 14,500 per brief and that the average number of words per page be no more than 320. The National Association of Criminal Defense Lawyers recommends increasing both the word limits and the safe harbors by 10%.

Several commentators also state that the safe harbors are too restrictive.

Three commentators object to the requirement that a brief include a certification that it does not exceed either the total word count or the limit on average number of words per page. They find the requirement demeaning.

e. Use of decisions retrieved electronically

Seven commentators object to that portion of the Committee Note stating that decisions retrieved electronically from Lexis or Westlaw may not be included in an appendix. The commentators note that if citation to an opinion that is either unpublished or not yet published is permitted, inclusion of the opinion as retrieved from Lexis or Westlaw may be the only pragmatic way to provide the court with a copy of the opinion. Because of the delay in publication of advance sheets and the slow response time to requests for copies of slip opinions, the electronically retrieved opinion may be all that the party can obtain. The restriction could deprive the litigants and the court of the opportunity to use the most current precedent. Moreover, the ability to "download" opinions and print them on high quality laser printers can eliminate legibility problems.

f. Miscellaneous "technical" matters.

Five commentators oppose requiring different margins depending upon whether a brief is prepared with monospaced or proportional type.

Four oppose the requirement that a brief lie flat when open. One approves the requirement but requests further guidance as to the type of binding that is acceptable. One commentator suggests that the rule require spiral binding for all 8-1/2 by 11 inch briefs.

Six commentators recommend deleting the requirement that the print have a resolution of 300 dots per inch or more. The commentators believe that the requirement is too technical and that requiring "legibility" is sufficient.

have no more than 10 characters per inch, the equivalent of pica type on a standard typewriter.

The reason that the published rule states that the monospaced type used cannot have more than 11 characters per inch (cpi) is that some of the monospaced typefaces produced by computers that are labeled 10 cpi actually produce slightly more than 10 characters per inch.

c. Double-sided printing

Thirty-one commentators oppose double-sided printing. A major concern is legibility even though the rule permits double-sided printing only when the brief is legible. Several commentators point out, however, that even if a brief is legible when submitted by the party, once the user of the brief highlights portions and takes notes on the brief there may be bleed through that destroys legibility. Another concern is that the back-side is currently used by many judges and law clerks for notetaking. Several of the opponents point out that any environmental saving that might result from use of fewer sheets of paper is likely to be offset by the use of heavier weight paper needed to meet the legibility requirement.

One commentator supports double-sided printing specifically because of the environmental savings.

d. Length limitations

Twelve commentators specifically oppose use of word limitations (both total words per brief and average number of words per page); one other opposes applying word limits to *pro se* litigants proceeding *in forma pauperis*. Another five commentators implicitly reject the word limitations by saying that the rule should use page limits. Various reasons are given for the opposition. Some oppose word counts because not all lawyers have computers or office machinery that will perform the counting function. Others oppose the counts because of the time and effort that will be used to comply with a rule that they think is unnecessarily technical. Still others worry about the fact that different word-processing systems count words differently.

Eight commentators support the use of word limits as the most straightforward way to address the "cheating" that is currently a problem. Three of these commentators, however, recommend that the rule define a "word" in an effort to minimize the variation in word counting as performed by various computer programs. One commentator favors a character count rather than a word count because it eliminates the variations resulting from the different counting methods used by software programs.

ISSUES AND CHANGES - RULE 32

The Committee received a total of sixty-nine comments on the proposed amendments to Rule 32. While it is risky business to attempt to characterize comments that are not only numerous but also lengthy, I have attempted to do so. Most of them deal with discreet provisions without expressing either general support for or opposition to the amendments as a whole. By my count, however, 6 of the comments expressed support for the amendments and the general approach taken by them and 11 comments stated general opposition. The commentators who oppose the rule amendments typically criticize the complexity of the proposed rule and its technical nature.

As previously stated the vast majority of comments were directed at specific provisions. The most commonly addressed issues are outlined below.

1. Comments

a. Proportional type

Nine commentators expressed opposition to the use of proportional type. Another 15 commentators would delete the preference for proportional type. Most of these commentators state that proportional type is too difficult to read.

Like Judge Easterbrook I believe that the "prejudice against it by some judges may be traced to its use as a cheating device." Used properly, proportional type is more legible. Books, newspapers, and magazines would not be printed in proportional type if it were less legible. Proportional type can be abused and used to "cram" more words into fewer pages. The complexity of the published rule exists largely to prohibit the abuses that have led to the belief that proportional type is not legible.

Twenty-seven commentators say that if proportional type is permitted it should be required to be larger than 12 point. Most of the commentators say that it should be at least 14 or 15 point.

One commentator specifically supports the preference for proportional typeface because use of a proportional typeface makes it possible to fit more material on a single page and there will be a resulting environmental savings.

b. Monospaced type

The commentators who oppose use of proportional type as well as those who would delete the preference for proportional type, prefer monospaced type. 19 commentators say that the monospaced type permitted under the rule should

lawyers who chisel on brief length limits by fudging the margins, typefaces, etc.

Ms. Weatherhead suggests that the rule should direct parties to attempt to produce a joint appendix "subject to the right of any party to supplement the joint appendix with whatever materials were overlooked or become necessary as the case develops in the briefing."

69. Honorable Charles E. Wiggins
United States Circuit Judge
50 West Liberty Street, Suite 950
Reno, Nevada 89501

Judge Wiggins has diabetes related vision problems. He requests that: the total pages be limited; margins be reasonable; the number of lines of text per page be limited; that all type (including that used for footnotes) be of a size and type style that is reasonable (he needs 14 or 15 point type to be able to read). He also encourages the committee to print, in the rule, an example of the required size and style of type. He further encourages requiring counsel to submit at least one "floppy disc" so that any judge who needs to do so may project the brief on a computer screen in a much larger version than the authorized type size.

counts are difficult for a typewriter user. He suggests, at a minimum, that the rule allow monospaced type of 10 characters per inch, rather than 11, because 10 is standard on typewriters.

65. Honorable Stephen S. Trott
United States Circuit Judge
Room 666
United States Court Building
Boise, Idaho 83724

Judge Trott urges to the committee to be concerned about ease of reading and suggests that proportionately spaced typeface be 14 or 15 point type. Judge Trott also believes that most of the proposed rule is too technical to be readily understood.

66. Professor Eugene Volokh
School of Law
University of California, Los Angeles
405 Hilgard Avenue
Los Angeles, California 90024-1476

Professor Volokh objects to double-sided printing of briefs. The bleed-through from two-sided printing will make briefs much harder to read but the even greater problem will be the bleed-through from highlighting and notes made by the reader of the briefs. Because heavier paper will be used to avoid the foregoing problems, there will be little, if any, environmental savings.

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

Chief Judge Wallace states that the Ninth Circuit Court of Appeals' Executive Committee endorses, in principle, the comments submitted by the Ninth Circuit Advisory Committee on Rules of Practice and Procedure.

68. Leslie R. Weatherhead
Witherspoon, Kelley, Davenport & Toole
422 West Riverside, Suite 1100
Spokane, Washington 99201-0390

Ms. Weatherhead opposes use of a word count to limit the length of a brief. She suggests that a better solution would be to sanction those

61. Diane M. Stahle, Esquire
Davis, Hockenberg, Wine, Brown, Koehn & Shors, P.C.
The Financial Center
666 Walnut Street, Suite 2500
Des Moines, Iowa 50309-3993

Ms. Stahle favors limiting brief by number of words rather than the number of pages but states that it is unclear whether headings are included in the word count. If headings are to be counted, she suggests changing the language in paragraph (a)(6) -- lines 104-107 -- to read: "and in either case there must be on average no more than 280 words per page including headings, footnotes and quotations."

62. Honorable Walter K. Stapleton
United States Circuit Judge
Federal Building, 844 King Street
Wilmington, Delaware 19801

Judge Stapleton opposes the provision permitting text on both sides of each page. He believes that any environmental savings would be offset by the use of heavier paper made necessary to render the brief legible.

63. Marc D. Stern & Denise Simmonds
American Jewish Congress
Stephen Wise Congress House
15 East 84th Street
New York, New York 10028-0458

Mr. Stern and Ms. Simmonds approve of the proposed revision believing "that it accurately reflects the current technology widely used in the preparation of appellate briefs. They suggest that the rule should be a "mandatory and inflexible national requirement" and that local departures should be forbidden.

64. Honorable Richard R. Suhrheinrich
United States Circuit Judge
United States Post Office and
Federal Building
315 West Allegan, Room 241
Lansing, Michigan 48933

Judge Suhrheinrich objects to printing briefs on both sides of the page and use of proportionately spaced type at less than 14 point. He also believes that the rule makes life difficult for a person using a typewriter. Word

57. Honorable Stephen Reinhardt
United States Circuit Judge
312 North Spring Street
Los Angeles, California 90012

He objects to double-sided printing and the proposal concerning typeface. He urges the committee to make the rule comprehensible to those without a great deal of technical expertise and to avoid excessive detail and a hypertechnical rule.

58. Robert H. Rotstein, Esquire
McDermott, Will & Emery
2049 Century Park East
Los Angeles, California 90067-3208

Mr. Rotstein believes that the use of proportionately spaced typeface is "detrimental to effective appellate advocacy and decision making because the briefs are too difficult to read, especially in 12 point type. He urges the committee to require "ten pitch pica monospaced typeface" in appellate briefs. In the alternative he suggests proportionately spaced typeface in at least 14 point type. Mr. Rotstein also opposes double-sided printing.

59. K. John Shaffer, Esquire
Stutman, Treister & Glatt
3699 Wilshire Boulevard
Suite 900
Los Angeles, California 90010-2739

His principal objection is to the complexity of the proposed rule. He suggests that the rule should simply require monospaced type with 10 characters per inch. He also objects to permitting double-sided briefs.

60. Lawrence J. Siskind, Esquire
Cooper, White & Cooper
201 California Street
Seventeenth Floor
San Francisco, California 94111

Mr. Siskind objects to double-sided briefs. He also dislikes the preference for proportionately spaced typeface because he believes it is harder to read. He would prefer that the rule state a preference for monospaced typeface but would be satisfied if the rule omitted a preference for either. He believes that the minimum acceptable size for proportional type should be 14 point.

55. Mr. Patrick D. Otto
Mohave Community College
1971 Jagerson Avenue
Kingman, Arizona 86401

Mr. Otto agrees with the proposed amendments.

56. Public Citizen Litigation Group
2000 P Street, N.W., Suite 700
Washington, D.C. 20036

Public Citizen has a number of comments on the proposed amendments.

a. As to 32(a)(2)(A), the terms "roman style" or "text" style should be explained either in the rule or the note.

b. As to 32(a)(4), the rule should not forbid use of bold type for emphasis.

c. As to 32(a)(6), Public Citizen in not averse to the use of a word limit rather than a page limit if the committee is determined to "fix" this "problem" although they state that lawyers will find ways to stretch a word limit. Public Citizen "object[s] strenuously," however, to the "substantial cut in the permissible length of briefs." With 280 words per page, the maximum size of a principal brief would be 44-1/2 pages. Examining several briefs containing fewer than 90% of the applicable page limits (on the assumption that none of such briefs would have been manipulated to comply with length limitations), Public Citizen found that no brief averaged as few as 250 words per page. The average ranged from a low of 254 words per page to a high of 278 words per page. Public Citizen also contended that their briefs tend to use fewer footnotes and fewer blocked quotations than seems to be the norm. Others of their briefs had an average number of word per page as high as 305 or 311.

In light of recent amendments to FRAP requiring a statement of subject matter and appellate jurisdiction and a statement of standard of review, and in light of the growth in the complexity of federal law and the quantity of federal precedent. Public Citizen states that "it seems unfair to the litigants to require their counsel to write shorter briefs." Public Citizen suggests that the number of words per brief and the average number of words per page should be more realistic and should not effectively reduce the existing length limitation. Public Citizen supports the concept of a safe harbor but says the 30 page limit is too low. Public citizen suggests that 37 pages should suffice for a principal brief and 18 pages for a reply.

52. Ninth Circuit Senior Advisory Board
comments forwarded by Mr. Mark Mendenhall
Assistant Circuit Executive
United States Courts for the Ninth Circuit
121 Spear Street, Suite 204
Post Office Box 193846
San Francisco, California 94119-3846

The Senior Advisory Board is a body of distinguished, experienced senior counsel who provide advice and guidance to the Ninth Circuit Judicial Council and the Ninth Circuit Judicial Conference. The board opposes the proposed amendments for several reasons. The board does not believe that the amendment will help the courts or save them time. The board suggests that the proposed amendments violate the following general principles about rulemaking: appellate rules should provide general guidance and direction to assist the lawyers and the courts and should not be rigid or tied to a particular state of technology; rules should not prohibit accommodation to local needs and conditions, nor should national rules attempt to micromanage regional court operations. Specifically, the board states that specifying computer printer resolution, limiting the length of a brief to a specified number of words, and specifying typeface and spacing are too rigid for a national rule. The board believes that the rule makes an arbitrary 40% reduction in the maximum brief length (from 50 to 30 pages) and questions whether the committee had adequate information upon which to base the change. If 30 pages is inadequate to provide the judges with sufficient information, the board believes that the limitation may delay the decisionmaking process.

53. Honorable John T. Noonan, Jr.
United States Circuit Judge
121 Spear Street
P.O. Box 193939
San Francisco, California 94119-3939

Judge Noonan objects to double-sided printing of briefs.

54. Associate Professor Julie Rose O'Sullivan
Georgetown University Law Center
600 New Jersey Avenue, N.W.
Washington, D.C. 20001-2075

She believes that the rule should prohibit the use of proportional type but that if it is permitted, the rule should require 14 or 15 point type. She also objects to double-sided briefs.

50. Honorable Thomas G. Nelson
United States Circuit Judge
Post Office Box 1339
304 North Eighth Street
Boise, Idaho 83701-1339

Judge Nelson suggests that Rule 32 should require monospaced typeface and since 10 characters per inch is most commonly used, the rules should use 10 rather than 11. If monospaced typeface is not required, Judge Nelson suggests that the rule should express a preference for monospaced typeface.

Judge Nelson does not believe that the word limit will protect the readability of a brief. He suggests discarding the word limit and tightening the safe harbor provisions and using them as the standards for brief preparation. He suggests limiting the allowable line per page on an 8-1/2 by 11-inch page, having no footnotes, to 28 lines. Footnotes should be double-spaced and in the same typeface as the body of the brief. He believes that, if footnotes cannot be used as a length extender, their use will decline. If double-spaced footnotes are unacceptable, he suggests that footnotes be limited to an average of three lines per page, or 105 lines in a 35-page brief. If proportionately spaced typeface is permitted, the minimum size should be 15 point.

In additional, Judge Nelson suggests that the Committee limit a principal brief to no more than 35 pages regardless of the typeface used and a reply brief to 15 pages.

He objects to double-sided printing.

51. New Jersey State Bar Association
One Constitution Square
New Brunswick, New Jersey 08901-1500

The association opposes the word-count approach because it may be more difficult for practitioners to follow and particularly difficult for pro se litigants and others without sophisticated word processing programs. In light of typeface and margin requirements, the association believes that page limits can be used.

by adjusting margin width. It also appreciates the receding on the question of single-spaced footnotes and headings.

b. The association supports the abolition of Rule 28(g) and in particular its local option provision but notes that the committee note should make it clear that local options would be invalid under the revised rule.

c. The association supports the change to a word count but opposes the reduction in brief length that results from the 12,500 word limitation (at 280 words per page, 45 pages) and the 40 page safe harbor length. The association opposes the reduction. The association "emphatically" urges the committee to add 10% to each of the proposed word counts and safe harbor page counts.

d. The association finds the certification of compliance "demeaning overkill."

e. The association supports the provision permitting a petition for rehearing or suggestion for rehearing in banc to be produced with simple binding and without a cover.

48. Honorable David A. Nelson
United States Circuit Judge
Potter Stewart U.S. Courthouse
100 E. 5th Street
Cincinnati, Ohio 45202-3988

Judge Nelson opposes double-sided briefs and suggests that if the issue is addressed at all that the rule state that the use of both sides is not encouraged. He thinks that 12 point proportionately spaced typeface is too small for the safe harbor. He also opposes the word-count provisions because not all lawyers have equipment capable of performing automatic word counts.

49. Honorable Dorothy W. Nelson
United States Circuit Judge
125 South Grand Avenue, Suite 303
Pasadena, California 91105

Judge Nelson objects to the use of proportionately spaced typeface and suggests that its use be prohibited. If it is permitted, she suggests that at least 14, and preferable 15, point type be required. She notes that 12 point type typically produces between 400 and 450 words per page, far more than the 280 words per page permitted under the rule. Judge Nelson also objects to double-sided briefs.

44. Kathleen L. Millian, Esquire
Terris, Pravlik & Wagner
1121 12th Street, N.W.
Washington, D.C. 20005-4632

Ms. Millian requests that the Committee consider allowing submissions on non-white recycled paper. Rule 32(a) states that all briefs must be submitted on white paper. Ms. Millian notes that recycled paper with a high content of post-consumer waste is usually gray-tone or off-white and requests that the rule be amended to allow non-white recycled paper. She states that the fact that the paper is not white does not affect its durability or readability.

45. John S. Moore, Esquire
Valikanje, Moore & Shore, Inc., P.S.
405 East Lincoln Avenue
P.O. Box C2550
Yakima, Washington 98907

Mr. Moore disapproves of the changes in Rule 28 and 32. He states that it "[w]ill take a specialist to spend time to make certain that compliance has been achieved."

46. Jesse A. Moorman, Esquire
Wood & Moorman
808 North Spring Street, Suite 614
Los Angeles, California 90012

Mr. Moorman says that the definition of "proportionately spaced typeface" is not clear and that using the term "advance width" may not even follow the conventions of the typesetting community. He also comments that the omission of "Times Roman" or "Times New Roman" from the examples may be confusing because they are widely available in Windows.

Mr. Moorman likes the idea of a brief "lying flat" but wants more guidance as to what is acceptable.

47. National Association of Criminal Defense Lawyers
1627 K Street, N.W.
Washington, D. C. 20006

The association makes a number of comments.

a. It appreciates the simple yet flexible manner in which the rule would accommodate both proportional and monospaced typefaces,

appendices.

41. Honorable J. Daniel Mahoney
United States Circuit Judge
55 Red Bush Lane
Milford, Connecticut 06460

Judge Mahoney finds monospaced type easier to read than proportionately spaced typeface. He suggested that proportional typeface should be 14 or 15 point and that monospaced type should be no more than 10 characters per inch. Judge Mahoney opposes double-sided printing of briefs.

42. Honorable H. Robert Mayer
United States Circuit Judge
United States Court of Appeals for
the Federal Circuit
Washington, D.C. 20439

Judge Mayer opposes double-sided printing. He also objects to the preference for proportionately spaced typefaces and would change the definition of monospaced typeface to specify no more than 10 characters per inch. Judge Mayer also suggests that proportionately spaced typeface should be at least 14 point.

43. State Bar of Michigan
United States Courts Committee
Richard Bisio
Honigman Miller Schwartz and Cohn
2290 First National Building
Detroit, Michigan 48226-3583

The United States Courts Committee of the State Bar of Michigan opposes the detailed regulation of brief format in the proposed amendments. The committee proposes that the first paragraph of present Rule 32(a) be retained with a modification specifying a minimum type size and that the current page limits of Rule 28(g) be retained (a redraft is provided). The committee believes that the increased time and expense of compliance with and enforcement of the detailed provisions in the proposed amendments will outweigh the marginal increase in readability or any other advantages. The committee also suggests that paragraph 32(a)(7) of the proposed rule be modified to permit use in an appendix of copies of electronically retrieved opinions when they are not readily available from other sources.

The committee offers the following suggestions:

a. Double-sided reproduction should be encouraged but heavier weight paper should be required to avoid bleed-through.
b. The rule might have an appendix that provides samples of approved typefaces, samples of approved type sizes, and a chart summarizing all of the various requirements.
c. The rule might specify a standardized format for brief covers, including a list of all required information and the order in which it is to be displayed. The methods, manner and style of page numbering should be specified. It might be helpful to prescribe a standardized set of titles for various briefs.
d. The margins should be the same regardless of style of typeface.
e. Pamphlet-sized briefs can be eliminated.
f. Additional format and style parameters might be set forth as "preferred."
g. A single rule should be used to define the format of all papers rather than having separate rules for briefs, motions, etc.
h. Type size and line spacing of footnotes should be the same as the text.

39. Honorable J. Michael Luttig
United States Circuit Judge
United States Court of Appeals for
the Fourth Circuit

Judge Luttig opposes the use of proportional typeface in briefs; he also opposes double-sided briefs. If the rule allows proportional type, he recommends that it require either 14 or 15 point type. He also states that for monospaced type, the standard should be 10 characters per inch.

40. Gordon MacDougall, Esquire
1025 Connecticut Avenue, N.W.
Washington, D.C. 20036

Mr. MacDougall states that Rule 32 should stay "as is." He states that the proposal eliminates the use of a typewriter. He suggests that a resolution of 300 dots is not needed in a national rule. He states that a national rule in inappropriate on the matter of two-sided briefs. He opposes the preference for proportionately spaced typeface. He would not change the margins. He states that the elimination of the 50 page rule would work a hardship on those required to count words or else be confined to 40 pages. He opposes the requirements that the case number be positioned at the top of the cover and that counsel's telephone numbers appear on the cover. He also opposes the "lie flat" requirement for binding briefs and

that it be no smaller than 15 point type. He does not favor double-sided printing.

36. Honorable Pierre N. Leval
United States Circuit Judge
United States Courthouse
Foley Square
New York, New York 10007

Judge Leval notes that word counts may be impractical for pro se litigants proceeding in forma pauperis. He believes that pro se litigants proceeding in forma pauperis should be exempted from the word count and be subject, instead, to page limits.

37. Los Angeles Chapter of the Federal Bar Association
Section on Appellate Practice

The section endorses the work and comments of the Ninth Circuit Advisory Committee on Rules of Practice. The section also urges that the rule provide guidance as to the criteria by which "words" will be defined for purposes of applying the word count limitation. The section suggests that citations (including parallel citations and citations to the record) be counted as a single word.

38. Los Angeles County Bar Association
Appellate Courts Committee
617 South Olive Street
Los Angeles, California 90014-1605

The Appellate Courts Committee of the Los Angeles County Bar Association agrees that the word count approach will greatly further the purposes of the rule. The committee states that use of a word count will level the playing field and eliminate the "cheating" now possible by playing font and spacing games. The committee is concerned, however, about the number of words and the ways a word is counted. The committee recommends that the count be raised to 14,000 and 7,000 (from 12,500 and 6,250). The committee also recommends that the rule define a "word" so that practitioners will know how to count a "word." The committee also suggests that all requirements pertaining to one format category of brief should be contained under a single heading rather than requiring the reader to jump from subsection to subsection to find all applicable requirements.

33. Kelly M. Klaus, Esquire
Wilson Sonsini Goodrich & Rosati
650 Page Mill Road
Palo Alto, California 94304-1050

As a general matter Mr. Klaus questions the need to amend Rule 32. She believes that the existing rule has the virtues of brevity and flexibility and that the proposed rule is unduly complex and will result in an increase in motions to strike portions of brief that allegedly fail to comply with the rule. Specifically, with regard to double-sided briefs, Ms. Klaus notes that even though the rule required that counsel's finished product be legible, that highlighting and notetaking on the brief by judges and law clerks will likely bleed through the paper causing legibility problems. Ms. Klaus also objects to the preference for proportionately spaced typeface. She suggests that monospaced type be preferred or even required and that the rule specify a maximum of 10 characters per inch rather than 11.

34. Associate Professor Michael S. Knoll
The Law Center
University of Southern California
University Park
Los Angeles, California 90089-0071

Professor Knoll suggests that the rule should omit the preference for proportional type and encourage the use of monospaced type because it is easier to read. He also believes that lawyers could abuse the 12 point proportional font option and attempt to press more words into their documents using the safe harbor provisions in (a)(6)(A). If proportional type is permitted, he believes the rule should require 14 or 15 point type. He also objects to double-sided briefs.

35. Stephen A. Kroft, Esquire
McDermott, Will & Emery
2049 Century Park East
Los Angeles, California 90067-3208

Mr. Kroft does not believe that the proposed amendments will materially improve the legibility of appellate briefs but that the amendments may create unnecessary difficulties. He favors monospaced type, specifically courier pica (10 characters per inch) because he finds it easier to read. He states that 12 point proportional type is not only more difficult to read, but it results in many more than 280 words per page. He would prefer 40 page briefs in courier pica type rather than 35 page briefs in 12 point proportional type. If proportional type is to be encouraged, he suggests

30. P. Michael Jung, Esquire
Strasburger & Price, L.L.P.
901 Main Street, Suite 4300
Dallas, Texas 73202

Mr. Jung suggests that 32(a)(7) should permit inclusion in an appendix of any court or agency decision, whether printed or not. Unprinted decisions, available only in electronic or manuscript form, may well be those whose inclusion is most helpful to the court.

31. Brett M. Kavanaugh, Esquire
2727 29th Street, N.W. #134
Washington, D.C. 20008

Mr. Kavanaugh believes that the rule should require, or at least encourage, monospaced typeface. At a minimum, he states, the rule should not state a preference for proportionately spaced typeface.

Mr. Kavanaugh further suggests that if proportionately spaced typeface is to be allowed, the rule should require a 14 or 15 point type.

Mr. Kavanaugh suggests that the rule should prohibit double-sided briefs except for "printed" briefs.

With regard to the requirement that a brief be bound so that it lies flat when open, Mr. Kavanaugh suggests that the rule require spiral binding for all 8-1/2 by 11-inch briefs.

32. Mr. Kevin M. Kelly
1800 Avenue of the Stars
Suite 500
Los Angeles, California 90067

Mr. Kelly objects to double-sided printing of briefs. He also objects to the use of 12 point proportional type. He finds 12 point type difficult to read especially if certain small fonts (such as CG Times) are used. He recommends use of 14 or 15 point proportional typeface but would favor stating a preference for monospaced type.

decision making.

Judge Hufstedler also challenges the apparent assumption that every lawyer who files a brief in a federal appellate court is computer literate and has available to him or her the kind of equipment that permits ready compliance with the revised rule.

27. Honorable Procter Hug, Jr.
United States Circuit Judge
50 W. Liberty Street, Suite 800
Reno, Nevada 89501

Judge Hug objects to permitting the use of 12 point proportional type to prepare a brief. He believes that it is too difficult to read. He thinks that the use of monospaced pica, 10 character per inch, should be encouraged, if not mandated. If proportional type is permitted it should not be smaller than 15 point type.

28. Sandra S. Ikuta, Esquire
O'Melveny & Myers
400 South Hope Street
Los Angeles, California 90071-2899

Ms. Ikuta believes that 12 point type is too small to be easily read. She also believes that proportional type is less readable than monospaced type, especially in footnotes.
She recommends monospaced typeface of 10 characters per inch on single-sided pages. The preferred typeface should be 15 point type.

29. Lawrence A. G. Johnson
Johnson & Swenson
2535 East 21st Street
Tulsa, Oklahoma 74114

Mr. Johnson suggests that Rule 32 should permit a brief writer to petition a court for permission to scan pertinent photographs and documentary evidence into the body of brief and that such items should be exempt from the page limits.

25. Joseph A. Halpern, Elizabeth A. Phelan, & Heather R. Hanneman, Esquires
Holland & Hart
555 Seventeenth Street, Suite 2900
Denver, Colorado 80202-3979

Mr. Halpern, et al, oppose the substitution of a word limitation for a page limitation even though they recognize the desirability of minimizing creative evasions of page limitations and the need for uniformity and legibility of briefs. They point out that gamesmanship will continue with a word limitation. They note that different word processing systems, and even different versions of the same system, count "words" differently. They performed a word-count on the same 50 page brief and found that Word Perfect 5.1 counted 12,436 words, MicroSoft Word 6.0 counted 12,850, and WordPerfect Windows 6.1 counted 13,011 words. Given the difference in word counting functions, Mr. Halpern concludes that a certificate concerning word count will be meaningless. Other gamesmanship opportunities exist; lawyers may eliminate parallel citations, shorten case names in citations, or use typographical characters that do not count as words, such as "7" instead of "seven." Finally they note that a word limitation is onerous for parties that do not have access to word processing systems.

Mr. Halpern, Ms. Phelan, and Ms. Hanneman recommend that Rule 32 limit the length of a brief by (1) using a page limitation; (2) specifying a minimum point size; and (3) specifying acceptable typefaces for briefs.

26. Honorable Shirley M. Hufstedler
Hufstedler & Kaus
Thirty-Ninth Floor
355 South Grand Avenue
Los Angeles, California 90071-3101

Judge Hufstedler objects to the revisions for a variety of reasons including that they will require conscientious lawyers to spend unjustifiable amounts of time trying to comply. She does not believe that the benefits to the judges are significant enough to justify the increased cost to litigants.

Judge Hufstedler also object to shortening the length of appellate briefs; she believes that shortening the length will actually increase the work for courts of appeals because there will be more motions to file oversized brief and difficult factual situations and hard questions of law will not be effectively explained if the length in inappropriately shortened. She does not believe that shorter briefs are more efficient or conducive to quality

contain more than simple citations to authority.

22. Honorable Jerome Farris
United States Circuit Judge
United States Courthouse
1010 5th Avenue
Seattle, Washington 98104

Judge Farris objects to printing text on both sides of the page. He also objects to use of proportionately spaced type. He further objects to the word counts; they will be difficult for a person using a typewriter. He suggests that the 11 characters per inch be changed to 10 characters per inch which is standard for typewriters.

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

Judge Feinberg opposes double-sided briefs. He suggests that the rule should specify that a monospaced typeface may have no more than 10 characters per inch. He further suggests that proportional typeface should be prohibited rather than preferred but if it is permitted it should be at least 14 point type.

24. Honorable Floyd R. Gibson
United States Circuit Judge
837 United States Courthouse
811 Grand Avenue
Kansas City, Missouri 64106-1991

Judge Gibson objects to the use of 12 point proportional type; he finds monospaced, pica (10 characters per inch) much easier to read. He also questions permitting double-sided printing unless it can be done without the imprint on one side of the page interfering with the characters on the other side of the page.

give a table of these things we'll end up in a swamp."

f. The term "advance widths" can be abandoned in favor of the proposed definitions of "characters of different widths" and "characters of the same width" for proportional and monospaced type.

g. Examples of typefaces do not belong in the text of the rule but would be helpful in the committee note.

h. It is essential to limit proportionally spaced fonts to those with serifs. A sans serif font is tiring to read in longer passages.

i. The reason the rule requires a monospaced font to have no more than 11 characters per inch (cpi) rather than 10 cpi is that some of the monospaced fonts built into printers yield about 10-1/4 or 10-1/2 cpi when printed at 12 point but when printed at 13 point, they look too large. Perhaps the rule could say that 10 cpi is strongly preferred and that no more than 10-1/2 cpi are allowed.

j. The reason for wider side margins for proportionally spaced type is that it is less readable in lines that reach 6-1/2 inches.

k. It would not be a big loss to abandon the pamphlet brief.

l. Boldface generally should be prohibited and case names should be in italic unless that is impossible.

m. The word limits should be increased to 14,500 per principal brief and no more than 320 word per page. The safe-harbors are designed for simplicity and should be retained. Judge Easterbrook agrees that the rule might limit the safe harbor for monospaced briefs to 40 pages to ward off the excessive use of footnotes.

n. Appendix volumes exceeding 300 pages are not troublesome.

o. Plastic covers are not problematic but Judge Easterbrook dislikes plastic backs, but is not convinced that either should be the subject of rulemaking.

p. Requiring a brief to "stay open" or "lie reasonably flat when open" would do the trick without compelling everyone to use spiral binders.

21. Honorable J.L. Edmondson
United States Circuit Judge
Room 416, 56 Forsyth Street
Atlanta, Georgia 30303

Judge Edmondson strongly objects to typeface as small as 12 point. If proportionately-spaced typeface is allowed, he believes that 15 point type should be required. If monospaced typeface is used, he believes that at least ten characters per inch should be the standard but he prefers even fewer than 10 characters per inch. Judge Edmondson also objects to double-sided briefs. He further objects to single spacing footnotes that

substantially curtailed the maximum length of a brief from the old
50-page rule. The proposed rule establishes a maximum of 12,500
words per brief and an average of 280 words per page. Using five
briefs submitted to the Supreme Court (printed, of course) he found
that the number of words in a 50 page printed brief would ordinarily
be at least 14,000 and may be almost as high as 16,900. He also
found that a 50 page typewritten brief produced in 12 point Courier
also has significantly more than 12,500 words. Using one inch
margins all around his document had 13,875 words (counted by
Microsoft Word) and using the smallest margins allowed by the
current rule 14,543 words. Setting the same brief in an easily read
proportional typeface and using the margins in the proposed rule,
his document had 16,333 words in 50 pages. The average words per
page in the printed briefs varied from a low of 283 to a high of 338.
The typewritten brief in 12 point Courier had 277.5 words per page
with the one inch margins and 290.1 words per page with the
smaller margins. The brief with proportional typeface had 326.7
words per page.

As previously stated, Judge Easterbrook prefers a character count to
a word count. His examples show that there is less variation in
character count from one word-processing package to another than
there is using a word count.

In a later comment, Judge Easterbrook responds to the comments of the
Ninth Circuit Advisory Committee on Rules. He agrees with many aspects
of the comment and differs with others. Specifically he responds as
follows:

a. He rejects the suggestion that the rule define how to count a word as not feasible. He prefers a character count because it eliminates the disparity in word count approaches across software packages, but if a character count is rejected he believes we simply must live with the variation from package to package as to word count.

b. The 300 dot per inch may be too technical, but rather than delete it he would offer more explanation in the committee note.

c. Double-sided printing is fine but he agrees that the rule should require 20 pound paper (or heavier) to prevent bleed through.

d. The preference for proportional type should be retained. "The current prejudice against it by some judges may be traced to its use as a cheating device. From here on, only legibility counts."

e. The minimum point size may stay at 12. "Once typographical tricks have been eliminated as a means to squeeze more words into a brief, lawyers will begin to appreciate how type can be used for persuasion. A brief set in Adobe Garamond ought to be 13-point; a brief set in Berthold Baskerville ought to be 12-point; if we try to

19. District of Columbia Bar
Section on Courts, Lawyers and the Administration of Justice
Anthony C. Epstein, Co-chair
Jenner & Block
601 Thirteenth Street, N.W., Suite 1200
Washington, D. C. 20005

The section agrees that the length of a brief and other papers should be primarily governed by limits on the number of words and by general rules concerning the layout of pages. The section states that the proposed amendments are, however, too detailed and will be confusing to those not versed in typographic issues. Specifically, the section states:

a. The requirement of "a clear black image on white paper" is sufficient; there is no need for the "300 dots per inch" standard.
b. The rule should not require a certification of compliance. The rule could provide that by filing a brief, an attorney certifies that the brief complies with the rule. The certification requirement is "implicitly demeaning to the integrity and professionalism of lawyers." The rules do not otherwise require certification of compliance even when a violation may not be obvious from the face of a document.

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

Judge Easterbrook states that the proposed amendments are a substantial step forward but he suggests a number of additional amendments.

a. He suggests that the copies of faxes and Lexis printouts should be includible in an appendix. He believes that the appropriate step would be to permit inclusion of a document in an appendix only if the original has 300 dots per inch or better.
b. To aid a judge with vision difficulties, the rule should require lawyers to retain electronic copies of any brief composed on a computer so that the courts by local rule, or order in particular cases, may call for the briefs and other papers in electronic form. This would permit a judge to enlarge the text on a computer screen, print it in a larger size on a local printer, or even have it read aloud by a computer equipped to do so. He does not suggest that the rule require routine filing of disks.
c. He continues to believe that the rule should adopt character rather than word limits.
d. He is concerned that the conversion from pages to words has

Committee, however, believes that a word count is necessary to curtail "cheating," the Litigation Committee suggests that a word count alone is a sufficient limitation.

Specifically, the Litigation Committee notes that some long-time practitioners on the committee did not understand the requirement that a font be "serifed, roman, text style" and that even the distinction between "monospaced" and "proportionately" spaced typeface eluded some members of the committee. The committee questions the propriety of including examples of acceptable typefaces in the rule, calling them "a virtual advertisement for a product sold by those who drafted and testified in favor of the rule." The committee questions the need to vary the margin sizes depending upon whether a typeface is monospaced or proportionately spaced.

The committee states that the complexity of the rule will make court evaluation of compliance difficult. The committee notes the need for the litigants to certify the total and average word counts. The committee states that the rule's reliance upon the party's representation as to compliance demonstrates the superfluousness of the rule. The committee objects to reliance upon the word count derived from the word processing system used to prepare the brief because different systems count differently.

The committee believes that the 300 dots per inch minimum is unnecessary (in light of the requirement that text be a "clear black image") and that court determination of compliance will be difficult. If the judgment is that it is important to keep the 300 dpi standard, the Litigation Committee believes that it should be moved from the text of the rule to the note so that the rule will not become outdated by technological changes.

The Litigation Committee also objects to the requirement that a brief lie flat when open.

Finally, the committee objects to the requirement that only "printed court or agency decisions" may be included in an appendix. The committee states that if an unpublished decision may be cited, a party should be permitted to use the decisions in the form normally obtained from Lexis, Westlaw, or the courthouse database through the Internet. The committee argues that "[s]ometimes, an electronically retrieved version of a decision is far more legible than an nth-generation photocopy that is the only 'original' available to a party."

unnecessarily on formatting discretion.

h. With regard to paragraph (a)(6), the committee recommends that the permissible number of words be increased from 12,500 (6,250 for a reply brief) to 14,000 (7,000). A brief containing 14,000 words would be 50 pages in length if the average number of words per page is 280. The committee would eliminate the "safe harbor" exception from the certificate of compliance because it is overly complicated and burdensome to enforce. The committee believes that a word count is the better approach for all proportionately spaced briefs.

With regard to monospaced briefs, the committee believes that litigants may use excessive single-spaced footnotes to circumvent the limitation on length. The committee recommends, therefore, that any monospaced principal brief exceeding 40 pages (or reply brief exceeding 20 pages) should be subject to the average words per page and maximum words per brief rule as well as the certificate of compliance requirement.

i. In paragraph (a)(7), the committee suggests that the volumes of an appendix be limited to 300 pages each.

j. The committee suggests that paragraph (a)(8) prohibit plastic covers on briefs.

k. In paragraph (a)(9), the committee suggests that requiring a brief to "lie flat" may be too restrictive and suggests that it might be better to require that it "stay open" or "lie reasonably flat when open."

18. The Bar Association of the District of Columbia
Litigation Committee and its Subcommittee on Court Rules
1819 H. Street, N.W., 12th Floor
Washington, D.C. 20006

Although the Litigation Committee agrees that there should be a uniform national standard for appellate briefs, one that will preempt local rules on the subject, the committee believes that the existing provisions in Rules 28 and 32 dealing with the length and form of a brief are sufficient to accomplish the Advisory Committee's goals of ensuring that all litigants have an equal opportunity to present their material and that the documents are easily legible. The Litigation Committee opposes the proposed revisions for several reasons. The committee objects in general to the complexity of the proposed revisions. The committee objects to the complexity not only because of the burdens ordinarily accompanying any complex rule, but also because, in this case, the complexity "suggests that lawyers have an improper attitude and simply cannot be trusted." The Litigation Committee urges the courts of appeals "simply to respect the integrity of the bar to comply with present requirements." If the Standing

proposed revisions and supports the basic concepts: that there be distinct provisions for proportionately spaced type in contrast to monospaced type, and that the length of proportionately spaced briefs be calculated by a "word-count" method.

The committee favors the word-count method because it removes the incentive to cram words on a page or otherwise "cheat" on a page limit. The one objection to word counting that troubled the committee is that various word processing systems count differently so that the total will vary depending on the system used. They believe that the difference can be more than 200 words for a 35 page brief (or the equivalent of a three-quarters of a page). Even so, the committee believes that the benefits of the rule outweigh its drawbacks and that it should be adopted.

The committee made a number of suggestions for "fine-tuning" the rule.

a. In paragraph (a)(1) the committee believes that the 300 dots per inch requirement is too technical and that requiring "a clear black image" is sufficient.

b. The committee also suggests that only single-sided printing be permitted.

c. In paragraph (a)(2) the committee questions whether there is a uniform preference for proportional typefaces.

d. In subsections (a)(2)(A) and (B), the committee recommends that the rule require proportional fonts to be 14 points rather than 12. The committee also believes that defining proportional and monospaced type in terms of "advance widths" may not be understood by many practitioners and suggests more reader-friendly definitions. The committee suggests that proportionately spaced type could be defined as that having "characters of different widths" and that monospaced type could be defined as that having "characters of the same width." The committee also suggests deleting the reference in the rule to particular type style examples. The committee does not believe that it is necessary to require serifed styles to ensure readability. Finally, the committee believes that monospaced type should be 10 characters per inch rather than 11.

e. In subsection (a)(3)(A), the committee would use a single margin requirement for all briefs.

f. In subsection (a)(3)(B), the committee would eliminate the option of using 6-1/8 by 9-1/4 inch paper.

g. The committee believes that paragraphs (a)(4) and (5) impinge

15. Clerks of the United States Courts of Appeals for
D.C. Circuit and the First through Eleventh Circuits

The primary concern of the clerks is that the rule be one that can realistically be enforced by deputy clerks and easily understood and abided by litigants. Specifically, the clerks state:

a. Legibility is crucial, but they question the need to require a "resolution of 300 dots per inch." How would a deputy clerk clearly identify a possible violation?
b. They suggest deletion of the preference for proportional type.
c. They are concerned about the requirement that a typeface design be serifed, Roman, text style. Given the large variety of type styles, they are concerned about enforceability and about fairness to those who have invested in alternatives.
d. They prefer a single margin requirement rather than varying the margins depending upon whether monospaced or proportional type is used.
e. Paragraphs (a)(4) and (5), dealing with boldface and underlining or italicizing case names, unnecessarily limit formatting discretion and provide more detail than is necessary in a national rule.
f. They support the use of word counts for defining the length of a brief <u>provided</u> the certification by the litigant can be relied upon for purposes of filing. They suggest that it might be helpful to create a form certification as an appendix to the rules.

16. Competitive Enterprise Institute
1001 Connecticut Avenue, N.W., Suite 1250
Washington, D.C. 20036

The institute opposes double-sided printing and, anticipating that the Advisory Committee will receive suggestions that it mandate the use of recycled paper, mandating the use of recycled paper. The institute does not believe that such measures will have any significant environmental benefits. Among other factors the institute provides statistics about the pollutants generated in recycling paper.

17. Peter W. Davis, Esquire, Chair
Ninth Circuit Advisory Committee on
Rules of Practice
Crosby, Hearey, Roach & May
1999 Harrison Street
Oakland, California 94612

The Ninth Circuit committee generally favors the approach taken in the

submissions to the courts of appeals.

The group calls double-sided printing both environmentally beneficial and cost-effective. They note that legibility is not an objection because the rule already takes legibility into account. Note taking, they say, is not a problem because commercially printed briefs are double-sided and there should not be a different standard when briefs are produced in-house.

With regard to recycled content paper, the group says that the states of Florida, New York and Colorado permit papers submitted to their courts on recycled-content paper and that Michigan and Washington have similar proposals under consideration. The group also notes that Executive Order 12873 requires the use of recycled paper by the administration. The group states that recycled-content paper is comparable to most types of nonrecycled paper in terms of quality, function, availability, and price and requires no changes in office machinery. They argue that mandating recycled-content paper for important appellate documents would have a ripple effect making the use of such paper acceptable generally in the practice of law, a profession that uses a great deal of paper products.

14. Chicago Council of Lawyers
Federal Courts Committee
One Quincy Court Building, Suite 800
220 South State Street
Chicago, Illinois 60604

The Federal Courts Committee of the Chicago Council of Lawyers supports the goal of setting a national standard for typeface and other requirements, "to clear the tangle of contradictory local rules."

The committee, however, opposes replacing the current page limits with the proposed word count. The committee believes that overlong briefs are usually the product of either poor writing style or the courts' insistence that all issues be fully briefed, on pain of waiver.

The committee also opposes the requirement that only "printed court or agency decision[s]" be included in an appendix. The committee points out that very often district court opinions are not printed at all. Even as to those that are "printed" there is a lag time of two to three weeks before incoming slip opinions are available in the federal court library and that West advance sheets run a full month to two months behind decision dates. The restriction would deprive the reviewing court of the benefit of the most recent, on-point authority.

11. The State Bar of California
The Committee on Federal Courts
555 Franklin Street
San Francisco, California 94102-4498

The committee states that the word limits are "a very bad idea." They believe that the cost exacted by the change is too great. Time will be wasted simply on compliance with a format requirement. Many attorney's offices do not have equipment that will count words and even automated counting will be unduly time consuming. The committee prefers the current page limits but would find a total word limit, without per-page limits, more palatable. The safe-harbor alternatives are not palatable.

The committee opposes the prohibition on use of Lexis and Westlaw printouts in an appendix. If necessary, the rule simply should require that the printouts be legible.

12. Honorable William C. Canby, Jr.
United States Circuit Judge
6445 United States Courthouse
230 N. First Avenue
Phoenix, Arizona 85025

Judge Canby states that double-spaced pica type is far easier to read than proportionately spaced type in 12, 14, or even 15 point type. Judge Canby urges the committee to require monospaced type with 10 characters per inch. If, however, the rule continues to allow proportionately spaced type, it should be 14 point type. He would not, however, say "at least 14 points" because footnotes are difficult to read at 14 points and even more difficult at 15 points. Judge Canby also urges reconsideration of the two-sided brief.

13. Aaron H. Caplan, Esquire
on behalf of the Law Firm Waste Reduction Network
Perkins Coie
1201 Third Avenue, 40th Floor
Seattle, Washington 98101-3099

Mr. Caplan writes on behalf of the Law Firm Waste Reduction Network, an affiliation of attorneys and staff from among Seattle's larger law firms. The group writes in support of those portions of the proposed rule permitting the use of both sides of the page and encouraging the use of proportionately spaced typefaces. The group also proposes that the committee consider encouraging the use of recycled content paper for

lie flat when open.

8. Honorable Pasco M. Bowman
United States Circuit Judge
819 U.S. Courthouse
Kansas City, Missouri 64106

Judge Bowman prefers monospaced type and suggests deleting the preference for either monospaced type or proportional type. He also suggests that the rule require 14 or 15 point proportional type rather than 12. He notes that the use of 12 point proportional type can result in considerably more words per page than the 280 word maximum in the proposed rule. With regard to monospaced type he questions why a maximum of 11 characters per inch is specified when the most common monospaced typefaces have only 10 characters per inch. He questions whether double-sided printing is a good idea.

9. Honorable James R. Browning
United States Circuit Judge
121 Spear Street
Post Office Box 193939
San Francisco, California 94119-3939

Judge Browning prefers single-sided briefs. He prefers monospaced typeface; if the rule permits proportionately spaced typeface, he believes that it should be larger than 12 point. With regard to monospaced typeface, he suggests that 10 characters per inch should be the minimum.

10. The State Bar of California
The Committee on Appellate Courts
555 Franklin Street
San Francisco, California 94102-4498

The committee opposes using a word count to limit the length of a brief and reducing the length of a brief from 50 pages to 44.6 (12,500 words per brief divided by 280 words per page). The committee says that many law firms do not have the capability of counting words using their word processing equipment and the safe harbors cause too significant loss in length. The committee also opposes the prohibition on using Lexis and Westlaw printouts in an appendix. The committee further notes that two-sided briefs are difficult to read and that common brief bindings generally do not lie flat.

4. Stewart A. Baker, Esquire
Steptoe & Johnson
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036-1795

Notes that it is difficult to read long lines of proportionally spaced type. He suggests that if the words per page limit is a subtle way of requiring the use of larger margins, the rule should be more direct.

5. Honorable Bobby R. Baldock
United States Circuit Judge
Post Office Box 2388
Roswell, New Mexico 88202

Judge Baldock prefers 14 point proportional type to either 12 point proportional type (which he characterizes as the least desirable) or monospaced type with at least 10 characters per inch. Judge Baldock also objects to double-sided printing.

6. Honorable Stanley F. Birch, JR.
United States Circuit Judge
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Judge Birch joins in the remarks of Judge Edmondson (see summary below).

7. Honorable Michael Boudin
United States Circuit Judge
J.W. McCormack Post Office and
Courthouse
Boston, Massachusetts 02109

Judge Boudin questions the replacement of the 50/25-page length limitations for principal and reply briefs by the new provisions governing typeface, words per page, and total number of words. He believes the new provisions are unduly complicated and will be especially burdensome for solo and small firm practitioners. He recognizes that there probably should be different page limits for printed and typewritten briefs but would otherwise simply include in the rule an admonishment that "any devices that appear unreasonably designed to crowd more than an ordinary number of words into the page limits may subject the brief to rejection, or requirement of refiling in proper form, or (in egregious cases) other sanctions. He also suggests that it is unnecessary to require an appendix to

mechanics used to curtail the ability of lawyers to circumvent the current page limits.

a. The section opposes (a)(6) stating that it effectively shorten the maximum length of a brief from 50 to 44 pages. The sections emphasizes that a party appearing before a court of appeals has a right to present all of his or her non-frivolous arguments to the court.

b. The section believes that the paragraphs (a)(1)-(6) are unduly confusing, hard to follow, and will be even more difficult to administer. The section cites the differing margin requirements depending upon the typeface used as illustrative. The section further notes that many word processors do not have word counting capabilities and that many pro se litigants and small firms still use typewriters. The section recommends a simpler solution such as keeping the current margin and page length requirements and requiring that all briefs not commercially printed be produced in 11-point, 10 character per inch Courier. As an alternative, it suggests the Fifth Circuit Rules 28.1 and 32.1, which allows proportional fonts but is relatively easy to follow and administer.

With regard to (a)(7), the section opposes the restrictive language in the Committee note regarding legibility of documents to be included in an appendix. The section believes that simply requiring "legibility" is sufficient and that the additional requirements of the note should not be added to the rule and that the language of the note should be stricken. The section points out that in many cases, the "original" document in the record is a copy. Sometimes the record document is a copy of a fax. Similarly, Westlaw and Lexis opinions can be retrieved on printers that produce a 300 dot per inch resolution in double column format.

With regard to (b)(2), the section notes that neither the text nor the note indicate the length limitation application to "other papers." The section recommends that, at a minimum, the rule should refer to Rule 40(b), which prescribes a 15-page limit for a petition for rehearing.

3. State Bar of Arizona
111 West Monroe, Suite 1800
Phoenix, Arizona 85003-1742

The State Bar of Arizona has no objections to and foresees no particular difficulties with the proposed amendments.

COMMENTS ON PROPOSED AMENDMENT OF FED. R. APP. P. 32

The proposed amendments change Rule 32 in several significant ways. The rule permits a brief to be produced using either a monospaced typeface or a proportionately spaced typeface, although the rule expresses a preference for the latter. Monospaced and proportionately spaced typefaces are defined in the rule. Margins are specified for different paper sizes and different typefaces.

The proposed rule establishes new length limitations for briefs. A principal brief is limited to a total of 12,500 words and a reply brief may not exceed 6,250 words. In addition, the average number of words per page may not exceed 280 words. The latter limitation is included to ensure that the typeface use is sufficiently large to be easily legible.

1. Honorable Ruggero J. Aldisert
United States Circuit Judge
6144 Calle Real
Santa Barbara, California 93117-2053

Given the caseload crises in the United States Courts of Appeals, Judge Aldisert states that any rule amendment should be designed to assist the judges. He believes that certain portions of the proposed amendments do not pass that test. He states that the rule should prohibit the use of proportionately spaced typeface because it is too difficult to read, but that if proportional type is used, the point size should be greater than 12. He objects to brief length being measured by number of words because it will be more difficult for court personnel to monitor. His strongest objection is to authorizing double-sided printing of briefs. Judge Aldisert uses the reverse side of the pages for his notes.

Specifically Judge Aldisert suggests that a monospaced typeface be not more than 10 characters per inch. He also suggests that brief lengths be expressed in number of pages and that a principal brief should be no more than 35 pages.

2. American Bar Association
Section of Litigation
750 North Lake Shore Drive
Chicago, Illinois 60611

The section disagrees with and proposed changes to (a)(1)-(6), (a)(7), and (b)(2).

With regard to (a)(1)-(6) the section disagrees with the substance and

opaque, unglazed paper 8-1/2 by 11 inches in size." That alternative is not eliminated because (a)(2)(B) permits the preparation of documents with standard pica type. The only change is that the rule now specifies margins for these typewritten documents.

already has such a requirement, and the Fifth Circuit rule states a preference for it. While a spiral binding would comply with this requirement, it is not intended to be the exclusive method of binding. Center stapling, such as used on a pamphlet brief, also satisfies this requirement.

The rule requires that the number of the case be centered at the top of the front cover of a brief or appendix. This will aid in identification of the document and again the idea was drawn from a local rule. The rule also requires that the title of the document identify the party or parties on whose behalf the document is filed. When there are multiple appellants or appellees, this information is necessary to the court. If, however, the document is filed on behalf of all appellants or all appellees it may so indicate. Further it may be possible to identify the class of parties on whose behalf the document is filed. Otherwise, it may be necessary to name each party. The rule also requires that attorneys' telephone numbers appear on the front cover of a brief or appendix.

Having amended the national rule to provide additional detail, the Committee foresees little need for local variation and suggests that the existing local rules be repealed. It is the Committee's further suggestion that before a circuit adopts a local rule governing the form or style of papers, the circuit will carefully weigh the value of the proposed local rule against the difficulties and inefficiencies local variations create for national practitioners.

Subdivision (b). The old rule required a petition for rehearing to be produced in the same manner as a brief or appendix. The new rule also requires that a suggestion for rehearing in banc and a response to either a petition for panel rehearing or a suggestion for rehearing in banc be prepared in the same manner but the length limitations of paragraph (a)(6) are not applicable, the sheets may be attached at the left margin, and a cover is not required if a caption is used that provides all the information needed by the court to properly identify the document and the parties for whom it is filed.

Former subdivision (b) stated that other papers "may be produced in like manner, or they may be typewritten upon

proportionately spaced typeface is used. The side margins must be wider and the top and bottom margins must be smaller when a proportionately spaced typeface is used than when a monospaced typeface is used. Again the differences are aimed at increasing ease of legibility.

The amendments include a length limitation based on the number of words per brief rather than the number of pages. This gives every party the same opportunity to present an argument without regard to the typeface used and eliminates any incentive to use footnotes or typographical "tricks" to squeeze more material onto a page. The rule imposes not only an overall word limit, but also limits the average number of words per page. The reason for the limit on the average number of words per page as well as the limit on the total number of words is to ensure legibility. The limitation on the average number of words per page is an important element in guaranteeing that any proportionately spaced typeface used is of sufficient size to be easily legible. The specification of both the margins and the average number of words per page will ensure that the typeface is of sufficient size to be easily legible.

The rule requires a certification of compliance with both word limits and permits the party to rely upon the word count of the word processing system used to prepare the brief. However, the rule provides safe harbors as to which no such certification is necessary.

The rule recognizes that an appendix is virtually always produced by photocopying existing documents. The rule, however, requires that the photocopies be legible. Photocopies of the original documents are most legible; photocopying of copies, and especially of faxed copies, should be avoided. The rule permits inclusion of "printed" court or agency decisions. Photocopies of decisions retrieved electronically, as from Westlaw or Lexis, should not be used.

The rule requires a brief or appendix to be bound or stapled in any manner that is secure, does not obscure the text, and that permits the document to lie flat when open. Many judges and most court employees do much of their work at computer keyboards and a brief that lies flat when open is significantly more convenient. The Federal Circuit

The rule provides two options. The text can be prepared using a proportionately spaced typeface or a monospaced typeface. "A monospaced typeface" is defined as one in which all characters have "the same advance width." That means that each character is given the same horizontal space on the line. A wide letter such as a capital "m" and a narrow letter such as a lower case "i" are given the same space. In contrast "a proportionately spaced typeface" gives a different amount of horizontal space to characters depending upon the need of the character. A capital "m" would be given more horizontal space than a lower case "i."

Additional requirements are imposed. "A proportionately spaced typeface," as further defined by the rule, must be "serifed." Serifs are the small strokes at the top or bottom of a character. Serifs give a horizontal emphasis to a line of text and make continuous text easier to read. The typeface must be a roman style, again because roman style typefaces are easier to read. New Century Schoolbook, Bookman, and Garamond are all serifed, roman style typefaces. Lastly, the typeface must be a text typeface rather than a display or script typeface.

"A monospaced typeface" within the meaning of this rule must have not only the same advance width for each character, but there must not be more than 11 characters per inch. The latter requirement is to ensure that the typeface is of sufficient size for easy legibility. A typewriter with Pica type produces a monospaced typeface with no more than 11 characters per inch, as does a computer with Courier font in 12 point.

The rule continues to authorize pamphlet size briefs on 6-1/8 by 9-1/4 inch paper; the size used by commercial printers. Although commercially printed briefs are not common, they are favored by judges; and technology is progressing to the point where production of such briefs "in house," that is using equipment in a lawyer's own office, may soon be possible. Such briefs must be single spaced and use proportionately spaced typeface.

A brief produced on 8-1/2 by 11 inch paper generally must be double spaced. For 8-1/2 by 11 inch briefs, the margins differ depending upon whether a monospaced or

241 (B) <u>a cover is not necessary if</u>
242 <u>the paper has a caption</u>
243 <u>that includes the case</u>
244 <u>number, the name of the</u>
245 <u>court, the title of the case,</u>
246 <u>and a brief descriptive title</u>
247 <u>indicating the purpose of</u>
248 <u>the paper and identifying</u>
249 <u>the party or parties for</u>
250 <u>whom it is filed.</u>

Committee Note

Subdivision (a). A number of stylistic and substantive changes have been made in subdivision (a). The rule permits the use of both sides of the paper if the resulting document is clear and legible. Because photocopying is inexpensive and widely available, the exception allowing a person to file carbon copies has been limited to pro se persons proceeding in forma pauperis.

New paragraphs have been added governing the printing of a brief or appendix. The old rule simply stated that a brief or appendix produced by the standard typographic process must be printed in at least 11 point type or, if produced in any other manner, the lines of text must be double spaced. Today few briefs are produced by commercial printers or by typewriters; most are produced on and printed by computers. The availability of computer fonts in a variety of sizes and styles has given rise to local rules limiting type styles. The Advisory Committee believes that some standards are needed both to ensure that all litigants have an equal opportunity to present their material and to ensure that the documents are easily legible.

219 ~~sheets shall be attached at the left~~
220 ~~margin. Carbon copies may be used for~~
221 ~~filing and service if they are legible.~~
222 ~~A motion or other paper~~
223 ~~addressed to the court shall contain a~~
224 ~~caption setting forth the name of the~~
225 ~~court, the title of the case, the file~~
226 ~~number, and a brief descriptive title~~
227 ~~indicating the purpose of the paper.~~
228 (1) *Motion.* The form for a motion is
229 governed by Rule 27(d).
230 (2) *Other Papers.* Other papers,
231 including a petition for rehearing
232 and a suggestion for rehearing in
233 banc, and any response to such
234 petition or suggestion, must be
235 produced in a manner prescribed
236 by subdivision (a), but paragraph
237 (a)(6) does not apply, and
238 (A) consecutive sheets may be
239 attached at the left margin;
240 and

197 ~~Appendix)~~; and

198 ~~(5)~~ <u>(F)</u> the ~~names~~ <u>name,</u>

199 ~~and~~ <u>office</u> addresses

200 <u>, and telephone</u>

201 <u>number</u> of counsel

202 representing the

203 party ~~on whose~~

204 ~~behalf~~ <u>for whom</u> the

205 document is filed.

206 <u>(9)</u> <u>*Binding.* A brief or appendix</u>

207 <u>must be stapled or bound in any</u>

208 <u>manner that is secure, does not</u>

209 <u>obscure the text, and permits the</u>

210 <u>document to lie flat when open.</u>

211 (b) *Form of <u>O</u>ther <u>P</u>apers.* ~~Petitions for~~

212 ~~rehearing shall be produced in a manner~~

213 ~~prescribed by subdivision (a). Motions~~

214 ~~and other papers may be produced in~~

215 ~~like manner, or they may be typewritten~~

216 ~~upon opaque, unglazed paper 8-1/2 by~~

217 ~~11 inches in size. Lines of typewritten~~

218 ~~text shall be double spaced. Consecutive~~

175 <u>(A)</u> <u>the number of the</u>
176 <u>case centered at the</u>
177 <u>top;</u>
178 ~~(1)~~ <u>(B)</u> the name of the
179 court ~~and the~~
180 ~~number of the case~~;
181 ~~(2)~~ <u>(C)</u> the title of the case
182 (see Rule 12(a));
183 ~~(3)~~ <u>(D)</u> the nature of the
184 proceeding in the
185 court (*e.g.*, Appeal,
186 Petition for Review)
187 and the name of the
188 court, agency, or
189 board below;
190 ~~(4)~~ <u>(E)</u> the title of the
191 document,
192 <u>identifying the party</u>
193 <u>or parties for whom</u>
194 <u>the document is</u>
195 <u>filed</u> ~~(*e.g.*, Brief for~~
196 (~~Appellant,~~

153 ~~such pages may be informally~~
154 ~~renumbered if necessary.~~
155 (8) *Cover.* ~~If briefs are produced by~~
156 ~~commercial printing or~~
157 ~~duplicating firms, or, if produced~~
158 ~~otherwise and the covers to be~~
159 ~~described are available,~~ Except
160 for filings of pro se parties, the
161 cover of the appellant's brief ~~of~~
162 ~~the appellant should~~ must be
163 blue; ~~that of the appellee~~ the
164 appellee's, red; ~~that of~~ an
165 intervenor's or amicus curiae's,
166 green; ~~that of~~ and any reply brief,
167 gray. The cover of ~~the appendix,~~
168 ~~if separately printed, should~~ a
169 separately printed appendix must
170 be white. The front ~~covers of the~~
171 ~~briefs and of appendices, if~~
172 ~~separately printed, shall~~ cover of
173 a brief and of a separately printed
174 appendix must contain:

131 (i) 30 pages for a
132 principal brief; or
133 (ii) 15 pages for a reply
134 brief; or
135 (B) in a monospaced typeface
136 and does not exceed
137 (i) 40 pages for a
138 principal brief; or
139 (ii) 20 pages for a reply
140 brief.
141 (7) *Appendix.* An appendix must be
142 in the same form as a brief, but
143 when an appendix is bound in
144 volumes having pages 8-1/2 by 11
145 inches, it may include a legible
146 photocopy of any document found
147 in the record or of a printed court
148 or agency decision.
149 ~~Copies of the reporter's transcript~~
150 ~~and other papers reproduced in a~~
151 ~~manner authorized by this rule~~
152 ~~may be inserted in the appendix;~~

109 must be on average no more than
110 280 words per page including
111 footnotes and quotations. The
112 word count does not include the
113 corporate disclosure statement,
114 table of contents, table of
115 citations, certificate of service and
116 any addendum containing statutes,
117 rules regulations, etc. The brief
118 must be accompanied by a
119 certification of compliance with
120 the word limits of this paragraph.
121 In preparing this certificate, a
122 party may rely upon the word
123 count of the word processing
124 system used to prepare the brief.
125 No certificate is required if the
126 brief is
127 (A) in at least a 12 point
128 proportionately spaced
129 typeface and does not
130 exceed

87 top and bottom
88 margins must be 1-
89 1/4 inch.
90 (B) A brief on 6-1/8 by 9-1/4
91 inch paper must be single
92 spaced or its equivalent,
93 must use a proportionately
94 spaced typeface, and must
95 have type matter not
96 exceeding 4-1/6 by 7-1/6
97 inches.
98 (4) *Boldface.* A brief may use
99 boldface only for covers, headings,
100 and captions.
101 (5) *Case Names.* Case names must
102 be underlined unless a distinct
103 italic typeface is used.
104 (6) *Length.* Except by permission of
105 the court, a principal brief must
106 not exceed 12,500 words and a
107 reply brief must not exceed 6,250
108 words, and in either case there

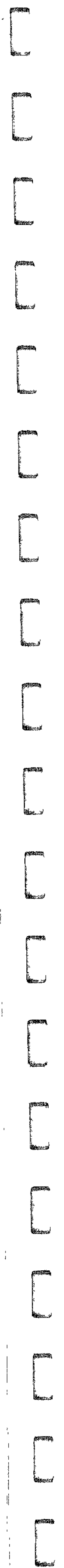
65 either 8-1/2 by 11 inch paper or
66 6-1/8 by 9-1/4 inch paper.
67 (A) A brief on 8-1/2 by 11 inch
68 paper must be double
69 spaced, but quotations
70 more than two lines long
71 may be indented and
72 single-spaced, and headings
73 and footnotes may be
74 single-spaced. In addition,
75 (i) if a proportionately
76 spaced typeface is
77 used, the side
78 margins must be at
79 least 1-1/4 inch, and
80 the top and bottom
81 margins must be at
82 least 1 inch; and
83 (ii) if a monospaced
84 typeface is used, the
85 side margins must
86 be 1 inch, and the

43 proportionately spaced typeface is
44 preferred.
45 (A) "A proportionately spaced
46 typeface" is one in which
47 the individual characters
48 have individual advance
49 widths. The design must
50 be of a serifed, roman, text
51 style. Examples are New
52 Century Schoolbook,
53 Bookman, and Garamond.
54 (B) "A monospaced typeface" is
55 a typeface in which all
56 characters have the same
57 advance width and there
58 are no more than 11
59 characters to an inch.
60 Examples are Pica type,
61 and a 12 point Courier
62 font.
63 (3) *Paper Size, Margins, and Line*
64 *Spacing.* A brief must be on

21 ~~All printed matter must appear in~~
22 ~~at least 11 point type on opaque,~~
23 ~~unglazed paper. Briefs and~~
24 ~~appendices produced by the~~
25 ~~standard typographic process shall~~
26 ~~be bound in volumes having pages~~
27 ~~6-1/8 by 9-1/4 inches and type~~
28 ~~matter 4-1/6 by 7-1/6 inches.~~
29 ~~Those produced by any other~~
30 ~~process shall be bound in volumes~~
31 ~~having pages 8-1/2 by 11 inches~~
32 ~~and type matter not exceeding 6-~~
33 ~~1/2 by 9-1/2 inches with double~~
34 ~~spacing between each line of text.~~
35 ~~In patent cases the pages of briefs~~
36 ~~and appendices may be of such~~
37 ~~size as is necessary to utilize~~
38 ~~copies of patent documents.~~
39 (2) *Typeface.* Either a
40 proportionately spaced typeface
41 or a monospaced typeface may be
42 used in a brief, but a

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

1 (a) *Form of a Briefs and ~~the~~ an Appendix.*
2 (1) *In General.* ~~Briefs and~~
3 ~~appendices~~ A brief may be
4 produced by ~~standard typographic~~
5 typing, printing, or by any
6 duplicating or copying process
7 ~~which~~ that produces a clear black
8 image on white paper with a
9 resolution of 300 dots per inch or
10 more. The paper must be
11 opaque, unglazed paper; both
12 sides of the paper may be used if
13 the resulting document is clear
14 and legible. Carbon copies ~~of~~
15 ~~briefs and appendices~~ must ~~may~~
16 not be ~~submitted~~ used without the
17 court's permission ~~of the court~~,
18 except ~~in behalf of parties allowed~~
19 ~~to proceed~~ by pro se persons
20 proceeding in forma pauperis.



appellant's
20 brief ~~of the appellant~~ except that a statement of the

21 case need not be made unless the appellee is

appellant's
22 dissatisfied with the statement ~~of the appellant.~~

Committee Note

Subdivision (g). The amendment deletes former subdivision (g) that limited a principal brief to 50 pages and a reply brief to 25 pages. The length limitations have been moved to Rule 32. Rule 32 deals generally with the format for a brief or appendix.

Subdivision (h). The amendment requires an appellee's brief to comply with (a)(1) through (7) with regard to a cross-appeal. The addition of a separate paragraph requiring a summary of argument increased the relevant paragraphs of subdivision (a) from (6) to (7).

Redraft - March 1995

Rule 28. Briefs.

* * * * *

1 (g) [reserved]

2 ~~*Length of briefs.* Except by permission of~~

3 ~~the court, or as specified by local rule of the court of~~

4 ~~appeals, principal briefs must not exceed 50 pages, and~~

5 ~~reply briefs must not exceed 25 pages, exclusive of~~

6 ~~pages containing the corporate disclosure statement,~~

7 ~~table of contents, tables of citations, proof of service,~~

8 ~~and any addendum containing statutes, rules,~~

9 ~~regulations, etc.~~

10 (h) *Briefs in Cases Involving Cross Appeals.* If a

11 cross appeal is filed, the party who ~~first~~ files a notice

12 of appeal, or ~~in the event that~~ the notices are filed on

13 the same day, the plaintiff in the proceeding below

14 ~~shall be~~ deemed the appellant for the purposes of this

15 rule and Rules 30 ~~and 31~~, unless the parties otherwise

16 agree or the court otherwise orders. The brief ~~of the~~

17 ~~appellee~~ ~~shall~~ conform to the requirements of

18 ~~subdivision~~ (a)(1)- ~~(6)~~ (7) ~~of this rule~~ with respect to

19 the appellee's cross appeal as well as respond to the

Attorney changes approved unanimously

Style changes approved unanimously

ISSUES AND CHANGES - RULE 28

There are only two commentators who made comments specifically aimed at Rule 28. Because of the interrelationship of the changes in Rule 28 and 32, most commentators combined their discussion of the two rules. Because the "substance" of the change is contained in Rule 32, the issues the commentators raise will be addressed in the treatment of Rule 32.

The only change made in the redraft of Rule 28 is to note that subdivision (g) is reserved and to leave the current labels on the remaining subdivisions. I agree that it is better not to disturb the labels.

Public Citizen suggests amendment of subdivision (h) to make it clear that if there is more than one appellant or appellee that a court of appeals cannot require the filing of a joint brief. At its September 1993 meeting the Advisory Committee rejected a proposal that each side file a single brief in consolidated or multi-party appeals but the Committee has not considered the wisdom of prohibiting a court from requiring a joint brief. Because the proposal under consideration does not amend subdivision (h), I have made no changes. If the Committee wishes to pursue the idea, I suggest that it be placed on the docket for later consideration.

COMMENTS ON PROPOSED AMENDMENT OF FED. R. APP. P. 28

Rule 28 is amended to delete the page limitations for a brief. The length limitations have been moved to Rule 32. Rule 32 deals generally with the form and format for a brief.

Because of the interrelationship of the changes to Rules 28 and 32 most commentators combined their discussion of the two rules. Because the "substance" of the changes is found in Rule 32, I have summarized here only those comments aimed specifically at Rule 28. The rest of the comments are summarized under Rule 32.

1. P. Michael Jung, Esquire
   Strasburger & Price, L.L.P.
   901 Main Street, Suite 4300
   Dallas, Texas 73202

   Mr. Jung suggests that 28(g) should be shown as "[reserved]" rather than relettering Fed. R. App. P. 28(h)-(j).

2. Public Citizen Litigation Group
   2000 P Street, N.W., Suite 700
   Washington, D.C. 20036

   Public Citizen suggests that subdivision (h) should be amended to make it clear that when there is more than one appellant or appellee they cannot be required to file joint briefs. This can result in parties who opposed each other below, and whose rights are still at odds although they are on the same side of the appellate caption, being forced to join in one brief.

Committee Note

Subdivision (g). The amendment deletes former subdivision (g) that limited a principal brief to 50 pages and a reply brief to 25 pages. The length limitations have been moved to Rule 32. Rule 32 deals generally with the format for a brief or appendix.

Former subdivisions (h) through (j) have been redesignated as subdivisions (g) through (i). New subdivision (g) has been amended to require the appellee's brief to comply with (a)(1) through (7) with regard to a cross-appeal. The addition of a separate paragraph requiring a summary of argument increased the relevant paragraphs of subdivision (a) from (6) to (7).

21 appellee is dissatisfied with the statement of the
22 appellant.
23 ~~(i)~~ (h) *Briefs in a Cases Involving Multiple*
24 *Appellants or Appellees.* In cases involving more than
25 one appellant or appellee, including cases consolidated
26 for purposes of the appeal, any number of either may
27 join in a single brief, and any ~~appellant or appellee~~
28 party may adopt by reference any part of the brief of
29 another. Parties may similarly join in reply briefs.
30 ~~(j)~~ (i) *Citation of Supplemental Authorities.*
31 When pertinent and significant authorities come to the
32 attention of a party after the party's brief has been
33 filed, or after oral argument but before decision, a
34 party may promptly advise the clerk of the court, by
35 letter, with a copy to all counsel, setting forth the
36 citations. There shall be a reference either to the
37 page of the brief or to a point argued orally to which
38 the citations pertain, but the letter shall without
39 argument state the reasons for the supplemental
40 citations. Any response shall be made promptly and
41 shall be similarly limited.

Rule 28. Briefs.

* * * * *

1 ~~(g) *Length of briefs.* Except by permission of~~
2 ~~the court, or as specified by local rule of the court of~~
3 ~~appeals, principal briefs must not exceed 50 pages, and~~
4 ~~reply briefs must not exceed 25 pages, exclusive of~~
5 ~~pages containing the corporate disclosure statement,~~
6 ~~table of contents, tables of citations, proof of service,~~
7 ~~and any addendum containing statutes, rules,~~
8 ~~regulations, etc.~~
9 ~~(h)~~ (g) *Briefs in a Cases Involving a Cross*
10 *Appeals*. If a cross appeal is filed, the party who first
11 files a notice of appeal, or in the event that the notices
12 are filed on the same day, the plaintiff in the
13 proceeding below shall be deemed the appellant for
14 the purposes of this rule and Rules 30 and 31, unless
15 the parties otherwise agree or the court otherwise
16 orders. The brief of the appellee shall conform to the
17 requirements of subdivision (a)(1)- ~~(6)~~ (7) of this rule
18 with respect to the appellee's cross appeal as well as
19 respond to the brief of the appellant except that a
20 statement of the case need not be made unless the

43 used in a brief. ~~, but a~~
44 ~~proportionately spaced typeface is~~
45 ~~preferred.~~
46 (A) "A proportionately spaced
47 typeface" is one that uses
48 characters of different
49 widths. The design must
50 be of a serifed, roman, text
51 style. ~~Examples are New~~
52 ~~Century Schoolbook,~~
53 ~~Bookman, and Garamond.~~
54 (B) "A monospaced typeface" is
55 a typeface in which all
56 characters are the same
57 width and there are no
58 more than 10-1/2
59 characters to an inch.
60 ~~Examples are Pica type,~~
61 ~~and a 12 point Courier~~
62 ~~font.~~
63 (3) *Paper Size, Margins, and Line*
64 *Spacing*. A brief must be on

65 either 8-1/2 by 11 inch paper or
66 6-1/8 by 9-1/4 inch paper.
67 (A) A brief on 8-1/2 by 11 inch
68 paper must be double
69 spaced, but quotations
70 more than two lines long
71 may be indented and
72 single-spaced, and headings
73 and footnotes may be
74 single-spaced. In addition,
75 (i) if a proportionately
76 spaced typeface is
77 used, the side
78 margins must be at
79 least 1-1/4 inch, and
80 the top and bottom
81 margins must be at
82 least 1 inch; and
83 (ii) if a monospaced
84 typeface is used, the
85 side margins must
86 be 1 inch, and the

87 top and bottom
88 margins must be 1-
89 1/4 inch.
90 (B) A brief on 6-1/8 by 9-1/4
91 inch paper must be single
92 spaced or its equivalent,
93 must use a proportionately
94 spaced typeface, and must
95 have type matter not
96 exceeding 4-1/6 by 7-1/6
97 inches.
98 (4) *Boldface.* A brief may use
99 boldface only for covers, headings,
100 and captions.
101 (5) *Case Names.* Case names must
102 be underlined unless a distinct
103 italic typeface is used.
104 (6) *Length.* Except by permission of
105 the court, a principal brief must
106 not exceed 14,000 words and a
107 reply brief must not exceed 7,000
108 words, and in either case there

109 must be on average no more than
110 280 words per page including
111 footnotes and quotations. The
112 word count does not include the
113 corporate disclosure statement,
114 table of contents, table of
115 citations, certificate of service and
116 any addendum containing statutes,
117 rules regulations, etc. The brief
118 must be accompanied by a
119 certification of compliance with
120 the word limits of this paragraph.
121 In preparing this certificate, a
122 party may rely upon the word
123 count of the word processing
124 system used to prepare the brief.
125 No certificate is required if the
126 brief is
127 (A) in at least a 14 point
128 proportionately spaced
129 typeface and does not
130 exceed

131 (i) 30 pages for a
132 principal brief; or
133 (ii) 15 pages for a reply
134 brief; or
135 (B) in a monospaced typeface
136 and does not exceed
137 (i) 40 pages for a
138 principal brief; or
139 (ii) 20 pages for a reply
140 brief.
141 (7) *Appendix.* An appendix must be
142 in the same form as a brief, but
143 when an appendix is bound in
144 volumes having pages 8-1/2 by 11
145 inches, it may include a legible
146 photocopy of any document found
147 in the record ~~or of a printed court~~
148 ~~or agency decision.~~
149 ~~Copies of the reporter's transcript~~
150 ~~and other papers reproduced in a~~
151 ~~manner authorized by this rule~~
152 ~~may be inserted in the appendix;~~

Delete 5-1
Delete from ~~reporter~~ committee note — to published opinion 5-2

153 ~~such pages may be informally~~
154 ~~renumbered if necessary.~~
155 <u>(8)</u> <u>*Cover.*</u> ~~If briefs are produced by~~
156 ~~commercial printing or~~
157 ~~duplicating firms, or, if produced~~
158 ~~otherwise and the covers to be~~
159 ~~described are available,~~ <u>Except</u>
160 <u>for filings of pro se parties,</u> the
161 cover of the <u>appellant's</u> brief ~~of~~
162 ~~the appellant should~~ <u>must</u> be
163 blue; ~~that of the appellee~~ <u>the</u>
164 <u>appellee's</u>, red; ~~that of~~ an
165 intervenor<u>'s</u> or amicus curiae<u>'s</u>,
166 green; ~~that of~~ <u>and</u> any reply brief,
167 gray. The cover of ~~the appendix,~~
168 ~~if separately printed, should~~ <u>a</u>
169 <u>separately printed appendix must</u>
170 be white. The front ~~covers of the~~
171 ~~briefs and of appendices, if~~
172 ~~separately printed, shall~~ <u>cover of</u>
173 <u>a brief and of a separately printed</u>
174 <u>appendix must</u> contain:

175 (A) the number of the
176 case centered at the
177 top;
178 ~~(1)~~ (B) the name of the
179 court ~~and the~~
180 ~~number of the case~~;
181 ~~(2)~~ (C) the title of the case
182 (see Rule 12(a));
183 ~~(3)~~ (D) the nature of the
184 proceeding in the
185 court (*e.g.*, Appeal,
186 Petition for Review)
187 and the name of the
188 court, agency, or
189 board below;
190 ~~(4)~~ (E) the title of the
191 document,
192 identifying the party
193 or parties for whom
194 the document is
195 filed ~~(e.g., Brief for~~
196 ~~(Appellant,~~

197 ~~Appendix)~~; and

198 ~~(5)~~ (F) the ~~names~~ name,

199 ~~and~~ office addresses

200 , and telephone

201 number of counsel

202 representing the

203 party ~~on whose~~

204 ~~behalf~~ for whom the

205 document is filed.

206 (9) *Binding.* A brief or appendix

207 must be stapled or bound in any

208 manner that is secure, does not

209 obscure the text, and permits the

210 document to lie flat when open.

211 (b) *Form of Other Papers.* ~~Petitions for~~

212 ~~rehearing shall be produced in a manner~~

213 ~~prescribed by subdivision (a). Motions~~

214 ~~and other papers may be produced in~~

215 ~~like manner, or they may be typewritten~~

216 ~~upon opaque, unglazed paper 8-1/2 by~~

217 ~~11 inches in size. Lines of typewritten~~

218 ~~text shall be double spaced. Consecutive~~

219 ~~sheets shall be attached at the left~~

220 ~~margin. Carbon copies may be used for~~

221 ~~filing and service if they are legible.~~

222 ~~A motion or other paper~~

223 ~~addressed to the court shall contain a~~

224 ~~caption setting forth the name of the~~

225 ~~court, the title of the case, the file~~

226 ~~number, and a brief descriptive title~~

227 ~~indicating the purpose of the paper.~~

228 (1) *Motion.* The form for a motion is

229 governed by Rule 27(d).

230 (2) *Other Papers.* Other papers,

231 including a petition for rehearing

232 and a suggestion for rehearing in

233 banc, and any response to such

234 petition or suggestion, must be

235 produced in a manner prescribed

236 by subdivision (a), but paragraph

237 (a)(6) does not apply, and

238 (A) consecutive sheets may be

239 attached at the left margin;

240 and

241 (B) a cover is not necessary if
242 the paper has a caption
243 that includes the case
244 number, the name of the
245 court, the title of the case,
246 and a brief descriptive title
247 indicating the purpose of
248 the paper and identifying
249 the party or parties for
250 whom it is filed.

Draft Two - March 1995

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

1 (a) *Form of a Briefs and the an Appendix.*
2 (1) *In General.* ~~Briefs and~~
3 ~~appendices~~ A brief may be
4 produced by ~~standard typographic~~
5 ~~printing or by any duplicating or~~
6 ~~copying process which produces~~
7 any process that results in a clear
8 black image on white paper with
9 a resolution of 300 dots per inch
10 or more, including by typing,
11 printing or photocopying. The
12 paper must be opaque, unglazed
13 paper and only one side of the
14 paper may be used. Carbon
15 copies ~~of briefs and appendices~~
16 ~~may not be submitted without~~
17 may be used only with the court's
18 permission ~~of the court, except in~~
19 ~~behalf of parties allowed to~~

20 ~~proceed~~ or by pro se persons
21 proceeding in forma pauperis.
22 ~~All printed matter must appear in~~
23 ~~at least 11 point type on opaque,~~
24 ~~unglazed paper. Briefs and~~
25 ~~appendices produced by the~~
26 ~~standard typographic process shall~~
27 ~~be bound in volumes having pages~~
28 ~~6-1/8 by 9-1/4 inches and type~~
29 ~~matter 4-1/6 by 7-1/6 inches.~~
30 ~~Those produced by any other~~
31 ~~process shall be bound in volumes~~
32 ~~having pages 8-1/2 by 11 inches~~
33 ~~and type matter not exceeding 6-~~
34 ~~1/2 by 9-1/2 inches with double~~
35 ~~spacing between each line of text.~~
36 ~~In patent cases the pages of briefs~~
37 ~~and appendices may be of such~~
38 ~~size as is necessary to utilize~~
39 ~~copies of patent documents.~~
40 (2) *Typeface.* Either a
41 proportionately spaced typeface of

42 14 points or more, or a
43 monospaced typeface of no more
44 than 10-1/2 characters per inch
45 may be used in a brief. "A
46 proportionately spaced typeface"
47 is one that has characters with
48 different widths. The design must
49 be serifed and in roman, non-
50 script type. "A monospaced
51 typeface" is a typeface in which all
52 characters are the same width.
53 (3) *Paper Size, Margins, and Line*
54 *Spacing.* A brief must be on 8-
55 1/2 by 11 inch paper. The text
56 must be double spaced, but
57 quotations more than two lines
58 long may be indented and single-
59 spaced, and headings and
60 footnotes may be single-spaced.
61 In addition,
62 (A) if a proportionately spaced
63 typeface is used, the side

64 margins must be at least 1-
65 1/4 inch, and the top and
66 bottom margins must be at
67 least 1 inch; and
68 (B) if a monospaced typeface is
69 used, the side margins
70 must be 1 inch, and the top
71 and bottom margins must
72 be 1-1/4 inch.
73 (4) *Boldface.* A brief may use
74 boldface only for covers, headings,
75 and captions.
76 (5) *Case Names.* Case names must
77 be underlined unless a distinct
78 italic typeface is used.
79 (6) *Length.*
80 (A) Proportionately spaced
81 briefs. A principal brief
82 must not exceed 14,500
83 words and a reply brief
84 must not exceed 7,250
85 words. No brief may have

86 an average of more than
87 320 words per page,
88 including headings,
89 footnotes and quotations.
90 The word count does not
91 include any of the
92 following: corporate
93 disclosure statement, table
94 of contents, table of
95 citations, certificate of
96 service, or any addendum
97 containing statutes, rules,
98 regulations, etc.
99 (B) Monospaced or typewritten
100 briefs. A brief prepared in
101 a monospaced typeface
102 must either
103 (i) not exceed 50 pages
104 for a principal brief
105 and 25 pages for a
106 reply brief,
107 excluding the

108 corporate disclosure
109 statement, table of
110 contents, table of
111 citations, certificate
112 of service, and any
113 addendum
114 containing statutes,
115 rules, regulations,
116 etc. or
117 (ii) comply with the
118 word counts, both
119 total and average
120 per page, for a
121 proportionately
122 spaced brief.
123 (C) The brief must be
124 accompanied by a
125 certificate of compliance
126 with (A) or (B) above. A
127 party preparing this
128 certificate may rely on the
129 word count of the word

130 <u>processing system used to</u>
131 <u>prepare the brief.</u>
132 <u>(D) A party may move for</u>
133 <u>permission to exceed the</u>
134 <u>brief lengths established by</u>
135 <u>this rule.</u>
136 <u>(7) *Appendix.* An appendix must be</u>
137 <u>in the same form as a brief, but it</u>
138 <u>may include a legible photocopy</u>
139 <u>of any document found in the</u>
140 <u>record or of a printed court or</u>
141 <u>agency decision.</u>
142 ~~Copies of the reporter's transcript~~
143 ~~and other papers reproduced in a~~
144 ~~manner authorized by this rule~~
145 ~~may be inserted in the appendix;~~
146 ~~such pages may be informally~~
147 ~~renumbered if necessary.~~
148 <u>(8) *Cover.*</u> ~~If briefs are produced by~~
149 ~~commercial printing or~~
150 ~~duplicating firms, or, if produced~~
151 ~~otherwise and the covers to be~~

152 ~~described are available,~~ <u>Except</u>
153 <u>for filings of pro se parties,</u> the
154 cover of the <u>appellant's</u> brief ~~of~~
155 ~~the appellant should~~ <u>must</u> be
156 blue; ~~that of the appellee~~ <u>the</u>
157 <u>appellee's,</u> red; ~~that of~~ an
158 intervenor<u>'s</u> or amicus curiae<u>'s,</u>
159 green; ~~that of~~ <u>and</u> any reply brief,
160 gray. The cover of ~~the appendix,~~
161 ~~if separately printed, should~~ <u>a</u>
162 <u>separately printed appendix must</u>
163 be white. The front ~~covers of the~~
164 ~~briefs and of appendices, if~~
165 ~~separately printed, shall~~ <u>cover of</u>
166 <u>a brief and of a separately printed</u>
167 <u>appendix must</u> contain:
168 <u>(A)</u> <u>the number of the</u>
169 <u>case centered at the</u>
170 <u>top;</u>
171 ~~(1)~~ <u>(B)</u> the name of the
172 court ~~and the~~
173 ~~number of the case~~;

174 ~~(2)~~ <u>(C)</u> the title of the case
175 (see Rule 12(a));
176 ~~(3)~~ <u>(D)</u> the nature of the
177 proceeding in the
178 court (*e.g.*, Appeal,
179 Petition for Review)
180 and the name of the
181 court, agency, or
182 board below;
183 ~~(4)~~ <u>(E)</u> the title of the
184 document,
185 <u>identifying the party</u>
186 <u>or parties for whom</u>
187 <u>the document is</u>
188 <u>filed</u> ~~(*e.g.*, Brief for~~
189 (~~Appellant,~~
190 ~~Appendix)~~; and
191 ~~(5)~~ <u>(F)</u> the ~~names~~ <u>name,</u>
192 ~~and~~ <u>office</u> addresses
193 <u>, and telephone</u>
194 <u>number</u> of counsel
195 representing the

196 party ~~on whose~~
197 ~~behalf~~ for whom the
198 document is filed.
199 (9) *Binding.* A brief or appendix
200 must be stapled or bound in any
201 manner that is secure, does not
202 obscure the text, and permits the
203 document to lie reasonably flat
204 when open.
205 (b) *Form of Other Papers.* ~~Petitions for~~
206 ~~rehearing shall be produced in a manner~~
207 ~~prescribed by subdivision (a). Motions~~
208 ~~and other papers may be produced in~~
209 ~~like manner, or they may be typewritten~~
210 ~~upon opaque, unglazed paper 8 1/2 by~~
211 ~~11 inches in size. Lines of typewritten~~
212 ~~text shall be double spaced. Consecutive~~
213 ~~sheets shall be attached at the left~~
214 ~~margin. Carbon copies may be used for~~
215 ~~filing and service if they are legible.~~
216 ~~A motion or other paper~~
217 ~~addressed to the court shall contain a~~

218 ~~caption setting forth the name of the~~
219 ~~court, the title of the case, the file~~
220 ~~number, and a brief descriptive title~~
221 ~~indicating the purpose of the paper.~~
222 (1) *Motion.* The form for a motion is
223 governed by Rule 27(d).
224 (2) *Other Papers.* Other papers,
225 including a petition for rehearing
226 and a suggestion for rehearing in
227 banc, and any response to such
228 petition or suggestion, must be
229 produced in a manner prescribed
230 by subdivision (a), but paragraph
231 (a)(6) does not apply, and
232 (A) consecutive sheets may be
233 attached at the left margin;
234 and
235 (B) a cover is not necessary if
236 the paper has a caption
237 that includes the case
238 number, the name of the
239 court, the title of the case.

240 <u>and a brief descriptive title</u>

241 <u>indicating the purpose of</u>

242 <u>the paper and identifying</u>

243 <u>the party or parties for</u>

244 <u>whom it is filed.</u>

Suggested additions to the Committee Note:

Paragraph (a)(1). The requirement that a brief be produced by a process "that produces a clear black image on white paper with a resolution of 300 dots per inch or more" is included to ensure the legibility of the brief. A brief produced by a typewriter, laser printer, or daisy wheel printer satisfies the 300 dots per inch (dpi) requirement. But a brief produced by a dot-matrix printer, fax machine, or portable printer that uses heat or dye transfer methods do not satisfy the requirement. Some ink jet printers are 300 dpi or more, but some are 216 dpi and would not be sufficient.

Paragraph (a)(2). The rule requires that a monospaced type yield no more the 10-1/2 characters per inch (cpi). Pica type, the standard on typewriters, yields 10 cpi. If a monospaced type is used to produce a brief, the ideal is one that produces no more than 10 cpi. Some of the monospaced fonts built into computer printers, although listed as 10 cpi, actually yield about 10-1/4 or 10-1/2 cpi. In order to accommodate the use of those fonts, the rule states that 10-1/2 cpi is the maximum.

Paragraph (a)(3). The rule specifies different margin sizes depending upon whether the brief is produced with proportionately spaced or monospaced type. The rationale is that proportionally spaced type is less readable in lines that reach 6-1/2 inches. But 6-1/2 inch lines are entirely appropriate for monospaced type.

Draft Three - March 1995

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

1 (a) *Form of a Briefs and ~~the~~ an Appendix.*
2 (1) *In General.* ~~Briefs and~~
3 ~~appendices~~ A brief may be
4 produced by ~~standard typographic~~
5 ~~printing or by any duplicating or~~
6 ~~copying process which produces~~
7 any process that results in a clear
8 black image on white paper,
9 including by typing, printing, or
10 photocopying. The paper must be
11 opaque, unglazed paper and only
12 one side of the paper may be
13 used. Carbon copies ~~of briefs and~~
14 ~~appendices may not be submitted~~
15 ~~without~~ may be used only with the
16 court's permission ~~of the court,~~
17 ~~except in behalf of parties allowed~~
18 ~~to proceed~~ or by pro se persons
19 proceeding in forma pauperis.

20 ~~All printed matter must appear in~~
21 ~~at least 11 point type on opaque,~~
22 ~~unglazed paper. Briefs and~~
23 ~~appendices produced by the~~
24 ~~standard typographic process shall~~
25 ~~be bound in volumes having pages~~
26 ~~6-1/8 by 9-1/4 inches and type~~
27 ~~matter 4-1/6 by 7-1/6 inches.~~
28 ~~Those produced by any other~~
29 ~~process shall be bound in volumes~~
30 ~~having pages 8-1/2 by 11 inches~~
31 ~~and type matter not exceeding 6-~~
32 ~~1/2 by 9-1/2 inches with double~~
33 ~~spacing between each line of text.~~
34 ~~In patent cases the pages of briefs~~
35 ~~and appendices may be of such~~
36 ~~size as is necessary to utilize~~
37 ~~copies of patent documents.~~
38 (2) *Paper Size, Type and Line Spacing,*
39 *and Margins.*
40 (i) A brief must be on 8-1/2
41 by 11 inch paper.

42 (ii) The type used for the text
43 must not produce more
44 than 10-1/2 characters per
45 inch and quotations and
46 footnotes must be in the
47 same size type as the text.
48 The text must be double
49 spaced, but quotations
50 more than two lines long
51 may be indented and
52 single-spaced, and headings
53 and footnotes may be
54 single-spaced.
55 (iii) The side margins must be
56 1 inch, and the top and
57 bottom margins must be 1-
58 1/4 inch.
59 (4) *Boldface.* A brief may use
60 boldface only for covers, headings,
61 and captions.
62 (5) *Case Names.* Case names must
63 be underlined.

64 (6) *Length.* Except by permission of
65 the court, a principal brief must
66 not exceed 50 pages, and a reply
67 brief must not exceed 25 pages,
68 excluding the corporate disclosure
69 statement, table of contents, table
70 of citations, certificate of service,
71 and any addendum containing
72 statutes, rules, regulations, etc.
73 (7) *Appendix.* An appendix must be
74 in the same form as a brief, but it
75 may include a legible photocopy
76 of any document found in the
77 record or of a printed court or
78 agency decision.
79 ~~Copies of the reporter's transcript~~
80 ~~and other papers reproduced in a~~
81 ~~manner authorized by this rule~~
82 ~~may be inserted in the appendix;~~
83 ~~such pages may be informally~~
84 ~~renumbered if necessary.~~
85 (8) *Cover.* ~~If briefs are produced by~~

86 ~~commercial printing or~~
87 ~~duplicating firms, or, if produced~~
88 ~~otherwise and the covers to be~~
89 ~~described are available,~~ <u>Except</u>
90 <u>for filings of pro se parties,</u> the
91 cover of the <u>appellant's</u> brief ~~of~~
92 ~~the appellant should~~ <u>must</u> be
93 blue; ~~that of the appellee~~ <u>the</u>
94 <u>appellee's</u>, red; ~~that of~~ an
95 intervenor<u>'s</u> or amicus curiae<u>'s</u>,
96 green; ~~that of~~ <u>and</u> any reply brief,
97 gray. The cover of ~~the appendix,~~
98 ~~if separately printed, should~~ <u>a</u>
99 <u>separately printed appendix must</u>
100 be white. The front ~~covers of the~~
101 ~~briefs and of appendices, if~~
102 ~~separately printed, shall~~ <u>cover of</u>
103 <u>a brief and of a separately printed</u>
104 <u>appendix must</u> contain:
105 <u>(A)</u> <u>the number of the</u>
106 <u>case centered at the</u>
107 <u>top;</u>

108 ~~(1)~~ (B) the name of the
109 court ~~and the~~
110 ~~number of the case~~;
111 ~~(2)~~ (C) the title of the case
112 (see Rule 12(a));
113 ~~(3)~~ (D) the nature of the
114 proceeding in the
115 court (*e.g.*, Appeal,
116 Petition for Review)
117 and the name of the
118 court, agency, or
119 board below;
120 ~~(4)~~ (E) the title of the
121 document,
122 identifying the party
123 or parties for whom
124 the document is
125 filed ~~(e.g., Brief for~~
126 (~~Appellant,~~
127 ~~Appendix~~); and
128 ~~(5)~~ (F) the ~~names~~ name,
129 ~~and~~ office addresses

130 <ins>, and telephone</ins>
131 <ins>number</ins> of counsel
132 representing the
133 party ~~on whose~~
134 ~~behalf~~ <ins>for whom</ins> the
135 document is filed.
136 <ins>(9) *Binding.* A brief or appendix</ins>
137 <ins>must be stapled or bound in any</ins>
138 <ins>manner that is secure, does not</ins>
139 <ins>obscure the text, and permits the</ins>
140 <ins>document to lie flat when open.</ins>
141 (b) *Form of Other Papers.* ~~Petitions for~~
142 ~~rehearing shall be produced in a manner~~
143 ~~prescribed by subdivision (a). Motions~~
144 ~~and other papers may be produced in~~
145 ~~like manner, or they may be typewritten~~
146 ~~upon opaque, unglazed paper 8-1/2 by~~
147 ~~11 inches in size. Lines of typewritten~~
148 ~~text shall be double-spaced. Consecutive~~
149 ~~sheets shall be attached at the left~~
150 ~~margin. Carbon copies may be used for~~
151 ~~filing and service if they are legible.~~

152 ~~A motion or other paper~~
153 ~~addressed to the court shall contain a~~
154 ~~caption setting forth the name of the~~
155 ~~court, the title of the case, the file~~
156 ~~number, and a brief descriptive title~~
157 ~~indicating the purpose of the paper.~~
158 (1) *Motion.* The form for a motion is
159 governed by Rule 27(d).
160 (2) *Other Papers.* Other papers,
161 including a petition for rehearing
162 and a suggestion for rehearing in
163 banc, and any response to such
164 petition or suggestion, must be
165 produced in a manner prescribed
166 by subdivision (a), but paragraph
167 (a)(6) does not apply, and
168 (A) consecutive sheets may be
169 attached at the left margin;
170 and
171 (B) a cover is not necessary if
172 the paper has a caption
173 that includes the case

174 number, the name of the

175 court, the title of the case,

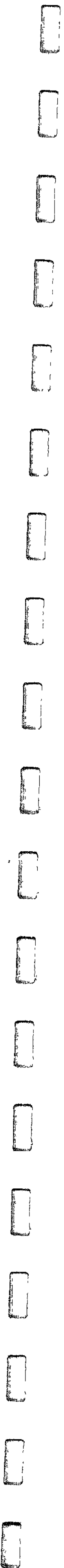
176 and a brief descriptive title

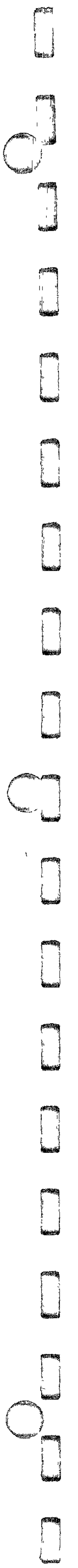
177 indicating the purpose of

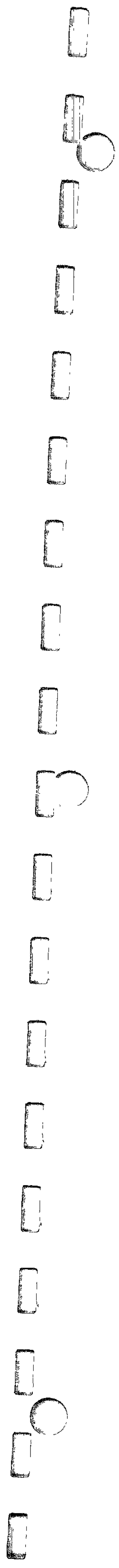
178 the paper and identifying

179 the party or parties for

180 whom it is filed.







Rule amendments approved 10/94
Submitted to Style Subcommittee for review
preceding request for publication

Rule 26.1. Corporate Disclosure Statement

1 Any nongovernmental corporate party to a civil or bankruptcy case appeal
2 or agency review proceeding, and any non-governmental corporate defendant in a
3 criminal case, must file a statement identifying all parent companies, subsidiaries
4 (except wholly-owned subsidiaries), and affiliates that have issued shares to the
5 public its parent corporation and listing stockholders that are publicly held
6 companies owning 10% or more of the stock of the party. The statement must be
7 filed with a party's A party must file the statement with the principal brief or
8 upon filing a motion, response, petition, or answer in the court of appeals,
9 whichever occurs first, unless a local rule requires earlier filing. Whenever If the
10 statement is filed before a party's the principal brief, the party must file an
11 original and three copies, of the statement must be filed unless the court requires
12 the filing of a different number by local rule or by order in a particular case. The
13 statement must be included in front of the table of contents in a party's principal
14 brief even if the statement was previously filed. Even if the statement has already
15 been filed, the party's principal brief must include the statement in front of the
16 table of contents.

Committee Note

1 The amendment deletes the requirement that a corporate party identify
2 subsidiaries and affiliates that have issued shares to the public. Although several
3 circuit rules include a similar requirement, the Committee believes that such

4 disclosure is unnecessary.

5 A disclosure statement assists a judge in ascertaining whether or not the
6 judge has an interest that should cause the judge to recuse himself or herself from
7 the case. Given that purpose, disclosure of entities that would not be adversely
8 affected by a decision in the case is unnecessary.

9 Disclosure of a party's parent corporation is necessary because a judgment
10 against a subsidiary can negatively impact the parent. A judge who owns stock in
11 the parent corporation, therefore, has an interest in litigation involving the
12 subsidiary. Conversely, disclosure of a party's subsidiaries or affiliated
13 corporations is ordinarily unnecessary. For example, if a party is a part owner of
14 a corporation in which a judge owns stock, the possibility is quite remote that the
15 judge might be biased by the fact that the judge and the litigant are co-owners of
16 a corporation.

17 The amendment, however, adds a requirement that the party list all its
18 stockholders that are publicly held companies owning 10% or more of the stock of
19 the party. A judgment against a corporate party can adversely affect the value of
20 the company's stock and, therefore, persons owning stock in the party have an
21 interest in the outcome of the litigation. A judge owning stock in a corporate
22 party ordinarily recuses himself or herself. The new requirement takes the
23 analysis one step further and assumes that if a judge owns stock in a publicly held
24 corporation which in turn owns 10% or more of the stock in the party, the judge
25 may have sufficient interest in the litigation to require recusal. The 10%
26 threshold ensures that the corporation in which the judge may own stock is itself
27 sufficiently invested in the party that a judgment adverse to the party could have
28 an adverse impact upon the investing corporation in which the judge may own
29 stock. This requirement is modelled on the seventh circuit's disclosure
30 requirement.

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Rule 29. Brief of an Amicus Curiae

1 (a) *When permitted.* The United States or its officer or agency, or a State,
2 Territory or Commonwealth may file an amicus-curiae brief without
3 consent of the parties or leave of court. Any other amicus curiae may
4 file a brief only:
5 (1) it is accompanied by written consent of all parties;
6 (2) by leave of court granted on motion; or
7 (3) at the court's request.
8 (b) *Motion for Leave to File.* The motion must be accompanied by the
9 proposed brief must state:
10 (1) the movant's interest;
11 (2) an amicus brief is desirable and the matters
12 asserted to the disposition of the case.
13 (c) *Contents and Form.* An amicus brief must comply with Rule 32. In
14 addition to the requirements of Rule 32(a), the cover must identify the
15 party or parties supported or indicate whether the brief supports
16 affirmance or reversal. If an amicus curiae is a corporation, the brief must
17 include a disclosure statement like that required of parties by Rule 26.1.
18 With respect to Rule 28, an amicus brief must include the following:
19 (1) a table of contents, with page references, and a table of cases

20 (alphabetically arranged), statutes and other authorities cited, with
21 references to the pages of the brief where they are cited;
22 (2) a concise statement of the identity of the amicus and its interest in
23 the case; and
24 (3) an argument, which may be preceded by a summary and which
25 need not include a statement of the applicable standard of review;
26 and
27 (4) a reproduction in the brief or an addendum
28 of all relevant statutes, rules, regulations, etc.
29 necessary to d.
30 (d) *Length.* An amicus brief may be no more than one-half the length of a
31 principal brief as specified in Rule 32.
32 (e) *Time for Filing.* An amicus curiae must file its brief, accompanied by a
33 motion for filing when necessary, within the time allowed to the party being
34 supported. If an amicus does not support either party, the amicus shall file
35 its brief within the time allowed to the appellant or petitioner. A court may
36 grant leave for later filing, specifying the time within which an opposing
37 party may answer.
38 (f) *Reply Brief.* An amicus curiae is not entitled to file a reply brief.
39 (g) *Oral Argument.* An amicus curiae's motion to participate in oral

40 argument will be granted only for extraordinary reasons.

Committee Note

1 Rule 29 is entirely rewritten

2 **Subdivision (a).** The only changes in this material are stylistic.

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

7 The former rule only required the motion to identify the applicant's
8 interest and to generally state the reasons why an amicus brief is desirable. The
9 amended rule additionally requires that the motion state the relevance of the
10 matters asserted to the disposition of the case. As Sup. Ct. R. 37.1 states:

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

16 Because the relevance of the matters asserted by an amicus is ordinarily the most
17 compelling reason for granting leave to file, the Committee believes that it is
18 helpful to explicitly require such a showing.

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

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

25 **Subdivision (d).** This new provision imposes a shorter page limit for an
26 amicus brief than for a party's brief. This is appropriate for two reasons. First,
27 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 should not require the use of a reply brief.

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

En banc 7-1

Rule amendments approved 10/94
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preceding request for publication

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

1 (a) *When Hearing or Rehearing in Banc ~~Will~~ May Be Ordered.* -- A majority of
2 the circuit judges who are in regular active service may order that an
3 appeal or other proceeding be heard or reheard by the court of appeals in
4 banc. ~~Such a~~ An in banc hearing or rehearing is not favored and
5 ordinarily will not be ordered ~~except when~~ unless:
6 (1) consideration by the full court is necessary to secure or maintain
7 uniformity of its decisions; or
8 (2) the proceeding involves a question of exceptional importance.
9 (b) ~~*Suggestion*~~ *Petition of a Party for Hearing or Rehearing in Banc.* - A party
10 may ~~suggest the appropriateness of~~ petition for a hearing or rehearing in
11 banc.
12 (1) The petition must begin with a statement either that:
13 (A) the panel decision conflicts with a decision of the United
14 States Supreme Court or of the court to which the petition is
15 addressed (with citation to the conflicting case or cases [illegible]
16 required) and [illegible] consideration by the full court is therefore necessary
17 to secure and maintain uniformity of the court's decisions; or
18 (B) the proceeding involves one or more questions of exceptional
19 importance, each of which must be concisely stated.

Awkward to Garner to draft, give to Carol, + then a mail vote

20 preferably in a single sentence. A proceeding may present a
21 question of exceptional importance if it involves an issue as
22 to which the panel decision conflicts with the authoritative
23 decisions of every other federal court of appeals that has
24 addressed the issue (citation to the conflicting case or cases is
25 required).
26 (2) Except by permission of the court, a petition for in banc hearing or
27 rehearing must not exceed 15 pages, excluding material not counted
28 under Rule 32(a)(6).
29 (3) Except by permission of the court, if a petition for panel rehearing
30 and a petition for rehearing in banc are both filed, whether or not
31 they are combined in a single document, the combined documents
32 must not exceed 15 pages excluding material not counted under
33 Rule 32(a)(6).
34 ~~No response shall be filed unless the court shall so order. The clerk shall~~
35 ~~transmit any such suggestion to the members of the panel and the judges of~~
36 ~~the court who are in regular active service but a vote need not be taken to~~
37 ~~determine whether the cause shall be heard or reheard in banc unless a~~
38 ~~judge in regular active service or a judge who was a member of the panel~~
39 ~~that rendered a decision sought to be reheard requests a vote on such a~~

40 suggestion made by a party.

41 (c) *Time for Suggestion Petition of a Party for Hearing or Rehearing in Banc.*; A

42 Suggestion Does Not Stay Mandate. If a party desires to suggest that A

43 petition that an appeal be heard initially in banc, the suggestion must be

44 made filed by the date [when] on which the appellee's brief is filed due. A

45 suggestion petition for a rehearing in banc must be made filed within the

46 time prescribed by Rule 40 for filing a petition for rehearing., whether

47 the suggestion is made in such petition or otherwise. The pendency of such

48 a suggestion whether or not included in a petition for rehearing shall not

49 affect the finality of the judgment of the court of appeals or stay the

50 issuance of the mandate.

51 (d) *Number of Copies.* -- The number of copies that must be filed may be

52 prescribed by local rule and may be altered by order in a particular case.

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

54 consideration unless the court orders a response.

55 (f) *Voting on a Petition.* -- The clerk must [forward] transmit any such petition to the

56 judges of the court who are in regular active service and, with respect to a

57 petition for rehearing, to any other members of the panel that rendered the

58 decision sought to be reheard. But a vote need not be taken to determine

59 whether the cause will be heard or reheard in banc unless one of those

60 judges requests a vote.

Committee Note

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

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

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

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

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

32 an in banc proceeding provides a safeguard against unnecessary intercircuit
33 conflicts.

34 Four circuits have rules or internal operating procedures that recognize a
35 conflict with another circuit as a legitimate basis for granting a rehearing in banc.
36 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
37 intercircuit conflict may present a question of "exceptional importance" because of
38 the costs that intercircuit conflicts impose on the system as a whole, in addition to
39 the significance of the issues involved. It is not, however, the Committee's intent
40 to make the granting of a hearing or rehearing in banc mandatory whenever there
41 is an intercircuit conflict.

42 The amendment states that a proceeding may present a question of
43 exceptional importance "if it involves an issue as to which the panel decision
44 conflicts with the authoritative decision of every other federal court of appeals
45 that has addressed the issue." That language contemplates two situations in
46 which a rehearing in banc may be appropriate. The first is when a panel decision
47 creates a conflict. A panel decision creates a conflict when it conflicts with the
48 decisions of all other circuits that have considered the issue. If a panel decision
49 simply joins one side of an already existing conflict, a rehearing in banc may not
50 be as important because it cannot avoid the conflict. The second situation that
51 may be a strong candidate for a rehearing in banc is one in which the circuit
52 persists in a conflict created by a pre-existing decision of the same circuit and no
53 other circuits have joined on that side of the conflict. The amendment states that
54 the conflict must be with an "authoritative" decision of another circuit.
55 "Authoritative" is used rather than "published" because in some circuits
56 unpublished opinions may be treated as authoritative.

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

60 Paragraph (2) of this subdivision establishes a maximum length for a
61 petition. Fifteen pages is the length currently used in five circuits; D.C. Cir. R.
62 35(b), 5th Cir. R. 35.5, 10th Cir. R. 35.5, 11th Cir. R. 35-8, and Fed. Cir. R. 35(d).
63 Each request for in banc consideration must be studied by every active judge of
64 the court and is a serious call on limited judicial resources. The extraordinary
65 nature of the issue or the threat to uniformity of the court's decision can be
66 established in most cases in less than fifteen pages. A court may shorten the
67 maximum length on a case by case basis but the rule does not permit a circuit to

68 shorten the length by local rule. The Committee has retained page limits rather
69 than using a word count similar to that in Rule 32 because there has not been a
70 serious enough problem to justify importing the word count and typeface
71 requirements applicable to briefs into other contexts.

72 Paragraph (3), although similar to (2), is separate because it deals with
73 those instances in which a party files both a petition for rehearing in banc under
74 this rule and a petition for panel rehearing under Rule 40.

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

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

85 Second, the language permitting a party to include a request for rehearing
86 in banc in a petition for panel rehearing is deleted. The Committee believes that
87 those circuits that want to require two separate documents should have the option
88 to do so.

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

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

94 Because of the discretionary nature of the in banc procedure, the filing of a
95 suggestion for rehearing in banc has not required a vote; a vote is taken only
96 when requested by a judge of the court in regular active service or by a judge who
97 was a member of the panel that rendered the decision sought to be reheard. It is
98 not the Committee's intent to change the discretionary nature of the procedure or
99 to require a vote on a petition for rehearing in banc. The rule continues,
100 therefore, to provide that a court is not obligated to vote on such petitions. It is

101 necessary, however, that each court develop a procedure for disposing of such
102 petitions because they will suspend the finality of the court's judgment and toll the
103 time for filing a petition for certiorari.

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Rule 41. Issuance of Mandate; Stay of Mandate

1 (a) *The Mandate: Date of Issuance, Effective Date.*

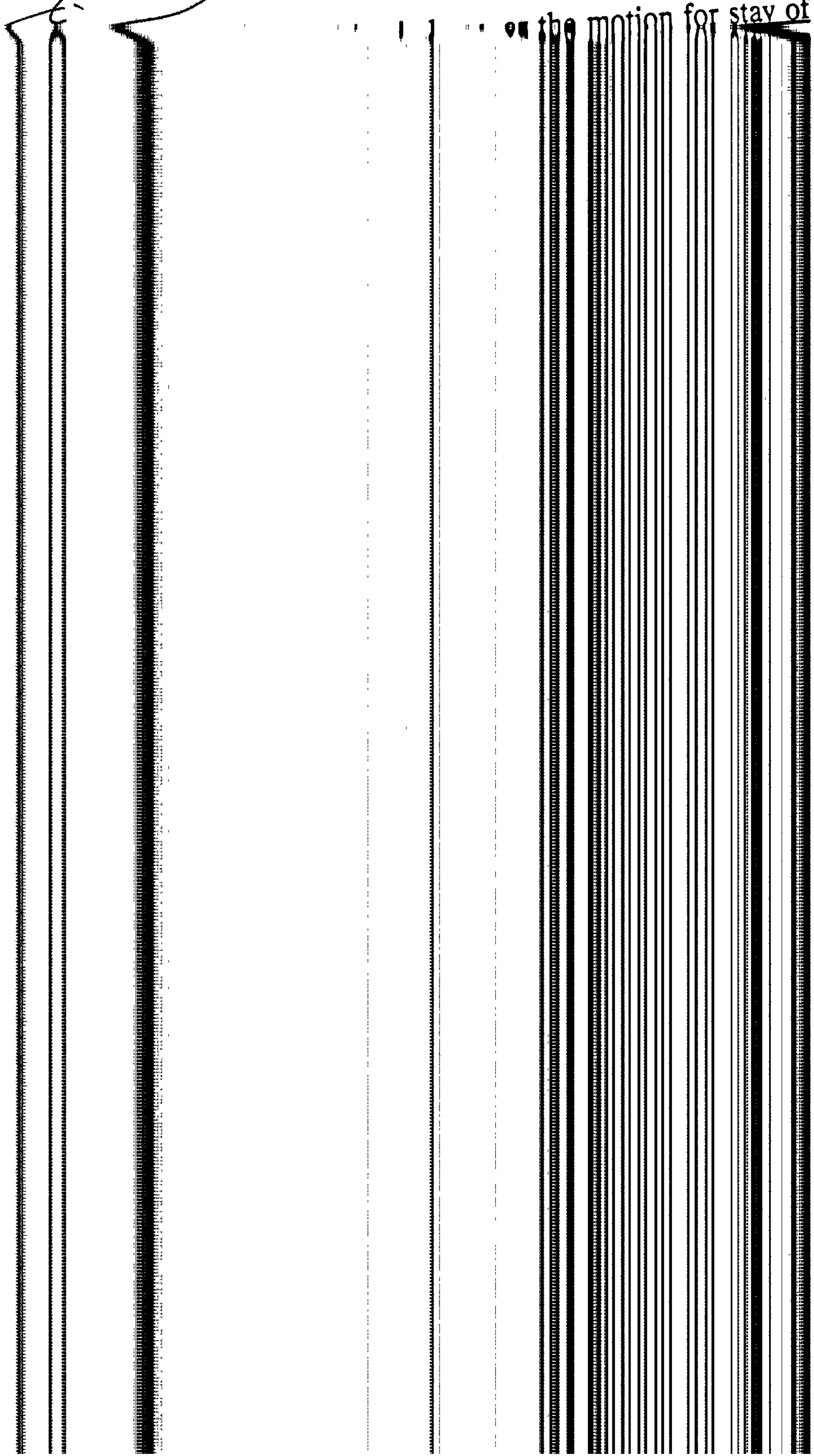
2 (1) Unless the court directs that a formal mandate issue, the mandate
3 consists of a certified copy of the judgment, a copy of the court's
4 opinion, if any, and any direction about costs.

5 (2) ~~The mandate of the court must issue 7 days after the expiration of~~
6 ~~the time for filing a petition for rehearing unless such a petition is~~
7 ~~filed or the time is shortened or enlarged by order. A certified copy~~
8 ~~of the judgment and a copy of the opinion of the court, if any, and~~
9 ~~any direction as to costs shall constitute the mandate, unless the~~
10 ~~court directs that a formal mandate issue.~~ The court's mandate
11 must issue 7 days after the time for filing a petition for rehearing
12 expires, unless an order shortens or extends the time, or a party files
13 a petition for rehearing, a petition for rehearing in banc, or a
14 motion for a stay of mandate pending petition to the Supreme Court
15 for a writ of certiorari. The timely filing of a petition for rehearing,
16 a petition for rehearing in banc, or the filing of a motion for a stay
17 of mandate pending petition to the Supreme Court for a writ of
18 certiorari, ~~will~~ stays the mandate until ~~disposition~~ the court disposes
19 of the petition or motion, unless ~~otherwise ordered by~~ the court

Rule amendments approved 10/94
Submitted to Style Subcommittee for review
preceding request for publication

20 orders otherwise. If the ~~petition is denied~~ court denies the petition

or the motion for stay of



20 orders otherwise. If the ~~petition is denied~~ court denies the petition
21 for rehearing or rehearing in banc, or the motion for stay of
22 mandate, the ~~mandate must~~ court must issue the mandate 7 days
23 after entry of the order denying the last such petition or motion,
24 ~~unless the time is shortened or enlarged by order~~ but an order may
25 shorten or extend the time.

26 (3) The mandate is effective when issued.

27 (b) *Stay of Mandate Pending Petition for Certiorari.* ~~A party who files filing a~~
28 ~~motion requesting a stay of mandate pending petition to the Supreme~~
29 ~~Court for a writ of certiorari must file, at the same time, file proof of~~
30 ~~service on all other parties. The motion~~ A party may ~~by motion, request~~
31 ~~a stay of~~ mandate pending the filing of a petition for a writ of certiorari in
32 the Supreme Court. The motion must be served on all parties and must
33 show that ~~a petition for certiorari~~ the certiorari petition would present a
34 substantial question and that there is good cause for a stay. The stay ~~must~~
35 ~~not~~ cannot exceed ~~30~~ 90 days, unless the period is extended for cause
36 ~~shown~~ and it cannot, in either case, exceed the time the party who
37 obtained the stay has to file a petition for a writ of certiorari in the
38 Supreme Court. ~~or unless during the period of the stay, a notice from~~ But
39 if the clerk of the Supreme Court ~~is filed showing~~ files a notice during the

40 stay indicating that the party who ~~has~~ obtained the stay ~~has~~ filed a petition

41 for the writ, ~~in which case~~ the stay ~~will~~ continues until ~~final disposition by~~

42 the Supreme Court's final disposition. The court of appeals must issue the

43 mandate immediately when a copy of a Supreme Court order denying the

44 petition for writ of certiorari is filed. The court may require a bond or

45 other security before ~~the~~ granting or ~~continuance of~~ continuing a stay of

46 ~~the~~ mandate.

Committee Note

1 **Subdivision (a).** The amendment to paragraph (2) provides that the filing
2 of a petition for rehearing in banc or a motion for a stay of mandate pending
3 petition to the Supreme Court for a writ of certiorari delays the issuance of the
4 mandate until the court disposes of the petition or motion. The provision that a
5 petition for rehearing in banc delays the issuance of the mandate is a companion
6 to the amendment of Rule 35 that deletes the language stating that a request for
7 a rehearing in banc does not affect the finality of the judgment or stay the
8 issuance of the mandate. The Committee's objective is to treat a request for a
9 rehearing in banc like a petition for panel rehearing so that a request for a
10 rehearing in banc will suspend the finality of the court of appeals' judgment and
11 extend the period for filing a petition for writ of certiorari. The change made in
12 this rule advances the Committee's objective of tolling the time for filing a
13 petition for writ of certiorari only indirectly. Amendment of Sup. Ct. R. 13.4 is
14 also necessary. Because the filing of a petition for rehearing in banc will stay the
15 mandate, a court of appeals will need to take final action on the petition but the
16 procedure for doing so is left to local practice.

17 The amendment to paragraph (2) also provides that the filing of a motion
18 for a stay of mandate pending petition to the Supreme Court for a writ of
19 certiorari delays the issuance of the mandate until the court disposes of the
20 motion. If the court denies the motion, the court must issue the mandate 7 days
21 after entering the order denying the motion. If the court grants the motion, the

22 mandate is stayed according to the terms of the order granting the stay. Delaying
23 issuance of the mandate eliminates the need to recall the mandate if the motion
24 for a stay is granted. If, however, the court believes that it would be
25 inappropriate to delay issuance of the mandate until disposition of the motion for
26 a stay, the court may order that the mandate issue immediately.

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

39 **Subdivision (b).** The amendment changes the maximum period for a stay
40 of mandate, absent the court of appeals granting an extension for cause, to 90
41 days and in any event to no longer than the period the party who obtained the
42 stay has to file a petition for a writ of certiorari to the Supreme Court. The
43 presumptive 30-day period was adopted when a party had to file a petition for a
44 writ of certiorari in criminal cases within 30 days after entry of judgment.
45 Supreme Court Rule 13.1 now provides that a party has 90 days after entry of
46 judgment by a court of appeals to file a petition for a writ of certiorari whether
47 the case is civil or criminal.

48 The amendment does not require a court of appeals to grant a stay of
49 mandate that is coextensive with the period granted for filing a petition for a writ
50 of certiorari. The granting of a stay and the length of the stay remain within the
51 discretion of the court of appeals. The amendment means only that a 90-day stay
52 may be granted without a need to show cause for a stay longer than 30 days.

Federal Rules of Appellate Procedure

Revised for Style by The Advisory Committee on Appellate Rules

Draft of 29 October 1994
(Rules 1-23 Only)

Rule 1. Scope of Rules and Title	Rule 1. Scope of Rules; Title
(a) Scope of rules. — These rules govern procedure in appeals to United States courts of appeals from the United States district courts and the United States Tax Court; in appeals from bankruptcy appellate panels; in proceedings in the courts of appeals for review or enforcement of orders of administrative agencies, boards, commissions and officers of the United States; and in applications for writs or other relief which a court of appeals or a judge thereof is competent to give. When these rules provide for the making of a motion or application in the district court, the procedure for making such motion or application shall be in accordance with the practice of the district court.	**(a) Scope of Rules.** (1) These rules govern procedure in the United States courts of appeals: (A) on appeal from a United States district court, the United States Tax Court, or a bankruptcy appellate panel; (B) in a proceeding to review or enforce an order of an administrative agency, board, commission, or officer of the United States; and (C) on application for a writ or other relief that a court of appeals or circuit judge can give. (2) When these rules provide for filing a motion or other document in the district court, the procedure must comply with the practice of the district court.
(b) Rules not to affect jurisdiction. — These rules shall not be construed to extend or limit the jurisdiction of the courts of appeals as established by law.	**(b) Rules Do Not Affect Jurisdiction.** These rules do not extend or limit the jurisdiction of the courts of appeals.

(c) Title. — These rules may be known and cited as the Federal Rules of Appellate Procedure.	(c) **Title.** These rules shall[1] be known as the Federal Rules of Appellate Procedure.

1 The Style Subcommittee suggested that this sentence state: "These rules are cited as the Federal Rules of Appellate Procedure." The Advisory Committee is cognizant of the Style Subcommittee's desire to eliminate all use of the word "shall but decided that its use is appropriate in this subdivision. This subdivision does not create a rule to be enforced and, therefore, "shall" does not create the troublesome ambiguity in this context that it does when a rule mandates some conduct. In addition, one does not "cite" the full set of rules. As a result, the Advisory Committee decided to use the traditional "shall be known as" language. CAM

Rule 2. Suspension of Rules	Rule 2. Suspension of Rules
In the interest of expediting decision, or for other good cause shown, a court of appeals may, except as otherwise provided in Rule 26(b), suspend the requirements or provisions of any of these rules in a particular case on application of a party or on its own motion and may order proceedings in accordance with its direction.	On its own or a party's motion, a court of appeals may — to expedite its decision or for other good cause — suspend the provisions of any of these rules in a particular case and order proceedings as it directs, except as otherwise provided in Rule 26(b).

Rule 3. Appeal as of Right — How Taken	Rule 3. Appeal as of Right — How Taken
(a) Filing the Notice of Appeal. — An appeal permitted by law as of right from a district court to a court of appeals must be taken by filing a notice of appeal with the clerk of the district court within the time allowed by Rule 4. At the time of filing, the appellant must furnish the clerk with sufficient copies of the notice of appeal to enable the clerk to comply promptly with the requirements of subdivision (d) of this Rule 3. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal. Appeals by permission under 28 U.S.C. § 1292(b) and appeals in bankruptcy must be taken in the manner prescribed by Rule 5 and Rule 6 respectively.	**(a) Filing the Notice of Appeal.** (1) An appeal permitted by law as of right from a district court to a court of appeals may be taken only by filing a notice of appeal with the district clerk within the time allowed by Rule 4. At the time of filing, the appellant must furnish the clerk with enough copies of the notice to enable the clerk to comply promptly with Rule 3(d). (2) An appellant's failure to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for the court of appeals to act as it considers appropriate, including dismissing the appeal. (3) An appeal by permission under 28 U.S.C. § 1292(b) or an appeal in a bankruptcy case may be taken only in the manner prescribed by Rules 5 and 6 respectively.[2]

2 In paragraphs (a)(1) and (3) the Style Subcommittee changed the words "must be taken by" to "is taken by." The Advisory Committee changed the words to "may be taken only by." The Advisory Committee preferred the word "may" to avoid the implication that there is an obligation to take an appeal. The word "only" was added to indicate that there is only one method for taking an appeal, an implication that formerly arose from the word "must." The Advisory Committee believes that these changes do not create any substantive change. CAM

(b) Joint or consolidated appeals. — If two or more persons are entitled to appeal from a judgment or order of a district court and their interests are such as to make joinder practicable, they may file a joint notice of appeal, or may join in appeal after filing separate timely notices of appeal, and they may thereafter proceed on appeal as a single appellant. Appeals may be consolidated by order of the court of appeals upon its own motion or upon motion of a party, or by stipulation of the parties to the several appeals.	**(b) Joint or Consolidated Appeals.** (1) When two or more persons are entitled to appeal from a district-court judgment or order, and their interests make joinder practicable, they may file a joint notice of appeal or may join[3] in the appeal after filing separate timely notices of appeal. They may then proceed on appeal as a single appellant. (2) On its own or on a party's motion — or by stipulation of all parties — a court of appeals may order that two or more appeals be consolidated.[4]

[3] The Advisory Committee noted that it does not understand what it means to "join" an appeal after filing a separate timely notice of appeal. Is this different from "consolidating" appeals under (b)(2)? The Committee noted this for further substantive discussion. CAM

[4] It is unclear under the existing rule whether appeals can be consolidated without court order if the parties stipulate to the consolidation. The Style Subcommittee's version requires a court order even when the parties stipulate to consolidation. The Committee Note should identify the existing ambiguity and indicate that the new version clarifies the procedure consistent with the Committee's view of the proper interpretation of the existing rule. CAM

(c) Content of the Notice of Appeal. — A notice of appeal must specify the party or parties taking the appeal by naming each appellant in either the caption or the body of the notice of appeal. An attorney representing more than one party may fulfill this requirement by describing those parties with such terms as "all plaintiffs," "the defendants," "the plaintiffs A, B, et al.," or "all defendants except X." A notice of appeal filed pro se is filed on behalf of the party signing the notice and the signer's spouse and minor children, if they are parties, unless the notice of appeal clearly indicates a contrary intent. In a class action, whether or not the class has been certified, it is sufficient for the notice to name one person qualified to bring the appeal as representative of the class. A notice of appeal also must designate the judgment, order, or part thereof appealed from, and must name the court to which the appeal is taken. An appeal will not be dismissed for informality of form or title of the notice of appeal, or for failure to name a party whose intent to appeal is otherwise clear from the notice. Form 1 in the Appendix of Forms is a suggested form for a notice of appeal.

(c) Content of the Notice of Appeal.

(1) The notice of appeal must:

(A) specify the party or parties taking the appeal by naming each one in the caption or body of the notice, but an attorney representing more than one party may describe those parties with such terms as "all plaintiffs," "the defendants," "the plaintiffs A, B, et al.," or "all defendants except X,";

(B) designate the judgment, order, or part thereof being appealed; and

(C) name the court to which the appeal is taken.

(2) A pro se notice of appeal is considered filed on behalf of the signer and the signer's spouse and minor children (if they are parties), unless the notice clearly indicates otherwise.

(3) In a class action, whether or not the class has been certified, the notice is sufficient if it names one person qualified to bring the appeal as representative of the class.

(4) An appeal must not be dismissed for informality of form or title of the notice of appeal, or for failure to name a party whose intent to appeal is otherwise clear from the notice.

(5) Form 1 in the Appendix of Forms is a suggested form of a notice of appeal.

(d) Serving the Notice of Appeal. - The clerk of the district court shall serve notice of the filing of a notice of appeal by mailing a copy to each party's counsel of record (apart from the appellant's), or, if a party is not represented by counsel, to the party's last known address. The clerk of the district court shall forthwith send a copy of the notice and of the docket entries to the clerk of the court of appeals named in the notice. The clerk of the district court shall likewise send a copy of any later docket entry in the case to the clerk of the court of appeals. When a defendant appeals in a criminal case, the clerk of the district court shall also serve a copy of the notice of appeal upon the defendant, either by personal service or by mail addressed to the defendant. The clerk shall note on each copy served the date when the notice of appeal was filed and, if the notice of appeal was filed in the manner provided in Rule 4(c) by an inmate confined in an institution, the date when the clerk received the notice of appeal. The clerk's failure to serve notice does not affect the validity of the appeal. Service is sufficient notwithstanding the death of a party or the party's counsel. The clerk shall note in the docket the names of the parties to whom the clerk mails copies, with the date of mailing.	(d) **Serving the Notice of Appeal.** (1) The district clerk must serve notice of the filing of a notice of appeal by mailing a copy to each party's counsel of record — excluding the appellant's — or, if a party is proceeding pro se, to the party's last known address. When a defendant in a criminal case appeals, the clerk must also serve a copy of the notice of appeal on the defendant, either by personal service or by mail addressed to the defendant. The clerk must promptly send a copy of the notice of appeal and of the docket entries — and any later docket entries — to the clerk of the court of appeals named in the notice. The clerk must note, on each copy, the date when the notice of appeal was filed. (2) If an inmate confined in an institution files a notice of appeal in the manner provided by Rule 4(c), the clerk must also note the date when the clerk received the notice.[5] (3) A clerk's failure to serve notice does not affect the validity of the appeal. The clerk must note on the docket the names of the parties to whom the clerk mails copies, with the date of mailing. Service is sufficient notwithstanding the death of a party or the party's counsel.
(e) Payment of fees. — Upon the filing of any separate or joint notice of appeal from the district court, the appellant shall pay to the clerk of the district court such fees as are established by statute, and also the docket fee prescribed by the Judicial Conference of the United States, the latter to be received by the clerk of the district court on behalf of the court of appeals.	(e) **Payment of Fees.** Upon filing a notice of appeal from the district court, the appellant must pay the district clerk all required fees. The district clerk receives the appellate docket fee on behalf of the court of appeals.

5 The Advisory Committee voted to omit the words "a pro se" from the Style Subcommittee's version. Rule 4(c) does not limit its applicability to an inmate proceeding pro se; it applies whenever an inmate "files" the notice of appeal. This raises the question whether Houston v. Lack applies when an attorney prepares a notice of appeal but sends it to the inmate for review and the inmate "files" it by depositing it in the institutional mailing system. Whether 3(d)(2) and 4(c) should apply only to an inmate who is proceeding pro se is a substantive question that the Advisory Committee will discuss to ensure that the restyled rules do not make substantive changes. The Advisory Committee also wishes to discuss the meaning of "an inmate confined in an institution" -- language taken from the Supreme Court's rule. CAM

Rule 3.1. Appeal from a Judgment Entered by a Magistrate Judge in a Civil Case	Rule 3.1 Appeal from a Judgment of a Magistrate Judge in a Civil Case
When the parties consent to a trial before a magistrate judge under 28 U.S.C. § 636(c)(1), any appeal from the judgment must be heard by the court of appeals in accordance with 28 U.S.C. § 636(c)(3), unless the parties consent to an appeal on the record to a district judge and thereafter, by petition only, to the court of appeals, in accordance with 28 U.S.C. § 636(c)(4). An appeal under 28 U.S.C. § 636(c)(3) must be taken in identical fashion as an appeal from any other judgment of the district court.	(1) When the parties have consented to a trial before a magistrate judge under 28 U.S.C. § 636(c)(1), an appeal from the judgment is heard by the court of appeals in accordance with § 636(c)(3), unless the parties have consented — at the time of reference to a magistrate judge — to an appeal on the record to a district judge and then, by petition only, to the court of appeals under § 636(c)(4). (2) An appeal under § 636(c)(3) must be taken in the same way as an appeal from any other district-court judgment.

Rule 4. Appeal as of Right — When Taken	Rule 4. Appeal as of Right — When Taken
(a) Appeal in a civil case. — (1) Except as provided in paragraph (a)(4) of this Rule, in a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 must be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after such entry. If a notice of appeal is mistakenly filed in the court of appeals, the clerk of the court of appeals shall note thereon the date when the clerk received the notice and send it to the clerk of the district court and the notice will be treated as filed in the district court on the date so noted.	**(a) Appeal in a Civil Case** (1) *Time for Filing a Notice of Appeal.* (A) In a civil case, except as provided in Rule 4(a)(4) and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after the date the judgment or order appealed from is entered.[6] (B) When the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after entry.
(2) A notice of appeal filed after the court announces a decision or order but before the entry of the judgment or order is treated as filed on the date of and after the entry.	(2) *Filing Before Entry of Judgment.* A notice of appeal filed after the court announces a decision or order — but before the entry of the judgment or order — is treated as filed on the date of and after the entry.
(3) If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period last expires.	(3) *Notice of Cross-Appeal.* If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period ends later.

6 The Committee Note should indicate that a cross-reference to subdivision 4(c) has been added to conform the rule to the Houston v. Lack amendments. CAM

(4) If any party makes a timely motion of a type specified immediately below, the time for appeal for all parties runs from the entry of the order disposing of the last such motion outstanding. This provision applies to a timely motion under the Federal Rules of Civil Procedure: (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; (E) for a new trial under Rule 59; or (F) for relief under Rule 60 if the motion is served within 10 days after the entry of judgment.	(4) *Effect of a Motion on a Notice of Appeal.* (A) If a party timely files any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion: (i) for judgment under Rule 50(b); (ii) to amend or make additional factual findings under Rule 52(b), whether or not granting the motion would alter the judgment; (iii) for attorney's fees under Rule 54 if a district court extends the time for appeal under Rule 58; (iv) to alter or amend the judgment under Rule 59; (v) for a new trial under Rule 59; or (vi) for relief under Rule 60 if the motion is filed no later than 10 days after the judgment is entered.
A notice of appeal filed after announcement or entry of the judgment but before disposition of any of the above motions is ineffective to appeal from the judgment or order, or part thereof, specified in the notice of appeal, until the date of the entry of the order disposing of the last such motion outstanding. Appellate review of an order disposing of any of the above motions requires the party, in compliance with Appellate Rule 3(c), to amend a previously filed notice of appeal. A party intending to challenge an alteration or amendment of the judgment shall file an amended notice of appeal within the time prescribed by this Rule 4 measured from the entry of the order disposing of the last such motion outstanding. No additional fees will be required for filing an amended notice.	(B)(i) A notice of appeal filed after the court announces or enters a judgment — but before it disposes of any of the motions listed in Rule 4(a)(4)(A) — becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered. (ii) To challenge such an order, or a judgment altered or amended upon such a motion, a party must file a notice, or an amended notice of appeal — in compliance with Appellate Rule 3(c) — within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion. (iii) No additional fee is required to file an amended notice.

(5) The district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4(a). Any such motion which is filed before expiration of the prescribed time may be ex parte unless the court otherwise requires. Notice of any such motion which is filed after expiration of the prescribed time shall be given to the other parties in accordance with local rules. No such extension shall exceed 30 days past such prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.	(5) ***Motion for Extension of Time.*** (A) The district court may extend the time to file a notice of appeal if: (i) a party so moves within 30 days after the time prescribed by this Rule 4(a) expires; and (ii) that party shows excusable neglect or good cause. (B) A motion filed before the expiration of the time prescribed in Rule 4(a)(1) or (3) may be ex parte unless the court requires otherwise. If the motion is filed after the expiration of the prescribed time, notice must be given to the other parties in accordance with local rules. (C) No extension under this Rule 4(a)(5) may exceed 30 days after the prescribed time or 10 days after the date when the order granting the motion is entered, whichever occurs later.
(6) The district court, if it finds (a) that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry and (b) that no party would be prejudiced, may, upon motion filed within 180 days of entry of the judgment or order or within 7 days of receipt of such notice, whichever is earlier, reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal.	(6) ***Reopening the Time to File an Appeal.*** The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied: (A) the motion is filed within 180 days after the entry of the judgment or order or within 7 days after receipt of such notice, whichever is earlier. (B) the court finds that the moving party was entitled to notice of the entry of a judgment or order sought to be appealed but did not receive such notice from the clerk or any party within 21 days after the entry;[7] and (C) the court finds that no party would be prejudiced.

7 The Advisory Committee will discuss whether actual notice during the 21 day period from some other source should bar reopening of the time for appeal. CAM

(7) A judgment or order is entered within the meaning of this Rule 4(a) when it is entered in compliance with Rules 58 and 79(a) of the Federal Rules of Civil Procedure.	(7) *Entry Defined.* A judgment or order is entered for purposes of this Rule 4(a) when it is entered in compliance with Rules 58 and 79(a) of the Federal Rules of Civil Procedure.[8]

8 Does Rule 58 require entry of a separate order when a court denies a new trial? It is possible to read (a)(7) as abolishing the collateral order doctrine. This rule should be substantively reviewed. CAM

(b) Appeal in a Criminal Case.- In a criminal case, a defendant shall file the notice of appeal in the district court within 10 days after the entry either of the judgment or order appealed from, or of a notice of appeal by the Government. A notice of appeal filed after the announcement of a decision, sentence, or order — but before entry of the judgment or order — is treated as filed on the date of and after the entry. If a defendant makes a timely motion specified immediately below, in accordance with the Federal Rules of Criminal Procedure, an appeal from a judgment of conviction must be taken within 10 days after the entry of the order disposing of the last such motion outstanding, or within 10 days after the entry of the judgment of conviction, whichever is later. This provision applies to a timely motion:
(1) for judgment of acquittal;
(2) for arrest of judgment;
(3) for a new trial on any ground other than newly discovered evidence; or
(4) for a new trial based on the ground of newly discovered evidence if the motion is made before or within 10 days after entry of the judgment.

(b) Appeal in a Criminal Case.

(1) *Time for Filing a Notice of Appeal*

(A) In a criminal case, a defendant's notice of appeal must be filed in the district court within 10 days after the later of:

(i) entry of either the judgment or the order being appealed, or

(ii) the filing of the Government's notice of appeal.

(B) When the government is entitled to appeal, the notice of appeal must be filed in the district court within 30 days after the later of:

(i) the entry of the judgment or order being appealed; or

(ii) the filing of any defendant's notice of appeal.[9]

9 Does the time begin to run from the filing of the first notice of appeal or from the last if more than one notice of appeal is filed? Does the statute provide an answer? CAM

(2) *Filing Before Entry of Judgment.* A notice of appeal filed after the court announces a decision, sentence, or order — but before the entry of the judgment or order — is treated as filed on the date of and after the entry.

(3) *Effect of a Motion on a Notice of Appeal.*

(A) If a defendant timely makes[10] any of the following motions under the Federal Rules of Criminal Procedure, the notice of appeal from a judgment of conviction must be filed within 10 days after the entry of the order disposing of the last such motion remaining, or within 10 days after the entry of the judgment of conviction, whichever period ends later. This provision applies to a timely motion:

(i) for judgment of acquittal;

(ii) for arrest of judgment;

(iii) for a new trial on any ground other than newly discovered evidence; or

(iv) for a new trial based on the ground of newly discovered evidence if the motion is made before or within 10 days after the entry of the judgment.

[10] The criminal rules should be consulted to determine whether they require the "filing" of such motions in a manner that would make use of the verb "files" appropriate. CAM

A notice of appeal filed after the court announces a decision, sentence, or order but before it disposes of any of the above motions, is ineffective until the date of the entry of the order disposing of the last such motion outstanding, or until the date of the entry of the judgment of conviction, whichever is later. Notwithstanding the provisions of Rule 3(c), a valid notice of appeal is effective without amendment to appeal from an order disposing of any of the above motions. When an appeal by the government is authorized by statute, the notice of appeal must be filed in the district court within 30 days after (i) the entry of the judgment or order appealed from or (ii) the filing of a notice of appeal by any defendant.

A judgment or order is entered within the meaning of this subdivision when it is entered on the criminal docket. Upon a showing of excusable neglect, the district court may — before or after the time has expired, with or without motion and notice — extend the time for filing a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision.

The filing of a notice of appeal under this Rule 4(b) does not divest a district court of jurisdiction to correct a sentence under Fed. R. Crim. P. 35(c), nor does the filing of a motion under Fed. R. Crim. P. 35(c) affect the validity of a notice of appeal filed before entry of the order disposing of the motion.

(B) A notice of appeal filed after the court announces a decision, sentence, or order — but before it disposes of any of the motions referred to in Rule 4(b)(1)(D) — becomes effective upon the later of the following:

(i) the entry of the order disposing of the last such remaining motion; or

(ii) the entry of the judgment of conviction.

(C) Notwithstanding the provisions of Rule 3(c), a valid notice of appeal is effective — without amendment — to appeal from an order disposing of any of the above motions.

(4) *Entry Defined.* *[NOTE: In (a)(7) this paragraph appears at the end, rather than middle.]* A judgment or order is entered for purposes of this Rule 4(b) when it is entered on the criminal docket.

(5) *Extension of Time.* *[NOTE: (a)(5) says "Motion for extention of time.]* Upon a showing of excusable neglect or good cause,[11] the district court may — before or after the time has expired, with or without motion and notice — extend the time to file a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this Rule 4(b).

(6) *Jurisdiction.* The filing of a notice of appeal under this Rule 4(b) does not divest a district court of jurisdiction to correct a sentence under Fed. R. Crim. P. 35(c), nor does the filing of a motion under Fed. R. Crim. P. 35(c) affect the validity of a notice of appeal filed before entry of the order disposing of the motion.

11 "Good cause" has been added as a justification for granting an extension of time. If a motion for extension of time is filed before the period has expired, the Advisory Committee believes that one should not need to show neglect. The Committee Note should identify that addition as a possible substantive change. The Advisory Committee postponed consideration of whether different grounds should be available when the application is made before time expires rather than after it has expired. CAM

(c) Appeal by an Inmate Confined in an Institution.- If an inmate confined in an institution files a notice of appeal in either a civil case or a criminal case, the notice of appeal is timely filed if it is deposited in the institution's internal mail system on or before the last day for filing. Timely filing may be shown by a notarized statement or by a declaration (in compliance with 28 U.S.C. § 1746) setting forth the date of deposit and stating that first-class postage has been prepaid. In a civil case in which the first notice of appeal is filed in the manner provided in this subdivision (c), the 14-day period provided in paragraph (a)(3) of this Rule 4 for another party to file a notice of appeal runs from the date when the district court receives the first notice of appeal. In a criminal case in which a defendant files a notice of appeal in the manner provided in this subdivision (c), the 30-day period for the government to file its notice of appeal runs from the entry of the judgment or order appealed from or from the district court's receipt of the defendant's notice of appeal.

(c) Appeal by an Inmate Confined in an Institution.

(1) If an inmate confined in an institution files a notice of appeal in either a civil or a criminal case, the notice is timely filed if it is deposited in the institution's internal mail system on or before the last day for filing. Timely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.

(2) If an inmate files the first notice of appeal in a civil case under this Rule 4(c), the 14-day period provided in Rule 4(a)(3) for another party to file a notice of appeal runs from the date when the district court dockets[12] the first notice.

(3) When a defendant in a criminal case files a notice of appeal under this Rule 4(c), the 30-day period for the government to file its notice of appeal runs from the entry of the judgment or order appealed from or from the district court's docketing of the defendant's notice of appeal, whichever is later.

(d) *Mistaken Filing in the Court of Appeals*

If a notice of appeal is mistakenly filed in the court of appeals, the clerk of that court must note on the notice the date when it was received and send it to the district clerk. The notice is then considered filed in the district court on the date so noted.

12 The Advisory Committee changed the word "receives to "dockets. A court may "receive" a paper when its mail is delivered to it even if the mail is not opened for a day or two. "Docketing is an easily identified event. The Committee Note must disclose the change. CAM

Rule 5. Appeal by Permission under 28 U.S.C. § 1292(b)	Rule 5. Appeal by Permission under 28 U.S.C. § 1292(b)
(a) Petition for permission to appeal. — An appeal from an interlocutory order containing the statement prescribed by 28 U.S.C. § 1292(b) may be sought by filing a petition for permission to appeal with the clerk of the court of appeals within 10 days after the entry of such order in the district court with proof of service on all other parties to the action in the district court. An order may be amended to include the prescribed statement at any time, and permission to appeal may be sought within 10 days after entry of the order as amended.	(a) **Petition for Permission[13] to Appeal.** To seek an appeal from an interlocutory order containing the statement prescribed by 28 U.S.C. § 1292(b), a party must — within 10 days after the entry of the district court's order — file with the circuit clerk a petition for permission to appeal. The petition must include proof of service on all other parties to the district-court action. A district-court order may at any time be amended to include the prescribed statement, and permission to appeal may be sought within 10 days after entry of the amended order.
(b) Content of petition; answer. — The petition shall contain a statement of the facts necessary to an understanding of the controlling question of law determined by the order of the district court; a statement of the question itself; and a statement of the reasons why a substantial basis exists for a difference of opinion on the question and why an immediate appeal may materially advance the termination of the litigation. The petition shall include or have annexed thereto a copy of the order from which appeal is sought and of any findings of fact, conclusions of law and opinion relating thereto. Within 7 days after service of the petition, an adverse party may file an answer in opposition. The application and answer shall be submitted without oral argument unless otherwise ordered.	(b) **Content of Petition; Answer.** (1) The petition must: (A) state the facts necessary to understand the controlling question of law that was determined by the district court's order; (B) state the question itself; (C) state the reasons why a substantial basis exists for a difference of opinion on the question and why an immediate appeal may materially advance the termination of the litigation; and (D) include or have attached to it a copy of the order being appealed and any findings of fact, conclusions of law, and related opinion. (2) An adverse party may file an answer within 7 days after service of the petition. (3) The petition and answer will be submitted without oral argument unless the court orders otherwise.

[13] The Style Subcommittee used the term "leave to appeal." The Advisory Committee changed back to the term used in the existing rule -- "permission to appeal." Use of the term "permission" is consistent with the caption and with the statute which says that a court of appeals may "permit" an interlocutory appeal. CAM

(c) Form of Papers; Number of Copies. — All papers may be typewritten. An original and three copies must be filed unless the court requires the filing of a different number by local rule or by order in a particular case.	(c) **Form of Papers; Number of Copies.** All papers must conform to Rule 32(a)(1). Three copies must be filed with the original, unless the court requires a different number by local rule or by order in a particular case.
(d) Grant of permission; cost bond; filing of record. — Within 10 days after the entry of an order granting permission to appeal the appellant shall (1) pay to the clerk of the district court the fees established by statute and the docket fee prescribed by the Judicial Conference of the United States and (2) file a bond for costs if required pursuant to Rule 7. The clerk of the district court shall notify the clerk of the court of appeals of the payment of the fees. Upon receipt of such notice the clerk of the court of appeals shall enter the appeal upon the docket. The record shall be transmitted and filed in accordance with Rules 11 and 12(b). A notice of appeal need not be filed.	(d) **Grant of Permission; Fees: Cost Bond; Filing of Record.** (1) Within 10 days after the entry of the order granting permission to appeal, the appellant must: (A) pay the district clerk all required fees; and (B) file a cost bond if required under Rule 7. (2) A notice of appeal need not be filed. (3) The district clerk must notify the circuit clerk once the appellant has paid the fees. Upon receiving this notice, the circuit clerk must enter the appeal on the docket. The record must be transmitted and filed in accordance with Rules 11 and 12(b).

Rule 5.1. Appeal by Permission Under 28 U.S.C. § 636(c)(5)	Rule 5.1 Appeal by Leave[14] under 28 U.S.C. § 636(c)(5)
(a) Petition for Leave to Appeal; Answer or Cross Petition. — An appeal from a district court judgment, entered after an appeal under 28 U.S.C. § 636(c)(4) to a district judge from a judgment entered upon direction of a magistrate judge in a civil case, may be sought by filing a petition for leave to appeal. An appeal on petition for leave to appeal is not a matter of right, but its allowance is a matter of sound judicial discretion. The petition shall be filed with the clerk of the court of appeals within the time provided by Rule 4(a) for filing a notice of appeal, with proof of service on all parties to the action in the district court. A notice of appeal need not be filed. Within 14 days after service of the petition, a party may file an answer in opposition or a cross petition.	**(a) Petition for Leave to Appeal.** (1) A party may seek an appeal from a district-court judgment entered after an appeal before the district court under 28 U.S.C. § 636(c)(4) — that is, an appeal to a court of appeals from the order of a district judge on appeal from a judgment entered upon direction of a magistrate judge in a civil case — by filing a petition for leave to appeal. Such an appeal to a court of appeals is a matter not of right but of sound judicial discretion. (2) The petition must be filed with the circuit clerk within the time provided by Rule 4(a) for filing a notice of appeal, with proof of service on all parties to the district-court action.

[14] Here the Style Subcommittee recommended use of the term "permission" rather than "leave." The Advisory Committee suggests that "leave" is preferable because subdivision (a) of this Rule and the statute, 28 U.S.C. § 636(c)(5), both use the term "leave to appeal." CAM

Existing Rule	Restyled Rule
(b) Content of petition; answer. — The petition for leave to appeal shall contain a statement of the facts necessary to an understanding of the questions to be presented by the appeal; a statement of those questions and of the relief sought; a statement of the reasons why in the opinion of the petitioner the appeal should be allowed; and a copy of the order, decree or judgment complained of and any opinion or memorandum relating thereto. The petition and answer shall be submitted to a panel of judges of the court of appeals without oral argument unless otherwise ordered.	**(b) Content of Petition; Answer or Cross-Petition.** (1) The petition must: (A) state the facts necessary to understand the questions to be presented by the appeal; (B) state the questions themselves; (C) state the relief sought; (D) state the reasons why, in the opinion of the petitioner, the appeal should be allowed; and (E) include a copy of the order, decree, or judgment complained of and any related opinion or memorandum. (2) Within 14 days after the petition is served, a party may file an answer in opposition or a cross-petition. (3) The petition and answer will be submitted without oral argument unless the court of appeals orders otherwise.
(c) Form of Papers; Number of Copies. — All papers may be typewritten. An original and three copies must be filed unless the court requires the filing of a different number by local rule or by order in a particular case.	**(c) Form of Papers; Number of Copies.** All papers must conform to Rule 32(a)(1). Three copies must be filed with the original, unless the court requires a different number by local rule or by order in a particular case.
(d) Allowance of the appeal; fees; cost bond; filing of record. — Within 10 days after the entry of an order granting the appeal, the appellant shall (1) pay to the clerk of the district court the fees established by statute and the docket fee prescribed by the Judicial Conference of the United States and (2) file a bond for costs if required pursuant to Rule 7. The clerk of the district court shall notify the clerk of the court of appeals of the payment of the fees. Upon receipt of such notice, the clerk of the court of appeals shall enter the appeal upon the docket. The record shall be transmitted and filed in accordance with Rules 11 and 12(b).	**(d) Allowance of the Appeal; Fees; Cost Bond; Filing of Record.** (1) Within 10 days after the entry of the order granting leave to appeal, the appellant must: (A) pay the district clerk all required fees; and (B) file a cost bond if required under Rule 7. (2) A notice of appeal need not be filed. (3) The district clerk must notify the circuit clerk once the appellant has paid the fees. Upon receiving this notice, the circuit clerk must enter the appeal on the docket. The record must be transmitted and filed in accordance with Rules 11 and 12(b).

Rule 6. Appeal in a Bankruptcy Case from a Final Judgment, Order, or Decree of a District Court or of a Bankruptcy Appellate Panel	**Rule 6. Appeal in a Bankruptcy Case from a Final Judgment, Order, or Decree of a District Court or Bankruptcy Appellate Panel**
(a) Appeal from a judgment, order or decree of a district court exercising original jurisdiction in a bankruptcy case. — An appeal to a court of appeals from a final judgment, order or decree of a district court exercising jurisdiction pursuant to 28 U.S.C. § 1334 shall be taken in identical fashion as appeals from other judgments, orders or decrees of district courts in civil actions.	(a) **Appeal From a Judgment, Order, or Decree of a District Court Exercising Original Jurisdiction in a Bankruptcy Case.** An appeal to a court of appeals from a final judgment, order, or decree of a district court exercising jurisdiction under 28 U.S.C. § 1334 is taken as any other civil appeal under these rules.
(b) Appeal from a judgment, order or decree of a district court or bankruptcy appellate panel exercising appellate jurisdiction in a bankruptcy case. —	(b) **Appeal From a Judgment, Order, or Decree of a District Court or Bankruptcy Appellate Panel Exercising Appellate Jurisdiction in a Bankruptcy Case.**
(1) Applicability of other rules. All provisions of these rules are applicable to an appeal to a court of appeals pursuant to 28 U.S.C. § 158(d) from a final judgment, order or decree of a district court or bankruptcy appellate panel exercising appellate jurisdiction pursuant to 28 U.S.C. § 158(a) or (b), except that:	(1) *Applicability of Other Rules.* These rules apply to an appeal to a court of appeals under 28 U.S.C. § 158(d) from a final judgment, order, or decree of a district court or bankruptcy appellate panel exercising appellate jurisdiction under 28 U.S.C. § 158(a) or (b). But there are three exceptions:
(i) Rules 3.1, 4(a)(4), 4(b), 5.1, 9, 10, 11, 12(b), 13-20, 22-23, and 24(b) are not applicable; (ii) the reference in Rule 3(c) to "Form 1 in the Appendix of Forms" shall be read as a reference to Form 5; and (iii) when the appeal is from a bankruptcy appellate panel, the term "district court" as used in any applicable rule, means "appellate panel".	(A) Rules 3.1, 4(a)(4), 4(b), 5.1, 9, 10, 11, 12(b), 13–20, 22–23, and 24(b) do not apply; (B) the reference in Rule 3(c) to "Form 1 in the Appendix of Forms" must be read as a reference to Form 5; and (C) when the appeal is from a bankruptcy appellate panel, the term "district court," as used in any applicable rule, means "appellate panel."
(2) Additional rules. In addition to the rules made applicable by subsection (b)(1) of this rule, the following rules shall apply to an appeal to a court of appeals pursuant to 28 U.S.C. § 158(d) from a final judgment, order or decree of a district court or of a bankruptcy appellate panel exercising appellate jurisdiction pursuant to 28 U.S.C. § 158(a) or (b):	(2) *Additional Rules.* In addition to the rules made applicable by Rule 6(b)(1), the following rules apply:

(i) Effect of a Motion for Rehearing on the Time for Appeal. If any party files a timely motion for rehearing under Bankruptcy Rule 8015 in the district court or the bankruptcy appellate panel, the time for appeal to the court of appeals for all parties runs from the entry of the order disposing of the motion. A notice of appeal filed after announcement or entry of the district court's or bankruptcy appellate panel's judgment, order, or decree, but before disposition of the motion for rehearing, is ineffective until the date of the entry of the order disposing of the motion for rehearing. Appellate review of the order disposing of the motion requires the party, in compliance with Appellate Rules 3(c) and 6(b)(1)(ii), to amend a previously filed notice of appeal. A party intending to challenge an alteration or amendment of the judgment, order, or decree shall file an amended notice of appeal within the time prescribed by Rule 4, excluding 4(a)(4) and 4(b), measured from the entry of the order disposing of the motion. No additional fees will be required for filing the amended notice.

(A) *Motion for Rehearing.*

(i) If a timely motion for rehearing under Bankruptcy Rule 8015 is filed, the time to appeal for all parties runs from the entry of the order disposing of the motion. A notice of appeal filed after the district court or bankruptcy appellate panel announces or enters a judgment, order, or decree — but before disposition of the motion for rehearing — becomes effective when the order disposing of the motion for rehearing is entered.

(ii) Appellate review of the order disposing of the motion requires the party, in compliance with Appellate Rules 3(c) and 6(b)(1)(B), to amend a previously filed notice of appeal. A party intending to challenge an altered or amended judgment, order, or decree must file a notice[15] or amended notice of appeal within the time prescribed by Rule 4 — excluding 4(a)(4) and 4(b) — measured from the entry of an order disposing of the motion. No additional fee is required to file an amended notice.

[15] The Style Subcommittee's draft was amended to conform to Rule 4(a)(4). The amendment provides that a party intending to challenge an altered or amended judgment order or decree must file "a notice or amended notice of appeal." The Committee Note must identify the conforming change. CAM

(ii) The record on appeal. Within 10 days after filing the notice of appeal, the appellant shall file with the clerk possessed of the record assembled pursuant to Bankruptcy Rule 8006, and serve on the appellee, a statement of the issues to be presented on appeal and a designation of the record to be certified and transmitted to the clerk of the court of appeals. If the appellee deems other parts of the record necessary, the appellee shall, within 10 days after service of the appellant's designation, file with the clerk and serve on the appellant a designation of additional parts to be included. The record, redesignated as provided above, plus the proceedings in the district court or bankruptcy appellate panel and a certified copy of the docket entries prepared by the clerk pursuant to Rule 3(d) shall constitute the record on appeal.	(B) *The Record on Appeal.* (i) Within 10 days after filing the notice of appeal, the appellant must file with the clerk possessing the record assembled in accordance with Bankruptcy Rule 8006 — and serve on the appellee — a statement of the issues to be presented on appeal and a designation of the record to be certified and sent to the circuit clerk. (ii) An appellee who believes that other parts of the record are necessary must, within 10 days after being served with the appellant's designation, file with the clerk and serve on the appellant a designation of additional parts to be included. (iii) The record on appeal consists of: • the redesignated record as provided above; • the proceedings in the district court or bankruptcy appellate panel; and • a certified copy of the docket entries prepared by the clerk under Rule 3(d).

(iii) Transmission of the record. When the record is complete for purpose of the appeal, the clerk of the district court or the appellate panel, shall transmit it forthwith to the clerk of the court of appeals. The clerk of the district court or of the appellate panel shall number the documents comprising the record and shall transmit with the record a list of documents correspondingly numbered and identified with reasonable definiteness. Documents of unusual bulk or weight, physical exhibits other than documents and such other parts of the record as the court of appeals may designate by local rule, shall not be transmitted by the clerk unless the clerk is directed to do so by a party or by the clerk of the court of appeals. A party must make advance arrangements with the clerk for the transportation and receipt of exhibits of unusual bulk or weight. All parties shall take any other action necessary to enable the clerk to assemble and transmit the record. The court of appeals may provide by rule or order that a certified copy of the docket entries shall be transmitted in lieu of the redesignated record, subject to the right of any party to request at any time during the pendency of the appeal that the redesignated record be transmitted.

(C) *Transmission of the Record.*

(i) When the record is complete, the district clerk or bankruptcy appellate panel clerk must number the documents comprising the record and send them promptly to the circuit clerk together with a list of the documents correspondingly numbered and reasonably identified. Unless directed to do so by a party or the circuit clerk, the clerk must not send to the court of appeals documents of unusual bulk or weight, physical exhibits other than documents, or other parts of the record designated for omission by local rule of the court of appeals. If the exhibits are unusually bulky or heavy, a party must arrange with the clerks in advance for their transportation and receipt.

(ii) All parties must take any other action necessary to enable the clerk to assemble and forward[16] the record. The court of appeals may provide by rule or order that a certified copy of the docket entries be sent in place of the redesignated record, but any party may request at any time during the pendency of the appeal that the redesignated record be sent.

16 In place of *transmit*, the restyled rules sometimes use *send* and sometimes *forward*. Here is the rationale. *Transmit* is simply a fancy word for *send*. It has been justly criticized as a word overworked in official documents. *See* Sir Ernest Gowers, *The Complete Plain Words* 130–31 (Sir Bruce Fraser ed., 2d ed. 1973). Moreover, one usage text states: "*Transmit* for *send* is labored elegance unless it carries the definite idea of passing something through or over an intermediary." Bergen Evans & Cordelia Evans, *A Dictionary of Contemporary American Usage* 187 (1957).

Though it works admirably in most places, *send* is somewhat awkward if it appears without a destination. That is, if we say *the clerk must assemble and send the record*, most native speakers of English would immediately ask, Send it where? That is, a place must be specified with the verb *send*.

I therefore looked for an everyday equivalent that wouldn't require a specified destination — and yet still wouldn't have the "labored elegance" (or pomposity) of *transmit* — and came up with *forward*. This word seems to make literal sense: "A letter or package is certainly forwarded when it is sent ahead to an address at which the addressee will be and it is forwarded when it is sent on after him to another address." Evans & Evans, *Contemporary American Usage* at 187. If we think of the record as following the parties to another address — say from the district court to the court of appeals — then *forward* works.

Thus, even though there may at first seem to be an inconsistency in usage, it is a principled inconsistency: *send* when the destination appears, *forward* when it doesn't. — BAG.

(iv) Filing of the record. Upon receipt of the record, the clerk of the court of appeals shall file it and shall immediately give notice to all parties of the date on which it was filed. Upon receipt of a certified copy of the docket entries transmitted in lieu of the redesignated record pursuant to rule or order, the clerk of the court of appeals shall file it, and shall immediately give notice to all parties of the date on which it was filed.	(D) *Filing of the Record*. Upon receiving the record — or a certified copy of the docket entries sent in place of the redesignated record — the circuit clerk must file it and must immediately give notice to all parties of the filing date.

Rule 7. Bond for Costs on Appeal in Civil Cases	Rule 7. Bond for Costs on Appeal in a Civil Case
The district court may require an appellant to file a bond or provide other security in such form and amount as it finds necessary to ensure payment of costs on appeal in a civil case. The provisions of Rule 8(b) apply to a surety upon a bond given pursuant to this rule.	In a civil case, the district court may require an appellant to file a bond or provide other security in any form and amount necessary to ensure payment of costs on appeal. Rule 8(b) applies to a surety on a bond given under this rule.

Rule 8. Stay or Injunction Pending Appeal	Rule 8. Stay or Injunction Pending Appeal
(a) Stay must ordinarily be sought in the first instance in district court; motion for stay in court of appeals. — Application for a stay of the judgment or order of a district court pending appeal, or for approval of a supersedeas bond, or for an order suspending, modifying, restoring or granting an injunction during the pendency of an appeal must ordinarily be made in the first instance in the district court. A motion for such relief may be made to the court of appeals or to a judge thereof, but the motion shall show that application to the district court for the relief sought is not practicable, or that the district court has denied an application, or has failed to afford the relief which the applicant requested, with the reasons given by the district court for its action. The motion shall also show the reasons for the relief requested and the facts relied upon, and if the facts are subject to dispute the motion shall be supported by affidavits or other sworn statements or copies thereof. With the motion shall be filed such parts of the record as are relevant. Reasonable notice of the motion shall be given to all parties. The motion shall be filed with the clerk and normally will be considered by a panel or division of the court, but in exceptional cases where such procedure would be impracticable due to the requirements of time, the application may be made to and considered by a single judge of the court.	**(a) Motion for Stay.** (1) *Initial Motion in the District Court.* A party must ordinarily move first in the district court for the following relief: (A) a stay of the judgment or order of a district court pending appeal; (B) approval of a supersedeas bond; or (C) an order suspending, modifying, restoring, or granting an injunction during the pendency of an appeal. (2) *Motion In the Court of Appeals.* (A) A motion for the relief mentioned in Rule 8(a)(1) may be made to the court of appeals or to one of its judges. But the motion must: (i) show that a motion in the district court for the relief is not practicable; or (ii) state that the district court has denied a motion or has failed to afford the requested relief and include any reasons given by the district court for its action. (B) The motion must also include: (i) the reasons for granting the relief requested and the facts relied on; (ii) originals or copies of affidavits or other sworn statements supporting facts subject to dispute; and (iii) relevant parts of the record.

	(C) The moving party must give reasonable notice of the motion to all parties. (D) A motion under Rule 8(a)(2) must be filed with the clerk and normally will be considered by a panel of the court. But in an exceptional case in which time requirements make that procedure impracticable, the motion may be made to and considered by a single judge.[17]
(b) Stay may be conditioned upon giving of bond; proceedings against sureties. — Relief available in the court of appeals under this rule may be conditioned upon the filing of a bond or other appropriate security in the district court. If security is given in the form of a bond or stipulation or other undertaking with one or more sureties, each surety submits to the jurisdiction of the district court and irrevocably appoints the clerk of the district court as the surety's agent upon whom any papers affecting the surety's liability on the bond or undertaking may be served. A surety's liability may be enforced on motion in the district court without the necessity of an independent action. The motion and such notice of the motion as the district court prescribed may be served on the clerk of the district court, who shall forthwith mail copies to the sureties if their addresses are known.	(b) **Stay May Be Conditioned Upon Filing of Bond; Proceedings Against Sureties.** Relief by the court of appeals under this rule may be conditioned upon a party's filing a bond or other appropriate security in the district court. If a party gives security in the form of a bond or stipulation or other undertaking with one or more sureties, each surety submits to the jurisdiction of the district court and irrevocably appoints the district clerk as the surety's agent on whom any papers affecting the surety's liability on the bond or undertaking may be served. On motion, a surety's liability may be enforced in the district court without the necessity of an independent action. The motion and any notice that the district court prescribes may be served on the district clerk, who must promptly mail a copy to each surety whose address is known.
(c) Stays in criminal cases. — Stays in criminal cases shall be had in accordance with the provisions of Rule 38(a) of the Federal Rules of Criminal Procedure.	(c) **Stay in a Criminal Case.** A stay in a criminal case must accord with Rule 38 of the Federal Rules of Criminal Procedure.

[17] Does a single judge have power, either under statute or Rule 25, to "file" a motion presented directly to him or her? Can a party apply to a single judge in other exigent circumstances? Does this rule limit a judge's power? The Advisory Committee will discuss these questions. CAM

Rule 9. Release in a Criminal Case	Rule 9. Release in a Criminal Case
(a) Appeal from an Order Regarding Release Before Judgment of Conviction. -The district court must state in writing, or orally on the record, the reasons for an order regarding release or detention of a defendant in a criminal case. A party appealing from the order, as soon as practicable after filing a notice of appeal with the district court, must file with the court of appeals a copy of the district court's order and its statement of reasons. An appellant who questions the factual basis for the district court's order must file a transcript of any release proceedings in the district court or an explanation of why a transcript has not been obtained. The appeal must be determined promptly. It must be heard, after reasonable notice to the appellee, upon such papers, affidavits, and portions of the record as the parties present or the court may require. Briefs need not be filed unless the court so orders. The court of appeals or a judge thereof may order the release of the defendant pending decision of the appeal.	**(a) Release Before Judgment of Conviction.** (1) The district court must state in writing, or orally on the record, the reasons for an order regarding the release or detention of a defendant in a criminal case.[18] A party appealing from the order must file with the court of appeals a copy of the district-court order and the court's statement of reasons as soon as practicable after filing the notice of appeal. An appellant who questions the factual basis for the district court's order must file a transcript of the release proceedings or explain why a transcript was not obtained. (2) The appeal must be determined promptly. It must be heard, after reasonable notice to the appellee, upon any papers, affidavits, and parts of the record that the parties present or the court requires. Unless the court so orders, briefs need not be filed. (3) The court of appeals or a circuit judge may order the defendant's release pending the disposition of the appeal.
(b) Review of an Order Regarding Release After Judgment of Conviction. — A party entitled to do so may obtain review of a district court's order regarding release that is made after a judgment of conviction by filing a notice of appeal from that order with the district court, or by filing a motion with the court of appeals if the party has already filed a notice of appeal from the judgment of conviction. Both the order and the review are subject to Rule 9(a). In addition, the papers filed by the applicant for review must include a copy of the judgment of conviction.	**(b) Release After Judgment of Conviction.** A party entitled to do so may obtain review of a district-court order regarding release after a judgment of conviction by filing a notice of appeal from that order in the district court, or by filing a motion in the court of appeals if the party has already filed a notice of appeal from the judgment of conviction. Both the order and the review are subject to Rule 9(a). The papers filed by the party seeking review must include a copy of the judgment of conviction.

[18] This paragraph requires a district court to state in writing the reasons for its order regarding release or detention of a defendant in a criminal case. The question was raised whether such an order to a district court would be better placed in the criminal rules. It was noted that Rule 22(b), dealing with habeas corpus, imposes a similar requirement upon a district judge. CAM

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

Rule 10. The Record on Appeal	Rule 10. The Record on Appeal
(a) Composition of the record on appeal. — 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.	(a) **Composition of the Record on Appeal.** The following items constitute the record on appeal: (1) the original papers and exhibits filed in the district court; (2) the transcript of proceedings, if any; and (3) a certified copy of the docket entries prepared by the district clerk.
(b) The Transcript of Proceedings; Duty of Appellant to Order; Notice to Appellee if Partial Transcript is Ordered. —	(b) **The Transcript of Proceedings.**
(1) Within 10 days after filing the notice of appeal the appellant shall 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 be in writing and within the same period a copy shall 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 so state. If no such parts of the proceedings are to be ordered, within the same period the appellant shall file a certificate to that effect.	(1) *Appellant's Duty to Order.* 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 must do either of the following: (A) order from the reporter a transcript of such parts of the proceedings not already on file as the appellant considers necessary, subject to a local rule of the court of appeals and with the following qualifications: (i) the order must be in writing; (ii) if the cost of the transcript is to be paid by the United States under the Criminal Justice Act, the order must so state; and (iii) the appellant must, within the same period, file a copy of the order with the district clerk; or (B) if no transcript is ordered, file a certificate to that effect.

(2) If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant shall include in the record a transcript of all evidence relevant to such finding or conclusion.	(2) *Unsupported Finding or Conclusion.* If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant must include in the record a transcript of all evidence relevant to any such finding or conclusion.
(3) Unless the entire transcript is to be included, the appellant shall, within the 10-day time provided in paragraph (b)(1) of this Rule 10, file a statement of the issues the appellant intends to present on the appeal, and shall serve on the appellee a copy of the order or certificate and of the statement. An appellee who believes that a transcript of other parts of the proceedings is necessary shall, within 10 days after the service of the order or certificate and the statement of the appellant, file and serve on the appellant a designation of additional parts to be included. Unless within 10 days after service of the designation the appellant has ordered such parts, and has so notified the appellee, the appellee may within the following 10 days either order the parts or move in the district court for an order requiring the appellant to do so.	(3) *Partial Transcript.* Unless the entire transcript is ordered: (A) the appellant must — within the 10 days provided in Rule 10(b)(1) — file a statement of the issues that the appellant intends to present on the appeal and must serve on the appellee a copy of both the order or certificate and the statement; (B) if the appellee considers it necessary to have a transcript of other parts of the proceedings, the appellee must, within 10 days after the service of the order or certificate and the statement of the issues, file and serve on the appellant a designation of additional parts to be ordered; and (C) unless within 10 days after service of that designation the appellant has ordered all such parts, and has so notified the appellee, the appellee may within the following 10 days either order the parts or move in the district court for an order requiring the appellant to do so.
(4) At the time of ordering, a party must make satisfactory arrangements with the reporter for payment of the cost of the transcript.	(4) *Payment.* At the time of ordering, a party must make satisfactory arrangements with the reporter for payment of the cost of the transcript.

(c) Statement of the evidence or proceedings when no report was made or when the transcript is unavailable. — If no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection. The statement shall be served on the appellee, who may serve objections or proposed amendments thereto within 10 days after service. Thereupon the statement and any objections or proposed amendments shall be submitted to the district court for settlement and approval and as settled and approved shall be included by the clerk of the district court in the record on appeal.	(c) **Statement of the Evidence When the Proceedings Were Not Recorded or When a Transcript Is Unavailable.** If the transcript of a hearing or trial is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection. The statement must be served on the appellee, who may serve objections or proposed amendments within 10 days after being served. The statement and any objections or proposed amendments must then be submitted to the district court for settlement and approval. As settled and approved, the statement must be included by the district clerk in the record on appeal.
(d) Agreed statement as the record on appeal. — In lieu of the record on appeal as defined in subdivision (a) of this rule, the parties may prepare and sign a statement of the case showing how the issues presented by the appeal arose and were decided in the district court and setting forth only so many of the facts averred and proved or sought to be proved as are essential to a decision of the issues presented. If the statement conforms to the truth, it, together with such additions as the court may consider necessary fully to present the issues raised by the appeal, shall be approved by the district court and shall then be certified to the court of appeals as the record on appeal and transmitted thereto by the clerk of the district court within the time provided by Rule 11. Copies of the agreed statement may be filed as the appendix required by Rule 30.	(d) **Agreed Statement as the Record on Appeal.** In place of the record on appeal as defined in Rule 10(a), the parties may prepare, sign, and submit to the district court a statement of the case showing how the issues presented by the appeal arose and were decided in the district court. The statement must set forth only those facts averred and proved or sought to be proved that are essential to the court's resolution of the issues. If the statement conforms to the truth, it — together with any additions that the district court may consider necessary to a full presentation of the issues on appeal — must be approved by the district court and must then be certified to the court of appeals as the record on appeal. The district clerk must then send it to the circuit clerk within the time provided by Rule 11. A copy of the agreed statement may be filed in place of the appendix required by Rule 30.[19]

[19] Given the infrequent use of this provision, the Advisory Committee will consider its abrogation. CAM

(e) Correction or modification of the record. — If any difference arises as to whether the record truly discloses what occurred in the district court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party is omitted from the record by error or accident or is misstated therein, the parties by stipulation, or the district court, either before or after the record is transmitted to the court of appeals, or the court of appeals, on proper suggestion or of its own initiative, may direct that the omission or misstatement be corrected, and if necessary that a supplemental record be certified and transmitted. All other questions as to the form and content of the record shall be presented to the court of appeals.	(e) **Correction or Modification of the Record.** If any difference arises about whether the record truly discloses what occurred in the district court, the difference must be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party is misstated or omitted from the record by error or accident, the parties by stipulation, or the district court — either before or after the record is sent to the court of appeals — or the court of appeals, on its own or a party's motion, may direct that the omission or misstatement be corrected and, if necessary, that a supplemental record be certified and forwarded. All other questions as to the form and content of the record must be presented to the court of appeals.

Rule 11. Transmission of the Record	Rule 11. Forwarding the Record
(a) Duty of appellant. -- After filing the notice of appeal the appellant, or in the event that more than one appeal is taken, each appellant, shall comply with the provisions of Rule 10(b) and shall take any other action necessary to enable the clerk to assemble and transmit the record. A single record shall be transmitted.	(a) **Appellant's Duty.** An appellant filing a notice of appeal must comply with Rule 10(b) and must do whatever else is necessary to enable the clerk to assemble and forward the record. If there are multiple appeals from a judgment or order, a single record must be forwarded.
(b) Duty of reporter to prepare and file transcript; notice to court of appeals; duty of clerk to transmit the record. — Upon receipt of an order for a transcript, the reporter shall acknowledge at the foot of the order the fact that the reporter has received it and the date on which the reporter expects to have the transcript completed and shall transmit the order, so endorsed, to the clerk of the court of appeals. If the transcript cannot be completed within 30 days of receipt of the order the reporter shall request an extension of time from the circuit clerk and the action of the clerk of the court of appeals shall be entered on the docket and the parties notified. In the event of the failure of the reporter to file the transcript within the time allowed, the clerk of the court of appeals shall notify the district judge and take such other steps as may be directed by the court of appeals. Upon completion of the transcript the reporter shall file it with the clerk of the district court and shall notify the clerk of the court of appeals that the reporter has done so.	(b) Duties of Reporter and District Clerk. (1) ***Reporter's Duty to Prepare and File a Transcript.*** The reporter must prepare and file a transcript as follows: (A) Upon receiving an order for a transcript, the reporter must enter at the foot of the order the date of its receipt and the expected completion date and send a copy, so endorsed, to the circuit clerk. (B) If the transcript cannot be completed within 30 days of the reporter's receipt of the order, the reporter may request the circuit clerk to grant additional time to complete it. The clerk must note on the docket the action taken and notify the parties. (C) When a transcript is complete, the reporter must file it with the district clerk and notify the circuit clerk of the filing. (D) If the reporter fails to file the transcript time, the circuit clerk must notify the district judge and do whatever else the court of appeals directs.

When the record is complete for purposes of the appeal, the clerk of the district court shall transmit it forthwith to the clerk of the court of appeals. The clerk of the district court shall number the documents comprising the record and shall transmit with the record a list of documents correspondingly numbered and identified with reasonable definiteness. Documents of unusual bulk or weight, physical exhibits other than documents, and such other parts of the record as the court of appeals may designate by local rule, shall not be transmitted by the clerk unless the clerk is directed to do so by a party or by the clerk of the court of appeals. A party must make advance arrangements with the clerks for the transportation and receipt of exhibits of unusual bulk or weight.	(2) *District Clerk's Duty to Forward.* When the record is complete, the district clerk must number the documents comprising the record and send them promptly to the circuit clerk together with a list of the documents correspondingly numbered and reasonably identified. Unless directed to do so by a party or the circuit clerk, the district clerk must not send to the court of appeals documents of unusual bulk or weight, physical exhibits other than documents, or other parts of the record designated for omission by local rule of the court of appeals. If the exhibits are unusually bulky or heavy, a party must arrange with the clerks in advance for their transportation and receipt.
(c) Temporary retention of record in district court for use in preparing appellate papers. — Notwithstanding the provisions of (a) and (b) of this Rule 11, the parties may stipulate, or the district court on motion of any party may order, that the clerk of the district court shall temporarily retain the record for use by the parties in preparing appellate papers. In that event the clerk of the district court shall certify to the clerk of the court of appeals that the record, including the transcript or parts thereof designated for inclusion and all necessary exhibits, is complete for purposes of the appeal. Upon receipt of the brief of the appellee, or at such earlier time as the parties may agree or the court may order, the appellant shall request the clerk of the district court to transmit the record.	(c) **Retaining the Record Temporarily in the District Court for Use in Preparing the Appeal.** The parties may stipulate, or the district court on motion may order, the district clerk to retain the record temporarily for the parties to use in preparing the papers on appeal. In that event the district clerk must certify to the circuit clerk that the record on appeal is complete. Upon receipt of the appellee's brief, or earlier if the court orders or the parties agree, the appellant must request the district clerk to forward the record.
(d) [Extension of time for transmission of the record; reduction of time] [Abrogated]	(d) **[Abrogated.]**

Current Rule	Restyled Draft
(e) Retention of the record in the district court by order of court. — The court of appeals may provide by rule or order that a certified copy of the docket entries shall be transmitted in lieu of the entire record, subject to the right of any party to request at any time during the pendency of the appeal that designated parts of the record be transmitted. If the record or any part thereof is required in the district court for use there pending the appeal, the district court may make an order to that effect, and the clerk of the district court shall retain the record or parts thereof subject to the request of the court of appeals, and shall transmit a copy of the order and of the docket entries together with such parts of the original record as the district court shall allow and copies of such parts as the parties may designate.	(e) **Retaining the Record by Court Order.** (1) The court of appeals may, by order or local rule, provide that a certified copy of the docket entries be forwarded instead of the entire record. But a party may at any time during the appeal request that designated parts of the record be forwarded. (2) The district court may order the record or some part of it retained if the court needs it while the appeal is pending, subject, however, to call by the court of appeals. (3) If part or all of the record is ordered retained, the district clerk must send to the court of appeals a copy of the order and the docket entries together with the parts of the original record allowed by the district court and copies of any parts of the record designated by the parties.
(f) Stipulation of parties that parts of the record be retained in the district court. — The parties may agree by written stipulation filed in the district court that designated parts of the record shall be retained in the district court unless thereafter the court of appeals shall order or any party shall request their transmittal. The parts thus designated shall nevertheless be a part of the record on appeal for all purposes.	(f) **Retaining Parts of the Record in the District Court by Stipulation of the Parties.** The parties may agree by written stipulation filed in the district court that designated parts of the record be retained in the district court subject to call by the court of appeals or request by a party. The parts of the record so designated remain a part of the record on appeal.
(g) Record for preliminary hearing in the court of appeals. — If prior to the time the record is transmitted a party desires to make in the court of appeals a motion for dismissal, for release, for a stay pending appeal, for additional security on the bond on appeal or on a supersedeas bond, or for any intermediate order, the clerk of the district court at the request of any party shall transmit to the court of appeals such parts of the original record as any party shall designate.	(g) **Record for Preliminary Hearing in the Court of Appeals.** If before the record is transmitted, a party desires to make in the court of appeals a motion for dismissal, for release, for a stay pending appeal, for additional security on the bond on appeal or on a supersedeas bond, or for any intermediate order, the district clerk must send to the court of appeals any parts of the original record designated by any party.

Rule 12. Docketing the Appeal; Filing a Representation Statement; Filing the Record	Rule 12. Docketing the Appeal; Filing a Representation Statement; Filing the Record
(a) Docketing the appeal. — Upon receipt of the copy of the notice of appeal and of the docket entries, transmitted by the clerk of the district court pursuant to Rule 3(d), the clerk of the court of appeals shall thereupon enter the appeal upon the docket. An appeal shall be docketed under the title given to the action in the district court, with the appellant identified as such, but if such title does not contain the name of the appellant, the appellant's name, identified as appellant, shall be added to the title.	**(a) Docketing the Appeal.** Upon receiving the copy of the notice of appeal and the docket entries from the district clerk under Rule 3(d), the circuit clerk must docket the appeal under the title of the district-court action with an identification of the appellant. If the appellant's name does not appear in the title, it must be added and identified as the appellant.
(b) Filing a Representation Statement. — Within 10 days after filing a notice of appeal, unless another time is designated by the court of appeals, the attorney who filed the notice of appeal shall file with the clerk of the court of appeals a statement naming each party represented on appeal by that attorney.	**(b) Filing a Representation Statement.** Unless the court of appeals designates another time, the attorney who filed the notice of appeal must, within 10 days after filing the notice, file a statement with the circuit clerk naming the parties that the attorney represents on appeal.
(c) Filing the Record, Partial Record, or Certificate. — Upon receipt of the record transmitted pursuant to Rule 11(b), or the partial record transmitted pursuant to Rule 11(e), (f), or (g), or the clerk's certificate under Rule 11(c), the clerk of the court of appeals shall file it and shall immediately give notice to all parties of the date on which it was filed.	**(c) Filing the Record, Partial Record, or Certificate.** Upon receiving the record, partial record, or district clerk's certificate sent under Rule 11(b), (c), (e), (f), or (g), the circuit clerk must file it and immediately notify all parties of the filing date.

Rule 13. Review of a Decision of the Tax Court	Rule 13. Review of a Decision of the Tax Court
(a) How Obtained; Time for Filing Notice of Appeal. — Review of a decision of the United States Tax Court must be obtained by filing a notice of appeal with the clerk of the Tax Court within 90 days after entry of the Tax Court's decision. At the time of filing the appellant must furnish the clerk with sufficient copies of the notice of appeal to enable the clerk to comply promptly with the requirements of Rule 3(d). If a timely notice of appeal is filed by one party, any other party may take an appeal by filing a notice of appeal within 120 days after entry of the Tax Court's decision. The running of the time for appeal is terminated as to all parties by a timely motion to vacate or revise a decision made pursuant to the Rules of Practice of the Tax Court. The full time for appeal commences to run and is to be computed from the entry of an order disposing of such motion, or from the entry of decision whichever is later.	**(a) How Obtained; Time for Filing Notice of Appeal.** (1) Review of a decision of the United States Tax Court is commenced by filing a notice of appeal with the Tax Court clerk within 90 days after the entry of the Tax Court's decision. At the time of filing, the appellant must furnish the clerk with enough copies of the notice to enable the clerk to comply with Rule 3(d). If one party files a timely notice of appeal, any other party may file a notice of appeal within 120 days after the decision is entered. (2) If, under Tax Court rules, a party files a timely motion to vacate or revise the Tax Court's decision, the time to file a notice of appeal runs from the entry of the order disposing of the motion or from the entry of a new decision, whichever is later.
(b) Notice of appeal — How filed. — The notice of appeal may be filed by deposit in the office of the clerk of the Tax Court in the District of Columbia or by mail addressed to the clerk. If a notice is delivered to the clerk by mail and is received after expiration of the last day allowed for filing, the postmark date shall be deemed to be the date of delivery, subject to the provisions of § 7502 of the Internal Revenue Code of 1954, as amended, and the regulations promulgated pursuant thereto.	**(b) Notice of Appeal; How Filed.** The notice of appeal may be filed either at the Tax Court clerk's office in the District of Columbia or by mail addressed to the clerk. If sent by mail — even if received after the last day allowed for filing has expired — the notice is considered filed on the postmark date, subject to § 7502 of the Internal Revenue Code, as amended, and the applicable regulations.
(c) Content of the notice of appeal; service of the notice; effect of filing and service of the notice. — The content of the notice of appeal, the manner of its service, and the effect of the filing of the notice and of its service shall be as prescribed by Rule 3. Form 2 in the Appendix of Forms is a suggested form of the notice of appeal.	**(c) Content of the Notice of Appeal; Service; Effect of Filing and Service.** Form 2 in the Appendix of Forms is a suggested form of the notice of appeal. Rule 3 prescribes the content and manner of serving, and the effect of filing and serving, a notice of appeal.

Current rule	Restyled draft
(d) The record on appeal; transmission of the record; filing of the record. — The provisions of Rules 10, 11 and 12 respecting the record and the time and manner of its transmission and filing and the docketing of the appeal in the court of appeals in cases on appeal from the district courts shall govern in cases on appeal from the Tax Court. Each reference in those rules and in Rule 3 to the district court and to the clerk of the district court shall be read as a reference to the Tax Court and to the clerk of the Tax Court respectively. If appeals are taken from a decision of the Tax Court to more than one court of appeals, the original record shall be transmitted to the court of appeals named in the first notice of appeal filed. Provision for the record in any other appeal shall be made upon appropriate application by the appellant to the court of appeals to which such other appeal is taken.	**(d) The Record on Appeal; Transmission; Filing.** (1) An appeal from the Tax Court is governed by the parts of Rules 10, 11, and 12 regarding the record on appeal from a district court, the time and manner of its transmission and filing, and the docketing in the court of appeals. References in those rules and in Rule 3 to the district court and district clerk are to be read as referring to the Tax Court and its clerk. (2) If an appeal from a Tax Court decision is taken to more than one court of appeals, the original record must be sent to the court named in the first notice of appeal filed. In an appeal to any other court of appeals, the appellant must apply to such other court to make provision for the record.

Rule 14. Applicability of Other Rules to the Review of a Tax Court Decision	**Rule 14. Applicability of Other Rules to the Review of a Tax Court Decision**
All provisions of these rules are applicable to review of a decision of the Tax Court, except that Rules 4-9, Rules 15-20, and Rules 22 and 23 are not applicable.	All provisions of these rules, except Rules 4–9, 15–20, and 22–23, apply to the review of a Tax Court decision.

Rule 15. Review or Enforcement of an Agency Order — How Obtained; Intervention	Rule 15. Review or Enforcement of an Agency Order — How Obtained; Intervention
(a) Petition for Review of Order; Joint Petition. - Review of an order of an administrative agency, board, commission, or officer (hereinafter, the term "agency" will include agency, board, commission, or officer) must be obtained by filing with the clerk of a court of appeals that is authorized to review such order, within the time prescribed by law, a petition to enjoin, set aside, suspend, modify, or otherwise review, or a notice of appeal, whichever form is indicated by the applicable statute (hereinafter, the term "petition for review" will include a petition to enjoin, set aside, suspend, modify, or otherwise review, or a notice of appeal). The petition must name each party seeking review either in the caption or in the body of the petition. Use of such terms as "et al.," or "petitioners," or "respondents" is not effective to name the parties. The petition also must designate the respondent and the order or part thereof to be reviewed. Form 3 in the Appendix of Forms is a suggested form of a petition for review. In each case the agency must be named respondent. The United States will also be a respondent if required by statute, even though not designated in the petition. If two or more persons are entitled to petition the same court for review of the same order and their interests are such as to make joinder practicable, they may file a joint petition for review and may thereafter proceed as a single petitioner.	**(a) Petition for Review; Joint Petition.** (1) Review of an agency order is commenced by filing, within the time prescribed by law, a petition for review with the clerk of a court of appeals authorized to review the agency order. If their interests make joinder practicable, two or more persons may join in a petition to the same court to review the same order. (2) The petition must: (A) name each party seeking review either in the caption or the body of the petition; using such terms as "et al.," "petitioners," or "respondents" does not effectively name the parties; (B) name the agency as a respondent (even though not named in the petition, the United States is a respondent if required by statute); and (C) specify the order or part thereof to be reviewed. (3) Form 3 in the Appendix of Forms is a suggested form of a petition for review. (4) In this rule "agency" includes an agency, board, commission or officer, and "petition for review" includes a petition to enjoin, suspend, modify, or otherwise review, or a notice of appeal, whichever form is indicated by the applicable statute.

Current rule	Restyled rule
(b) Application for enforcement of order; answer; default; cross-application for enforcement. — An application for enforcement of an order of an agency shall be filed with the clerk of a court of appeals which is authorized to enforce the order. The application shall contain a concise statement of the proceedings in which the order was entered, the facts upon which venue is based, and the relief prayed. Within 20 days after the application is filed, the respondent shall serve on the petitioner and file with the clerk an answer to the application. If the respondent fails to file an answer within such time, judgment will be awarded for the relief prayed. If a petition is filed for review of an order which the court has jurisdiction to enforce, the respondent may file a cross-application for enforcement.	(b) **Application or Cross-Application to Enforce an Order; Answer; Default.** (1) An application to enforce an agency order must be filed with the clerk of a court of appeals authorized to enforce the order. If a petition is filed to review an agency order that the court may enforce, the respondent may file a cross-application for enforcement. (2) The application must contain a concise statement of the proceedings in which the order was entered, the facts upon which venue is based, and the relief requested. (3) Within 20 days thereafter the respondent must serve on the applicant an answer to the application and file it with the clerk. If the respondent fails to answer in time, the court will enter judgment for the relief requested.
(c) Service of petition or application — A copy of a petition for review or of an application or cross-application for enforcement of an order shall be served by the clerk of the court of appeals on each respondent in the manner prescribed by Rule 3(d), unless a different manner of service is prescribed by an applicable statute. At the time of filing, the petitioner shall furnish the clerk with a copy of the petition or application for each respondent. At or before the time of filing a petition for review, the petitioner shall serve a copy thereof on all parties who shall have been admitted to participate in the proceedings before the agency other than respondents to be served by the clerk, and shall file with the clerk a list of those so served.	(c) **Service of Petition or Application.** The circuit clerk must serve a copy of the petition for review, or an application or cross-application to enforce an agency order, on each respondent as prescribed by Rule 3(d), unless a different manner of service is prescribed by statute. At the time of filing, the petitioner must: (1) have served a copy on all parties admitted to participate in the agency proceedings, except for the respondents; (2) file with the clerk a list of those so served; and (3) give the clerk enough copies of the petition or application to serve each respondent.[20]

[20] The Advisory Committee will discuss the possibility of amending this subdivision, as well as Rule 3, to require that the appellant or petitioner serve the copies of the petition or notice of appeal rather than imposing that burden on the clerk.

(d) Intervention. — Unless an applicable statute provides a different method of intervention, a person who desires to intervene in a proceeding under this rule shall serve upon all parties to the proceeding and file with the clerk of the court of appeals a motion for leave to intervene. The motion shall contain a concise statement of the interest of the moving party and the grounds upon which intervention is sought. A motion for leave to intervene or other notice of intervention authorized by an applicable statute shall be filed within 30 days of the date on which the petition for review is filed.	(d) **Intervention.** Unless a statute provides another method, a person who wants to intervene in a proceeding under this rule must file a motion for leave to intervene with the circuit clerk and serve a copy on all parties. The motion — or other notice of intervention authorized by law — must be filed within 30 days after the petition for review is filed and must contain a concise statement of the interest of the moving party and the grounds for intervention.
(e) Payment of Fees. - When filing any separate or joint petition for review in a court of appeals, the petitioner must pay the clerk of the court of appeals the fees established by statute, and also the docket fee prescribed by the Judicial Conference of the United States.	(e) **Payment of Fees.** When filing any separate or joint petition for review in a court of appeals, the petitioner must pay the circuit clerk all required fees.[21]

[21] The Style Subcommittee asks the Advisory Committee to consider whether this might not be a substantive change. If so, we would recommend replacing *required fees* with *statutory fees, as well as the docket fee prescribed by the Judicial Conference of the United States*.

Rule 15.1. Briefs and Oral Argument in National Labor Relations Board Proceedings	Rule 15.1. Briefs and Oral Argument in a National Labor Relations Board Proceeding
Each party adverse to the National Labor Relations Board in an enforcement or a review proceeding shall proceed first on briefing and at oral argument unless the court orders otherwise.	In either an enforcement or a review proceeding, a party adverse to the National Labor Relations Board proceeds first on briefing and at oral argument, unless the court orders otherwise.

Rule 16. The record on Review or Enforcement.	**Rule 16. The Record on Review or Enforcement**
(a) Composition of the record. — The order sought to be reviewed or enforced, the findings or report on which it is based, and the pleadings, evidence and proceedings before the agency shall constitute the record on review in proceedings to review or enforce the order of any agency.	**(a) Composition of the Record.** The record on review or enforcement of an agency order consists of: (1) the order involved; (2) any findings or report on which it is based; and (3) the pleadings, evidence, and proceedings before the agency.
(b) Omissions from or misstatements in the record. — If anything material to any party is omitted from the record or is misstated therein, the parties may at any time supply the omission or correct the misstatement by stipulation, or the court may at any time direct that the omission or misstatement be corrected and, if necessary, that a supplemental record be prepared and filed.	**(b) Omissions From or Misstatements in the Record.** The parties may at any time, by stipulation, supply any omission from the record or correct a misstatement, or the court may so direct. If necessary, the court may direct that a supplemental record be prepared and filed.

<table>
<tr><th>Rule 17. Filing of the Record</th><th>Rule 17. Filing of the Record</th></tr>
<tr><td>(a) Agency to file; time for filing; notice of filing. — The agency shall file the record with the clerk of the court of appeals within 40 days after service upon it of the petition for review unless a different time is provided by the statute authorizing review. In enforcement proceedings the agency shall file the record within 40 days after filing an application for enforcement, but the record need not be filed unless the respondent has filed an answer contesting enforcement of the order, or unless the court otherwise orders. The court may shorten or extend the time above prescribed. The clerk shall give notice to all parties of the date on which the record is filed.</td><td>(a) Agency to File; Time for Filing; Notice of Filing. The agency must file the record with the circuit clerk within 40 days after service on it of a petition for review, unless the statute authorizing review provides otherwise, or within 40 days after it files an application for enforcement unless the respondent fails to answer or the court orders otherwise. The court may shorten or extend the time to file the record. The clerk must notify all parties of the date when the record is filed.</td></tr>
<tr><td>(b) Filing — What Constitutes. — The agency may file the entire record or such parts thereof as the parties may designate by stipulation filed with the agency. The original papers in the agency proceeding or certified copies thereof may be filed. Instead of filing the record or designated parts thereof, the agency may file a certified list of all documents, transcripts of testimony, exhibits and other material comprising the record, or a list of such parts thereof as the parties may designate, adequately describing each, and the filing of the certified list shall constitute filing of the record. The parties may stipulate that neither the record nor a certified list be filed with the court. The stipulation shall be filed with the clerk of the court of appeals and the date of its filing shall be deemed the date on which the record is filed. If a certified list is filed, or if the parties designate only parts of the record for filing or stipulate that neither the record nor a certified list be filed, the agency shall retain the record or parts thereof. Upon request of the court or the request of a party, the record or any part thereof thus retained shall be transmitted to the court notwithstanding any prior stipulation. All parts of the record retained by the agency shall be a part of the record on review for all purposes.</td><td>(b) Filing — What Constitutes.
(1) The agency may file the record with the court in one of the following ways:
(A) The agency may file either the entire record or parts that the parties have designated by stipulation filed with the agency. These filings may consist of either original papers or certified copies.
(B) The agency may file a certified list adequately describing all documents, transcripts of testimony, exhibits, and other material comprising the record, or the parts that the parties have designated.
(2) The parties may stipulate in writing that no record or certified list be filed , or that only parts be filed or listed. The date the stipulation is filed with the circuit clerk is treated as the date when the record is filed.
(3) The agency must retain the record or its parts, if less than the entire record is filed. All parts of the record retained by the agency are a part of the record on review for all purposes and, if the court or a party so requests, must be sent to the court regardless of any prior stipulation.</td></tr>
</table>

Rule 18. Stay Pending Review	Rule 18. Stay Pending Review
Application for a stay of a decision or order of any agency pending direct review in the court of appeals shall ordinarily be made in the first instance to the agency. A motion for such relief may be made to the court of appeals or to a judge thereof, but the motion shall show that application to the agency for the relief sought is not practicable, or that application has been made to the agency and denied, with the reasons given by it for denial, or that the action of the agency did not afford the relief which the application had requested. The motion shall also show the reasons for the relief requested and the facts relied upon and if the facts are subject to dispute the motion shall be supported by affidavits or other sworn statements or copies thereof. With the motion shall be filed such parts of the record as are relevant to the relief sought. Reasonable notice of the motion shall be given to all parties to the proceeding in the court of appeals. The court may condition relief under this rule upon the filing of a bond or other appropriate security. The motion shall be filed with the clerk and normally will be considered by a panel or division of the court, but in exceptional cases where such procedure would be impracticable due to the requirements of time, the application may be made to and considered by a single judge of the court.	**(a) Motion for Stay.**[22] (1) **Initial Motion before the Agency.** A petitioner must ordinarily move first before the agency for a stay pending review of its decision or order. (2) **Motion in the Court of Appeals.** A motion for stay may be made to the court of appeals or one of its judges. (A) But the motion must: (i) show that moving first before the agency would be impractical; or (ii) state that, a motion having been made, the agency denied the motion or failed to afford the relief requested. (B) The motion must also include: (i) the reasons for granting the relief requested and the facts relied on; (ii) originals or copies of affidavits or other sworn statements supporting facts subject to dispute; and (iii) relevant parts of the record.

22 A party may move for a stay of an agency order pending review of the agency's decision or order. There is no corollary provision authorizing the agency to move during the pendency of an application to enforce its order. In contrast, Rule 8 permits a party to litigation in a district court to move for an order "restoring or granting an injunction during the pendency of an appeal." That provision is not applicable in the agency context. See Rule 20. This is a substantive question that the Advisory Committee will consider. CAM

	(C) The moving party must give reasonable notice of the motion to all parties. (D) A motion under Rule 18 (a)(1) must be filed with the circuit clerk and normally will be considered by a panel of the court. But in an exceptional case in which time requirements make that procedure impracticable, the motion may be made to and considered by a single judge.[23] (E) The court may condition relief upon the filing of a bond or other appropriate security.

[23] See Rule 8, n.17.

Rule 19. Settlement of Judgments Enforcing Orders	Rule 19. Settlement of a Judgment Enforcing an Agency Order in Part
When an opinion of the court is filed directing the entry of a judgment enforcing in part the order of any agency, the agency shall within 14 days thereafter serve upon the respondent and file with the clerk a proposed judgment in conformity with the opinion. If the respondent objects to the proposed judgment as not in conformity with the opinion, the respondent shall within 7 days thereafter serve upon the agency and file with the clerk a proposed judgment which the respondent deems to be in conformity with the opinion. The court will thereupon settle the judgment and direct its entry without further hearing or argument.	When the court files an opinion directing entry of judgment enforcing the agency's order in part, the agency must within 14 days file with the clerk and serve on the respondent a proposed judgment conforming to the opinion. A respondent who disagrees with the agency's proposed judgment must within 7 days file with the clerk and serve the agency with a proposed judgment that the respondent believes conforms to the opinion. The court will settle the judgment and direct entry without further hearing or argument.

Rule 20. Applicability of Other Rules To Review or Enforcement of Agency Orders	Rule 20. Applicability of Rules to the Review or Enforcement of an Agency Order
All provisions of these rules are applicable to review or enforcement of orders of agencies, except that Rules 3-14 and Rules 22 and 23 are not applicable. As used in any applicable rule, the term "appellant" includes a petitioner and the term "appellee" includes a respondent in proceedings to review or enforce agency orders.	All provisions of these rules, except Rules 3-14 and 22-23, apply to the review or enforcement of an agency order. In these rules, "appellant" includes a petitioner or applicant, and "appellee" includes a respondent in proceedings to review or enforce agency orders.

<table>
<tr><th>Rule 21. Writs of Mandamus and Prohibition Directed To a Judge or Judges and Other Extraordinary Writs</th><th>Rule 21. Writ of Mandamus or Prohibition Directed to a Judge or Judges; Other Extraordinary Writs[24]</th></tr>
<tr><td>(a) Mandamus or prohibition to a judge or judges; petition for writ; service and filing. — Application for a writ of mandamus or of prohibition directed to a judge or judges shall be made by filing a petition therefor with the clerk of the court of appeals with proof of service on the respondent judge or judges and on all parties to the action in the trial court. The petition shall contain a statement of the facts necessary to an understanding of the issues presented by the application; a statement of the issues presented and of the relief sought; a statement of the reasons why the writ should issue; and copies of any order or opinion or parts of the record which may be essential to an understanding of the matters set forth in the petition. Upon receipt of the prescribed docket fee, the clerk shall docket the petition and submit it to the court.</td><td>(a) Mandamus or Prohibition to a Judge or Judges; Petition for Writ; Service and Filing.

(1) A petition for a writ of mandamus or prohibition directed to a judge or judges must be filed with the circuit clerk, together with proof of service on the respondent judge or judges and on the parties to the district-court action. The petition must include the following:

(A) the facts necessary to understand the issues presented;

(B) the issues presented and the relief sought;

(C) the reasons why the writ should issue; and

(D) an attached copy of any order, opinion, or parts of the record necessary to understand the issues.

(2) When the prescribed docket fee is paid, the clerk must docket the petition and submit it to the court.</td></tr>
</table>

[24] Because an extensively revised Rule 21 is currently published for comment, the Advisory Committee did not review this Rule.

(b) Denial; order directing answer. — If the court is of the opinion that the writ should not be granted, it shall deny the petition. Otherwise, it shall order that an answer to the petition be filed by the respondents within the time fixed by the order. The order shall be served by the clerk on the judge or judges named respondents and on all other parties to the action in the trial court. All parties below other than the petitioner shall also be deemed respondents for all purposes. Two or more respondents may answer jointly. If the judge or judges named respondents do not desire to appear in the proceeding, they may so advise the clerk and all parties by letter, but the petition shall not thereby be taken as admitted. The clerk shall advise the parties of the dates on which briefs are to be filed, if briefs are required, and of the date of oral argument. The proceeding shall be given preference over ordinary civil cases.	**(b) Denial; Order Directing Answer.** (1) Unless the court believes the writ should be denied, it must order the respondents to file an answer within a fixed time. The clerk must serve the order to answer on the respondent judge or judges, and on all parties to the district-court action — other than the petitioner — who are for all purposes to be considered respondents. Two or more respondents may answer jointly. If briefs are required, the clerk must advise the parties of the filing dates and the date of oral argument. The proceeding must be given priority over ordinary civil cases. (2) A respondent judge or judges not desiring to appear in the proceeding may, by letter, so advise the clerk and all parties. But this action is not an admission of anything in the petition.
(c) Other extraordinary writs. — Application for extraordinary writs other than those provided for in subdivisions (a) and (b) of this rule shall be made by petition filed with the clerk of the court of appeals with proof of service on the parties named as respondents. Proceedings on such application shall conform, so far as is practicable, to the procedure prescribed in subdivisions (a) and (b) of this rule.	(c) **Other Extraordinary Writs.** A petition for any other extraordinary writ must be filed with the circuit clerk with proof of service on all named respondents. Otherwise, the procedure follows Rule 21(a) and (b).
(d) Form of papers; number of copies. — All papers may be typewritten. An original and three copies must be filed unless the court requires the filing of a different number by local rule or by order in a particular case.	(d) **Form of Papers; Number of Copies.** Papers may be typewritten. An original and three copies must be filed unless the court requires the filing of a different number by local rule or by order in a particular case.

Rule 22. Habeas Corpus Proceedings.	Rule 22. Habeas Corpus Proceeding
(a) Application for the original writ. — An application for a writ of habeas corpus shall be made to the appropriate district court. If application is made to a circuit judge, the application will ordinarily be transferred to the appropriate district court. If an application is made to or transferred to the district court and denied, renewal of the application before a circuit judge is not favored; the proper remedy is by appeal to the court of appeals from the order of the district court denying the writ.	(a) **Application for Writ.** An application for a writ of habeas corpus shall[25] be made to the appropriate district court. If made to a circuit judge, the application will ordinarily be transferred to the appropriate district court. If a district court denies an application made or transferred to it, renewal of the application before a circuit judge is not favored; the proper remedy is to appeal to the court of appeals from the district court's order denying the writ.

[25] Because this rule governs the procedure for the constitutionaly preserved writ, it is not appropriate to require -- by use of the word "must" -- application to the district court. The second sentence of subdivision (a) makes it clear that one may apply first to a circuit judge. A circuit judge ordinarily transfers the application to a district court, but a circuit judge need not do so and may grant the writ in an appropriate circumstance. The Advisory Committee considered but decided not to use the word "should" (an application for a writ of habeas corpus "should" be made to the appropriate district court). Use of "should" might imply greater openness to an application to a circuit judge than exists. The Advisory Committee voted to return to the word "shall" -- the word used in the existing rule. Although "shall is ambiguous, the Committee was more comfortable with that ambiguity than any of the alternatives. "Shall" might mean either "must" or "should" but the ambiguity preserved the proper tension. In fact, the Committee Note accompanying the rule upon its original promulgation can be read to say that the ambiguity was deliberate. CAM

(b) Necessity of certificate of probable cause for appeal. — In a habeas corpus proceeding in which the detention complained of arises out of process issued by a state court, an appeal by the applicant for the writ may not proceed unless a district or a circuit judge issues a certificate of probable cause. If an appeal is taken by the applicant, the district judge who rendered the judgment shall either issue a certificate of probable cause or state the reasons why such a certificate should not issue. The certificate or the statement shall be forwarded to the court of appeals with the notice of appeal and the file of the proceedings in the district court. If the district judge has denied the certificate, the applicant for the writ may then request issuance of the certificate by a circuit judge. If such a request is addressed to the court of appeals, it shall be deemed addressed to the judges thereof and shall be considered by a circuit judge or judges as the court deems appropriate. If no express request for a certificate is filed, the notice of appeal shall be deemed to constitute a request addressed to the judges of the court of appeals. If an appeal is taken by a state or its representative, a certificate of probable cause is not required.	**(b) Necessity of Certificate of Probable Cause for Appeal.** (1) If the detention complained of in a habeas corpus proceeding arises from process issued by a state court, the applicant cannot take an appeal unless a district or circuit judge issues a certificate of probable cause. If an applicant files a notice of appeal, the district judge who rendered the judgment must either issue a certificate of probable cause or state why a certificate should not issue. The district clerk must send the certificate or statement to the court of appeals with the notice of appeal and the file of the district-court proceedings. If the district judge denies the certificate, the applicant may request a circuit judge to issue the certificate. (2) A request addressed to the court of appeals may be considered by a circuit judge or judges, as the court prescribes. If no express request for a certificate is filed, the notice of appeal constitutes a request addressed to the judges of the court of appeals. A certificate of probable cause is not required when a state or its representative appeals.

Rule 23. Custody of Prisoners in Habeas Corpus Proceedings	**Rule 23. Custody or Release of a Prisoner in a Habeas Corpus Proceeding**[26]
(a) Transfer of custody pending review. — Pending review of a decision in a habeas corpus proceeding commenced before a court, justice or judge of the United States for the release of a prisoner, a person having custody of the prisoner shall not transfer custody to another unless such transfer is directed in accordance with the provisions of this rule. Upon application of a custodian showing a need therefor, the court, justice or judge rendering the decision may make an order authorizing transfer and providing for the substitution of the successor custodian as a party.	(a) **Transfer of Custody Pending Review.** Pending review of a decision in a habeas corpus proceeding commenced before a court, justice, or judge of the United States for the release of a prisoner, a person having custody of the prisoner must not transfer custody to another unless the transfer is directed in accordance with this rule. When, upon application, a custodian shows the need for a transfer, the court, justice, or judge rendering the decision under review may authorize the transfer and substitute the successor custodian as a party.[27]
(b) Detention or release of prisoner pending review of decision failing to release. — Pending review of a decision failing or refusing to release a prisoner in such a proceeding, the prisoner may be detained in the custody from which release is sought, or in other appropriate custody, or may be enlarged upon the prisoner's recognizance, with or without surety, as may appear fitting to the court or justice or judge rendering the decision, or to the court of appeals or to the Supreme Court, or to a judge or justice of either court.	(b) **Detention or Release Pending Review of Decision Not to Release.** Pending review of a decision not to release a prisoner, the prisoner may be detained in the custody from which release is sought, or in other appropriate custody, or may be released upon personal recognizance, with or without surety, as may appear appropriate to the court, justice, or judge rendering the decision, or to the court of appeals or to the Supreme Court, or to a judge or justice of either court.

26 Rule 23 was modeled on Supreme Court Rule 36 and the Advisory Committee believes that the rule should retain its similarity to the Supreme Court Rule. As a result, the Advisory Committee rejected several of the proposed revisions and returned to the original rule, making slight modifications therein in order to improve comprehension. CAM

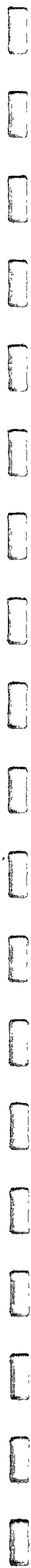
27 How is a warden of a state prison made aware of this provision in the federal rules? CAM

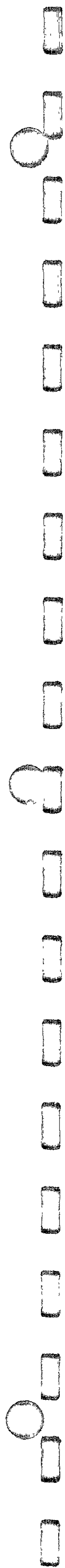
(c) Release of prisoner pending review of decision ordering release. — Pending review of a decision ordering the release of a prisoner in such a proceeding, the prisoner shall be enlarged upon the prisoner's recognizance, with or without surety, unless the court or justice or judge rendering the decision or the court of appeals or the Supreme Court, or a judge or justice of either court shall otherwise order.	(c) **Release Pending Review of Decision Ordering Release.** Pending review of a decision ordering the release of a prisoner, the prisoner must be released upon personal recognizance, with or without surety, unless the court, justice or judge rendering the decision or the court of appeals or the Supreme Court, or a judge or justice of either court orders otherwise.[28]
(d) Modification of initial order respecting custody. — An initial order respecting the custody or enlargement of the prisoner and any recognizance or surety taken, shall govern review[29] in the court of appeals and in the Supreme Court unless for special reasons shown to the court of appeals or to the Supreme Court, or to a judge or justice of either court, the order shall be modified, or an independent order respecting custody, enlargement or surety shall be made.	(d) **Modification of the Initial Order on Custody.** An initial order governing the prisoner's custody or release, including any recognizance or surety, continues in effect[30] pending review unless for special reasons shown to the court of appeals or the Supreme Court, or to a judge or justice of either court, the order is modified or an independent order regarding custody, release, or surety is issued.

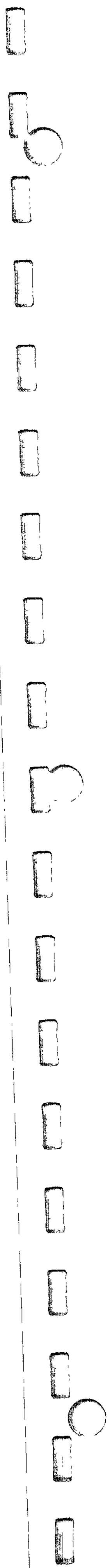
[28] There is an apparent inconsistency between subdivisions (b) and (c). Subdivision (b) deals with review of a decision denying a prisoner's petition for habeas corpus. Pending review of that decision, the prisoner may be detained in the custody from which release is sought, in other appropriate custody, or released. Subdivision (c) deals with review of a decision granting the writ. Pending review of that decision, the prisoner must be released "unless the court or justice or judge . . . orders otherwise." In subdivision (c) the presumption is that the prisoner will be released on personal recognizance but numerous persons and entities have the ability to "order otherwise." Does the authority to "order otherwise" include authority to order "other appropriate custody" or only to order detention in the "custody from which release is sought?" If only the latter, it is anamalous to permit release to an institution such as a half-way house under subdivision (b) but not under subdivision (c). The Advisory Committee will return to discussion of this issue. CAM

[29] The following language is unclear: "An initial order . . . shall govern review . . . ." — BAG. JFS agrees and has rewritten the provision.

[30] The language in the existing rule that an order "shall govern review" is an unusual one and could be read as establishing the law of the case and that the order is not alterable. That language is especially odd when applied to an order regarding release. The substitute words -- "continue in effect" -- imply only that the order is in effect until something else is done. The restyling may have simply clarified an existing ambiguity. The Committee Note should flag the issue. CAM







L. RALPH MECHAM
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UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
CHIEF, RULES COMMITTEE
SUPPORT OFFICE

VIA FEDERAL EXPRESS

March 24, 1995

MEMORANDUM TO ADVISORY COMMITTEE ON APPELLATE RULES

SUBJECT: *Suggested Revisions of Style Subcommittee's Changes to Rules 24-35*

I am attaching a copy of recommended changes to the "stylized" Appellate Rules 24-35, which are proposed by Judge Kozinski and Michael Meehan. New matter is underlined; matter to be omitted is lined through.

As with the suggested revisions to Rules 36-48, which were sent to you under separate cover, Judge Logan requests that you send any comments or recommendations regarding these rules and proposed changes to my office no later than Tuesday, April 11, 1995, so that I can incorporate them into a new document. I will try to reformat the entire package using larger print for use at the committee meeting.

John K. Rabiej

Attachment

cc: Honorable Alicemarie H. Stotler
Style Subcommittee

A TRADITION OF SERVICE TO THE FEDERAL JUDICIARY

Federal Rules of Appellate Procedure

Revised for Style by
The Style Subcommittee of the Standing Committee on Rules of Practice and Procedure

Draft of December 1994
(Rules 24–End)

AS REVISED BY
JUDGE KOZINSKI AND MICHAEL MEEHAN (RULES 24-35)
AND
JUDGE LOGAN AND JUSTICE THOMAS (RULES 36-48)
MARCH 24, 1995

Rule 24. Proceedings in Forma Pauperis	Rule 24. Proceedings in Forma Pauperis
(a) Leave to proceed on appeal in forma pauperis from district court to court of appeals. — A party to an action in a district court who desires to proceed on appeal in forma pauperis shall file in the district court a motion for leave so to proceed, together with an affidavit, showing, in the detail prescribed by Form 4 of the Appendix of Forms, the party's inability to pay fees and costs or to give security therefor, the party's belief that that party is entitled to redress, and a statement of the issues which that party intends to present on appeal. If the motion is granted, the party may proceed without further application to the court of appeals and without prepayment of fees or costs in either court or the giving of security therefor. If the motion is denied, the district court shall state in writing the reasons for the denial. Notwithstanding the provisions of the preceding paragraph, a party who has been permitted to proceed in an action in the district court in forma pauperis, or who has been permitted to proceed there as one who is financially unable to obtain adequate defense in a criminal case, may proceed on appeal in forma pauperis without further authorization unless, before or after the notice of appeal is filed, the district court shall certify that the appeal is not taken in good faith or shall find that the party is otherwise not entitled so to proceed, in which event the district court shall state in writing the reasons for such certification or finding. If a motion for leave to proceed on appeal in forma pauperis is denied by the district court, or if the district court shall certify that the appeal is not taken in good faith or shall find that the party is otherwise not entitled to proceed in forma pauperis, the clerk shall forthwith serve notice of such action. A motion for leave so to proceed may be filed in the court of appeals within 30 days after service of notice of the action of the district court. The motion shall be accompanied by a copy of the affidavit filed in the district court, or by the affidavit prescribed by the first paragraph of this subdivision if no affidavit has been filed in the district court, and by a copy of the statement of reasons given by the district court for its action.	**(a) Leave to Proceed in Forma Pauperis** (1) *Motion to District Court.* Except as stated in (2), a party in a district-court action who desires to appeal in forma pauperis must file a motion for leave in the district court. The party must attach an affidavit showing, in the detail prescribed by Form 4 of the Appendix of Forms, the party's inability to pay or give security for fees and costs, claiming an entitlement to redress, and stating the issues that the party intends to present on appeal. If the district court grants the motion~~, is granted,~~ the party may proceed on appeal without prepaying or giving security for fees and costs. If the ~~A~~ district court ~~that~~ denies the motion, it shall ~~must~~ state the reasons in writing. (2) *Prior Approval.* A party who has been permitted to proceed in a district-court action in forma pauperis, or who was considered financially unable to obtain an adequate defense in a criminal case, may proceed on appeal in forma pauperis without further authorization, unless the district court ~~certifies~~ — before or after the notice of appeal is filed — certifies that the appeal is not taken in good faith or finds that the party is not otherwise entitled to proceed in forma pauperis. In that event, the district court ~~must~~ shall state in writing the reasons for the certification or finding. (3) *Notice of District Court's Denial.* The district clerk must immediately serve notice on the applicant and any ~~opposing~~ other party when the district court does any of the following: (A) denies a motion for leave to proceed on appeal in forma pauperis; (B) certifies that the appeal is not taken in good faith; or (C) finds that the party is not otherwise entitled to proceed in forma pauperis. (4) *Motion in Court of Appeals.* A party may file a motion for leave to proceed on appeal in forma pauperis in the court of appeals within 30 days after service of the notice described in (a)(3). The party must include in the motion a copy of the affidavit filed in the district court and a copy of the district court's statement of reasons for its action. If no affidavit was filed in the district court, the party must include the affidavit prescribed in (1).
(b) Leave to proceed on appeal or review in forma pauperis in administrative agency proceedings. — A party to a proceeding before an administrative agency, board, commission or officer (including, for the purpose of this rule, the United States Tax Court) who desires to proceed on appeal or review in a court of appeals in forma pauperis, when such appeal or review may be had directly in a court of appeals, shall file in the court of appeals a motion for leave so to proceed, together with the affidavit prescribed by the first paragraph of (a) of this Rule 24.	**(b) Leave to Proceed in Forma Pauperis on Appeal or Review in Administrative-Agency Proceedings.** When an appeal or review of a proceeding before an administrative agency, board, commission, or officer (including for the purpose of this rule, the United States Tax Court) proceeds directly in a court of appeals, a party may file in the court of appeals a motion for leave to proceed on appeal in forma pauperis with an affidavit prescribed by (a)(1).

(c) Form of briefs, appendices and other papers. — Parties allowed to proceed in forma pauperis may file briefs, appendices and other papers in typewritten form, and may request that the appeal be heard on the original record without the necessity of reproducing parts thereof in any form.	(c) **Form of a Brief, Appendix, or Other Paper.** A party allowed to proceed in forma pauperis may file a brief, appendix, or other paper in typewritten form, and may request that the appeal be heard on the original record without having any part of the record reproduced.

<table>
<tr><th>Rule 25. Filing and Service</th><th>Rule 25. Filing and Service</th></tr>
<tr><td>(a) Filing.- Papers required or permitted to be filed in a court of appeals must be filed with the clerk. Filing may be accomplished by mail addressed to the clerk, but filing is not timely unless the clerk receives the papers within the time fixed for filing, except that briefs and appendices are treated as filed on the day of mailing if the most expeditious form of delivery by mail, except special delivery, is used. Papers filed by an inmate confined in an institution are timely filed if deposited in the institution's internal mail system on or before the last day for filing. Timely filing of papers by an inmate confined in an institution may be shown by a notarized statement or declaration (in compliance with 28 U.S.C. § 1746) setting forth the date of deposit and stating that first-class postage has been prepaid. If a motion requests relief that may be granted by a single judge, the judge may permit the motion to be filed with the judge, in which event the judge shall note thereon the date of filing and thereafter give it to the clerk. A court of appeals may, by local rule, permit papers to be filed by facsimile or other electronic means, provided such means are authorized by and consistent with standards established by the Judicial Conference of the United States.</td><td>(a) Filing.
(1) "Filing" means filing a paper with the court clerk. Filing by mail is permitted, but to be timely, the clerk must receive a paper within the time fixed for filing. "Filing" may include facsimile transmission to a court that allows this method by local rule, <s>as</s> <u>so</u> long as the local rule is authorized by and is consistent with any standards established by the Judicial Conference of the United States.
(2) Briefs and appendices are timely filed if they are mailed <s>by first-class</s>[1] <s>mail</s> <u>, postage pre-paid,</u> on or before the last day for filing.
(3) Papers filed by an inmate confined in an institution are timely filed if deposited in the institution's internal mail system on or before the last day for filing. Timely filing by an inmate may be shown by a notarized statement or declaration — in compliance with 28 U.S.C. § 1746 — setting forth the date of deposit and stating that first-class postage has been prepaid.
(4) If a motion requests relief that a single judge may grant, the judge may accept the motion, in which case the judge must note the filing date on the motion and promptly give it to the clerk.
(5) The clerk must not refuse to accept any paper presented for filing solely because it is not in the form prescribed by these rules or by local rules.</td></tr>
<tr><td>(b) Service of all papers required. — Copies of all papers filed by any party and not required by these rules to be served by the clerk shall, at or before the time of filing, be served by a party or person acting for that party on all other parties to the appeal or review. Service on a party represented by counsel shall be made on counsel.</td><td>(b) Service of All Papers Required. Unless a rule requires service by the clerk, a party <s>or someone acting for the party</s> must, at or before the time of filing, <s>serve</s> <u>have</u> copies of any filed paper <u>served</u> on the other parties to the appeal or review. Service on a party represented by counsel must be made on the party's counsel.</td></tr>
<tr><td>(c) Manner of service. — Service may be personal or by mail. Personal service includes delivery of the copy to a clerk or other responsible person at the office of counsel. Service by mail is complete on mailing.</td><td>(c) Manner of Service. Service may be personal or by mail. Personal service includes delivery of the copy to a <s>clerk or other</s> responsible person at counsel's office. Service by mail is complete on mailing.</td></tr>
</table>

[1] Though it may express the intention of the original drafters, this is probably a substantive change. Express mail is now the most expeditious. What does the Advisory Committee want to do? — GCP.

(d) Proof of Service. — Papers presented for filing must contain an acknowledgment of service by the person served or proof of service in the form of a statement of the date and manner of service, of the names of the persons served, and of the addresses to which the papers were mailed or at which they were delivered, certified by the person who made service. Proof of service may appear on or be affixed to the papers filed.	(d) **Proof of Service.** (1) A paper presented for filing must contain either of the following: (A) an acknowledgment of service by the person served; or (B) proof of service consisting of a statement that is certified by the person who made service and that shows (i) the date and manner of service, (ii) the names of the persons served, and (iii) the mailing addresses or the addresses of the places of delivery. (2) Proof of service may appear on or be affixed to the papers filed.
(e) Number of Copies. — Whenever these rules require the filing or furnishing of a number of copies, a court may require a different number by local rule or by order in a particular case.	(e) **Number of Copies.** When these rules require the filing or furnishing of a number of copies, a court may require a different number by local rule or by order in a particular case.

Rule 26. Computation and Extension of Time	Rule 26. Computing and Extending Time
(a) Computation of time. — In computing any period of time prescribed or allowed by these rules, by an order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, or, when the act to be done is the filing of a paper in court, a day on which weather or other conditions have made the office of the clerk of the court inaccessible, in which event the period runs until the end of the next day which is not one of the aforementioned days. When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. As used in this rule "legal holiday" includes New Year's Day, Birthday of Martin Luther King, Jr., Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other day appointed as a holiday by the President or the Congress of the United States. It shall also include a day appointed as a holiday by the state wherein the district court which rendered the judgment or order which is or may be appealed from[2] is situated, or by the state wherein the principal office of the clerk of the court of appeals in which the appeal is pending is located.	(a) **Computing Time.** The following rules apply in computing any period specified in these rules or in any court order or applicable statute: (1) Exclude the day of the act, event, or default from which the period begins. (2) Include the last day of the period unless it is a Saturday, Sunday, legal holiday, or — if the act to be done is filing a paper in court — a day on which the weather or other conditions have made the clerk's office inaccessible. In any of these circumstances, the period runs until the end of the ~~next~~ following day that is not excluded. (3) When the period is less than 7 days, exclude intermediate Saturdays, Sundays, and legal holidays. (4) As used in this rule, "legal holiday" includes New Year's Day, Martin Luther King, Jr.'s Birthday, President's Day,[3] Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, Christmas Day, and any other day the President or Congress declares a holiday. It also includes a holiday declared by the state in which the district court that rendered the challenged judgment or order is situated, or by the state in which the principal office of the clerk of the court of appeals in which the appeal is pending is located.
(b) Enlargement of time. — The court for good cause shown may upon motion enlarge the time prescribed by these rules or by its order for doing any act, or may permit an act to be done after the expiration of such time; but the court may not enlarge the time for filing a notice of appeal, a petition for allowance, or a petition for permission to appeal. Nor may the court enlarge the time prescribed by law for filing a petition to enjoin, set aside, suspend, modify, enforce or otherwise review, or a notice of appeal from, an order of an administrative agency, board, commission or officer of the United States, except as specifically authorized by law.	(b) **Extending Time.** For good cause shown, the court may, on motion, extend the time prescribed by these rules or by its order to perform any act, or may permit an act to be done after that time expires. But the court ~~must~~ may not extend the time[4] to file: (1) a notice of appeal, a petition for allowance, or a petition for leave to appeal; or (2) a notice of appeal from or a petition to enjoin, set aside, suspend, modify, enforce, or otherwise review ~~— or a notice of appeal from —~~ an order of an administrative agency, board, commission, or officer of the United States, unless specifically authorized by law.

[2] Is the phrase *which is or may be appealed from* necessary? — BAG. JFS thinks it is not.

[3] This change from Washington's Birthday to President's Day is a necessary update. — BAG.

[4] The Style Subcommittee has deleted the phrase *prescribed by law*, which in the original was specific to the items listed in (2) — whereas both (1) and (2) would surely be modified by the phrase if it were necessary at all. And it doesn't seem necessary. — BAG.

(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.	(c) **Additional Time After Service by Mail.** When a party is required or permitted to act within a prescribed period after a paper is served, and the paper is served by mail, 3 days are added to the prescribed period.

Rule 26.1. Corporate Disclosure Statement	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 that have issued shares to the public.[5] 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.	(a) Any nongovernmental corporate party to a civil or bankruptcy appeal or agency review proceeding, and any nongovernmental corporate defendant in a criminal case, must file a statement identifying all of the following that have issued public shares: (1) parent companies; (2) subsidiaries ~~(except wholly owned subsidiaries[6])~~; and 3) affiliates. (b) A party must file the statement with the principal brief or upon filing a motion, response, petition, or answer in the court of appeals, whichever occurs first, unless a local rule requires earlier filing. (c) If the statement is filed before the principal brief, the party must file an original and three copies, unless the court requires a different number by local rule or by order in a particular case. Even if the statement has already been filed, the party's principal brief must include the statement in front of the table of contents.[7]

[5] This phrasing implicates the Rule of the Last Antecedent. Does the language *that have issued public shares* modify only *affiliates*, or is it also intended to modify *parent companies* and *subsidiaries*? If, as I suspect, the latter is correct, then the better phrasing might be: *all of the following that have issued public shares: parent companies, subsidiaries (except wholly owned subsidiaries), and affiliates*. GCP and JAP agreed that the last suggested revision is probably what is intended, but the Style Subcommittee would like the Advisory Committee to consider the question. — BAG. [Judge Kozinski suggests going with the revision.]

[6] GCH questions the reason for this exception.

[7] JFS prefers the original sentence to this revision. My reservation about the original, however, is that the short condition comes at the end, and it was a condition already mentioned. There is a "looping-back" effect in the original that makes it slightly harder to follow, in my view. — BAG. [Judge Kozinski suggests the revised version.]

Rule 27. Motions	Rule 27. Motions
(a) Content of motions; response. — Unless another form is elsewhere prescribed by these rules, an application for an order or other relief shall be made by filing a motion for such order or relief with proof of service on all other parties. The motion shall contain or be accompanied by any matter required by a specific provision of these rules governing such a motion,[8] shall state with particularity the ground on which it is based, and shall set forth the order or relief sought. If a motion is supported by briefs, affidavits or other papers, they shall be served and filed with the motion. Any party may file a response in opposition to a motion other than one for procedural order [for which see subdivision (b)] within 7 days after service of the motion, but motions authorized by Rules 8, 9, 18 and 41 may be acted upon after reasonable notice, and the court may shorten or extend the time for responding to any motion.	(a) **Content of a Motion.** Unless another form is prescribed elsewhere by these rules, a request for an order or other relief must be made by filing a motion for the order or relief with proof of service on all parties. The motion must contain or be accompanied by any material[9] required by a specific provision of these rules, must state with particularity the grounds on which it is based, and must set forth the order or relief sought. A brief, affidavit, or other paper supporting a motion must be served and filed with the motion. (b) Time to Respond. Except for a motion for a procedural order to which Rule 27~~(b)~~ (c) applies, a party may file a response in opposition to a motion within 7 days after service of the motion. ~~But a motion authorized by Rule 8, 9, 18, or 41 may be acted on after reasonable notice.~~ The court may shorten or extend the time to respond to a motion.
(b) Determination of motions for procedural orders. — Notwithstanding the provisions of (a) of this Rule 27 as to motions generally, motions for procedural orders, including any motion under Rule 26(b), may be acted upon at any time, without awaiting a response thereto, and pursuant to rule or order of the court, motions for specified types of procedural orders may be disposed of by the clerk. Any party adversely affected by such[10] action may by application to the court request consideration, vacation or modification of such action.	~~(b)~~(c) **Determination of a Motion ~~for a Procedural Order~~.** (1) Despite Rule 27(a), a motion for a procedural order, including a motion under Rule 26(b), may be acted on at any time, without awaiting a response. If authorized by court order or local rule, the clerk may dispose of motions for ~~specified types of~~ procedural orders. An adversely affected party may move to have the clerk's disposition vacated or modified. (2) A motion authorized by Rule 8, 9, 18, or 41 may be acted on after reasonable notice.
(c) Power of a single judge to entertain motions. — In addition to the authority expressly conferred by these rules or by law,[11] a single judge of a court of appeals may entertain and may grant or deny any request for relief which under these rules may properly be sought by motion, except that a single judge may not dismiss or otherwise determine an appeal or other proceeding, and except that a court of appeals may provide by order or rule that any motion or class of motions must be acted upon by the court. The action of a single judge may be reviewed by the court.	(c) **Power of a Single Judge to Act on a Motion.** A single judge of a court of appeals may grant or deny a motion requesting relief sought under these rules~~. But~~ but ~~a single judge must~~ may not dismiss or otherwise determine an appeal or other proceeding. A court of appeals may provide by order or rule that only the court ~~must~~ may act upon any motion or class of motions. The court may review the action of a single judge.
(d) Form of Papers; Number of Copies. — All papers relating to a motion may be typewritten. An original and three copies must be filed unless the court requires the filing of a different number by local rule or by order in a particular case.	(d) **Form of Papers; Number of Copies.** A motion or related paper may be typewritten. An original and three copies must be filed unless the court requires a different number by local rule or by order in a particular case.

8 The phrase *governing such a motion* seems unnecessary. — BAG. JFS agrees.

9 *Material* rather than *matter* seems to reflect what is being referred to here. *Matter* is an amorphous word that sometimes refers to a case itself. — BAG. JFS agrees.

10 Ambiguous: does *such action* refer only to an action by the clerk? Or does it refer to either of the two types of action mentioned in the preceding sentence? — BAG. JFS says it refers only to an action by the clerk.

11 The introductory phrase, *In addition to the authority expressly conferred by these rules or by law,* seems unnecessary and unrelated to discussion about motions. — BAG. JFS agrees.

Rule 28. Briefs	Rule 28. Briefs
(a) Appellant's Brief. — The brief of the appellant must contain, under appropriate headings and in the order here indicated: (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) A statement of subject matter and appellate jurisdiction. The statement shall include: (i) a statement of the basis for subject matter jurisdiction in the district court or agency, with citation to applicable statutory provisions and with reference to the relevant facts to establish such jurisdiction; (ii) a statement of the basis for jurisdiction in the court of appeals, with citation to applicable statutory provisions and with reference to the relevant facts to establish such jurisdiction; the statement shall include relevant filing dates establishing the timeliness of the appeal or petition for review and (a) shall state that the appeal is from a final order or a final judgment that disposes of all claims with respect to all parties or, if not, (b) shall include information establishing that the court of appeals has jurisdiction on some other basis. (3) A statement of the issues presented for review.	(a) **Appellant's Brief.** The appellant's brief must contain the following under appropriate headings and in the order indicated: (1) a table of contents, with page references; (2) a table of authorities[12] — cases (alphabetically arranged), statutes, and other authorities — with references to the pages of the brief where they are cited; (3) a statement of subject-matter and appellate jurisdiction, including: (A) the basis for the district court's or agency's subject-matter jurisdiction, supported by citations of applicable statutory provisions and referring to relevant facts establishing jurisdiction; (B) the basis for the court of appeals' jurisdiction, supported by citations of applicable statutory provisions and referring to relevant facts establishing jurisdiction; (C) the filing dates establishing the timeliness of the appeal or petition for review; and (D) an assertion that the appeal is from a final order or judgment that disposes of all parties' claims, or information establishing the court of appeal's jurisdiction on some other basis; (4) a statement of the issues presented for review;

[12] This name seems more apt than *table of cases*. — BAG.

(4) A statement of the case. The statement shall first indicate briefly the nature of the case, the course of proceedings, and its disposition in the court below. There shall follow a statement of the facts relevant to the issues presented for review, with appropriate references to the record (see subdivision (e)). (5) A summary of argument. The summary should contain a succinct, clear, and accurate statement of the arguments made in the body of the brief. It should not be a mere repetition of the argument headings. (6) An argument. The argument must contain the contentions of the appellant on the issues presented, and the reasons therefor, with citations to the authorities, statutes, and parts of the record relied on. The argument must also include for each issue a concise statement of the applicable standard of review; this statement may appear in the discussion of each issue or under a separate heading placed before the discussion of the issues. (7) A short conclusion stating the precise relief sought.	(5) a statement of the case, which must: (A) indicate briefly the nature of the case, the course of proceedings, and the disposition ~~in the lower court~~ below; and (B) present a statement of facts relevant to the issues submitted for review with appropriate references to the record (see Rule 28(e)); (6) a summary of the argument, which must contain a succinct, clear, and accurate statement of the arguments made in the body of the brief, and which must not merely repeat the argument headings; (7) the argument, which must contain appellant's contentions on the issues presented and the reasons for them, with citations to the authorities and parts of the record relied on; for each issue the argument must also include a concise statement of the applicable standard of review (this statement may appear in the discussion of each issue or under a separate heading placed before the discussion of the issues); and (8) a short conclusion stating the precise relief sought.
(b) Appellee's Brief. — The brief of the appellee must conform to the requirements of paragraphs (a)(1)-(6), except that none of the following need appear unless the appellee is dissatisfied with the statement of the appellant: (1) the jurisdictional statement; (2) the statement of the issues; (3) the statement of the case; (4) the statement of the standard of review.	(b) **Appellee's Brief.** Appellee's brief must conform to the requirements of paragraphs (a)(1)–(7). But the following are not required unless appellee is dissatisfied with appellant's statement: (1) the jurisdictional statement; (2) the statement of the issues; (3) the statement of the case; and (4) the statement of the standard of review.
(c) Reply brief. — The appellant may file a brief in reply to the brief of the appellee, and if the appellee has cross-appealed, the appellee may file a brief in reply to the response of the appellant to the issues presented by the cross appeal. No further briefs may be filed except with leave of court. All reply briefs shall contain 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 reply brief where they are cited.	(c) **Reply Brief.** Appellant may file a brief in reply to appellee's brief. If appellee has cross-appealed, appellee may file a brief in reply to appellant's response to the issues presented by the cross-appeal. Unless the court permits, no further briefs may be filed. Reply briefs must contain a table of contents, with page references, and a table of authorities — cases (alphabetically arranged), statutes, and other authorities — with references to the pages of the reply brief where they are cited.
(d) References in briefs to parties. — Counsel will be expected in their briefs and oral arguments to keep to a minimum references to parties by such designations as "appellant" and "appellee". It promotes clarity to use the designations used in the lower court or in the agency proceedings, or the actual names of parties, or descriptive terms such as "the employee," "the injured person," "the taxpayer," "the ship," "the stevedore," etc.	(d) **References to Parties in Briefs.** In briefs and oral arguments, counsel must avoid the terms "appellant" and "appellee" — using them sparingly if at all. To make briefs clear, counsel should use the parties' actual names or the designations used below ~~in the lower court or agency~~, or such descriptive terms as "the employee," "the injured person," "the taxpayer," "the ship," "the stevedore."

(e) References in briefs to the record. — References in the briefs to parts of the record reproduced in the appendix filed with the brief of the appellant (see Rule 30(a)) shall be to the pages of the appendix at which those parts appear[13]. If the appendix is prepared after the briefs are filed, references in the briefs to the record shall be made by one of the methods allowed by Rule 30(c). If the record is reproduced in accordance with the provisions of Rule 30(f), or if references are made in the briefs to parts of the record not reproduced, the references shall be to the pages of the parts of the record involved; e.g., Answer p. 7, Motion for Judgment, p. 2, Transcript p. 231. Intelligible abbreviations may be used. If reference is made to evidence the admissibility of which is in controversy, reference shall be made to the pages of the appendix or of the transcript at which the evidence was identified, offered, and received or rejected.	(e) **References in Briefs to the Record.** References to the parts of the record contained in the appendix filed with appellant's brief must be to the pages of the appendix. (See Rule 30(a) for appendix requirements.) If the appendix is prepared after the briefs are filed, a party referring to the record must follow one of the methods detailed in Rule 30(c). If the original record is used under Rule 30(f), or if the brief refers to an unreproduced part of the record, any reference must be to the page of the original document. For example: • Answer p. 7; • Motion for Judgment p. 2; • Transcript p. 231. Only clear abbreviations may be used. A party referring to evidence whose admissibility is in controversy must cite the pages of the appendix or of the transcript at which the evidence was identified, offered, and received or rejected.
(f) Reproduction of statutes, rules, regulations, etc. — If determination of the issues presented requires the study of statutes, rules, regulations, etc., or relevant parts thereof, they shall be reproduced[14] in the brief or in an addendum at the end, or they may be supplied to the court in pamphlet form.	(f) **Reproduction of Statutes, Rules, Regulations, etc.** If the court's determination of the issues presented requires the study of statutes, rules, regulations, etc., they must be reproduced in the brief or in an addendum at the end, or may be supplied to the court in pamphlet form.
(g) Length of briefs. — Except by permission of the court, or as specified by local rule of the court of appeals, principal briefs must not exceed 50 pages, and reply briefs must not exceed 25 pages, exclusive of pages containing the corporate disclosure statement, table of contents, tables of citations, proof of service, and any addendum containing statutes, rules, regulations, etc.	~~(g) **Length of Briefs.** Unless the court or a local rule permits or specifies otherwise, principal briefs must not exceed 50 pages and reply briefs must not exceed 25 pages, not including the corporate disclosure statement, table of contents, table of citations, proof of service, and any addendum containing statutes, rules, regulations, etc.~~ (Delete in light of New Rule 32 -- Judge Kozinski.)
(h) Briefs in cases involving cross appeals. — If a cross appeal is filed, the party who first files a notice of appeal, or in the event that the notices are filed on the same day, the plaintiff in the proceeding below shall be deemed the appellant for the purposes of this rule and Rules 30 and 31, unless the parties otherwise agree or the court otherwise orders. The brief of the appellee shall conform to the requirements of subdivision (a)(1)-(6) of this rule with respect to the appellee's cross appeal as well as respond to the brief of the appellant except that a statement of the case need not be made unless the appellee is dissatisfied with the statement of the appellant.	(h) **Briefs in a Case Involving a Cross-Appeal.** If a cross-appeal is filed, the party who first files a notice of appeal is the appellant for the purposes of this rule and Rules 30 and 31. If notices are filed on the same day, the plaintiff in the proceeding below is the appellant. These designations may be modified by agreement of the parties or by court order. With respect to appellee's cross-appeal and response to appellant's brief, appellee's brief must conform to the requirements of Rule 28(a)(1)–(8). But an appellee who is satisfied with appellant's statement need not include a statement of the case.
(i) Briefs in cases involving multiple appellants or appellees. — In cases involving more than one appellant or appellee, including cases consolidated for purposes of the appeal,[15] any number of either may join in a single brief, and any appellant or appellee may adopt by reference any part of the brief of another. Parties may similarly join in reply briefs.	(i) **Briefs in a Case Involving Multiple Appellants or Appellees.** In a case involving more than one appellant or appellee, including consolidated cases, any number of appellants or appellees may join in a brief, and any ~~appellant or appellee~~ party may adopt by reference a part of another's brief. Parties may also join in reply briefs.

[13] The phrase *at which those parts appear* seems superfluous. — BAG.

[14] The word *reproduced* seems slightly inaccurate. — BAG.

[15] The phrase *for purposes of the appeal* seems superfluous. — BAG.

(j) Citation of supplemental authorities. — When pertinent and significant authorities come to the attention of a party after the party's brief has been filed, or after oral argument but before decision, a party may promptly advise the clerk of the court, by letter, with a copy to all counsel, setting forth the citations. There shall be a reference either to the page of the brief or to a point argued orally to which the citations pertain, but the letter shall without argument state the reasons for the supplemental citations. Any response shall be made promptly and shall be similarly limited.	(j) **Citation of Supplemental Authorities.** If pertinent and significant authorities come to a party's attention after the party's brief has been filed — or after oral argument but before decision — a party may promptly advise the clerk of the court by letter, with a copy to all counsel, setting forth the citations. The letter must state without argument the reasons for the supplemental citations, referring either to the page of the brief or to a point argued orally. Any response must be made promptly and must be similarly limited.

Rule 29. Brief of an Amicus Curiae	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 a 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.	(a) Who May File. The United States or its officer or agency, or a State, Territory, or Commonwealth may file an amicus-curiae brief without consent of the parties or leave of ~~the~~ court. Any other amicus curiae may file a brief only if it is accompanied by written consent of all parties, or by leave of court ~~granted on motion or at the court's request~~. The brief may be filed with the motion for leave to file. The motion must identify the applicant's interest and must state why the amicus brief would be helpful. (b) Time for Filing. Unless all parties consent ~~otherwise~~, an amicus curiae must file its brief within the time allowed to the party whose position on affirmance or reversal the amicus brief supports. The court may, for cause, grant leave for later filing, specifying the time within which ~~the opposing party~~ other parties may answer. (c) Oral Argument. An amicus curiae's motion to participate in oral argument will be granted only for extraordinary reasons. [Reply Briefs by Amici? Judge Kozinski]

<table>
<tr><th>Rule 30. Appendix to the Briefs</th><th>Rule 30. Appendix to the Briefs</th></tr>
<tr><td>(a) Duty of Appellant to Prepare and File; Content of Appendix; Time for Filing; Number of Copies. — The appellant must prepare and file an appendix to the briefs which must contain: (1) the relevant docket entries in the proceeding below; (2) any relevant portions of the pleadings, charge, findings, or opinion; (3) the judgment, order, or decision in question; and (4) any other parts of the record to which the parties wish to direct the particular attention of the court. Except where they have independent relevance, memoranda of law in the district court should not be included in the appendix. The fact that parts of the record are not included in the appendix shall not prevent the parties or the court from relying on such parts.

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

(1) Contents of the Appendix. The appellant must prepare and file an appendix to the briefs, containing:

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

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

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

(D) other parts of the record to which the parties wish to direct the court's attention.

(2) Excluded Material. Memoranda of law in the district court should not be included in the appendix unless they have independent relevance. Parts of the record may be relied upon by the court or the parties even though not included in the appendix.

(3) Time for Filing; Number of Copies. Unless filing is deferred under (c), the appellant must serve and file ten copies of the appendix with the brief and must serve one copy on counsel for each party separately represented. The court may by local rule or by order in a particular case require the filing or service of a different number.</td></tr>
</table>

(b) Determination of contents of appendix; cost of producing. — The parties are encouraged to agree as to the contents of the appendix. In the absence of agreement, the appellant shall, not later than 10 days after the date on which the record is filed, serve on the appellee a designation of the parts of the record which the appellant intends to include in the appendix and a statement of the issues which the appellant intends to present for review. If the appellee deems it necessary to direct the particular attention of the court to parts of the record not designated by the appellant, the appellee shall, within 10 days after receipt of the designation, serve upon the appellant a designation of those parts. The appellant shall include in the appendix the parts thus designated with respect to the appeal and any cross appeal[16]. In designating parts of the record for inclusion in the appendix, the parties shall have regard for the fact that the entire record is always available to the court for reference and examination and shall not engage in unnecessary designation. The provisions of this paragraph shall apply to cross appellants and cross appellees. Unless the parties otherwise agree, the cost of producing the appendix shall initially be paid by the appellant, but if the appellant considers that parts of the record designated by the appellee for inclusion are unnecessary for the determination of the issues presented the appellant may so advise the appellee and the appellee shall advance the cost of including such parts[17]. The cost of producing the appendix shall be taxed as costs in the case, but if either party shall cause matters to be included in the appendix unnecessarily the court may impose the cost of producing such parts on the party. Each circuit shall provide by local rule for the imposition of sanctions against attorneys who unreasonably and vexatiously increase the costs of litigation through the inclusion of unnecessary material in the appendix.	(b) **All Parties' Responsibilities.** (1) ***Determining the Contents of the Appendix.*** The parties are encouraged to agree about the contents of the appendix. In the absence of an agreement, the appellant must, within 10 days after the record is filed, serve on the appellee a designation of the parts of the record the appellant intends to include in the appendix and a statement of the issues the appellant intends to present for review. The appellee may, within 10 days after receiving the designation, serve on the appellant a designation of those parts to which it wishes to direct the court's attention. The appellant must include those designated parts in the appendix. The parties ~~should~~ shall not engage in unnecessary designation of parts of the record, because the entire record is available to the court. This paragraph applies also to a cross-appellant and a cross-appellee. (2) ***Costs of Appendix.*** Unless the parties agree otherwise, the appellant must pay the cost of the appendix. If the appellant considers parts of the record designated by the appellee to be unnecessary, the appellant ~~should~~ may advise the appellee, who must then advance the cost of including those parts. The cost of the appendix is ~~taxed as a~~ a taxable cost in the case. But if ~~either~~ any party causes unnecessary parts of the record to be included in the appendix, the court may impose the cost of those parts on that party. Each circuit must, by local rule, authorize sanctions against attorneys who unreasonably and vexatiously increase litigation costs by including unnecessary material in the appendix.

[16] The phrase *with respect to the appeal and any cross appeal* seems unnecessary. — BAG. JAP and JFS agree.

[17] It is not entirely clear what is permissive and what is mandatory. — BAG. JAP and JFS believe it to be mandatory. Meehan does not read it this way in first clause.

Original Rule	Restyled Rule
(c) Alternative method of designating contents of the appendix; how references to the record may be made in the briefs when alternative method is used. — If the court shall so provide by rule for classes of cases or by order in specific cases, preparation of the appendix may be deferred until after the briefs have been filed, and the appendix may be filed 21 days after service of the brief of the appellee. If the preparation and filing of the appendix is thus deferred, the provisions of subdivision (b) of this Rule 30 shall apply, except that the designations referred to therein shall be made by each party at the time each brief is served, and a statement of the issues presented shall be unnecessary. If the deferred appendix authorized by this subdivision is employed, references in the briefs to the record may be to the pages of the parts of the record involved,[18] in which event the original paging of each part of the record shall be indicated in the appendix by placing in brackets the number of each page at the place in the appendix where the page begins. Or if a party desires to refer in a brief directly to pages of the appendix, that party may serve and file typewritten or page proof copies of the brief within the time required by Rule 31(a), with appropriate references to the pages of the parts of the record involved In that event, within 14 days after the appendix is filed the party shall serve and file copies of the brief in the form prescribed by Rule 32(a) containing references to the pages of the appendix in place of or in addition to the initial references to the pages of the parts of the record involved. No other changes may be made in the brief as initially served and filed,[19] except that typographical errors may be corrected.	(c) **Alternative Method of Designating Contents of the Appendix.** (1) *Deferral Until After Briefs Are Filed.* The court may provide by rule for classes of cases or by order in particular cases that preparation of the appendix may be deferred until after the briefs have been filed and that the appendix may be filed 21 days after the appellee's brief is served. Even though the preparation and filing of the appendix may be deferred, (b) of this rule applies. ~~But when~~ ; except that a party ~~serves its brief, it may~~ must designate the parts of the record it wants included in the appendix when it serves its brief, and need not include a statement of the issues presented. (2) *References to the Record.* (A) If the deferred appendix is used, the parties may cite in their briefs the pages of the pertinent parts of the record. When the appendix is prepared, the original paging of each part of the record must be indicated by placing in brackets the number of each page of the appendix where the ~~part~~ record item begins, by inserting page numbers of the record, in brackets, at places in the appendix where text is cited in the briefs [20] (B) A party who wants to refer directly to pages of the appendix may serve and file typewritten or page-proof copies of the brief within the time required by Rule 31(a), containing appropriate references to the pages of the parts of the record involved. In that event, within 14 days after the appendix is filed, the party must serve and file copies of the brief in the form prescribed by Rule 32(a), containing references to the pages of the appendix in place of or in addition to the references to the pages of the parts of the record involved. ~~(C)~~ Except for the correction of typographical errors, no other changes may be made to the brief.

[18] The meaning of the rest of this sentence is not at all clear. — BAG.

[19] The phrase *as initially served and filed* seems unnecessary. — BAG. JFS agrees.

[20] The following language may clarify the meaning of the last part of this sentence: "by inserting page numbers of the record, in brackets, at places in the appendix where the corresponding text appears." — BAG.

Current rule	Restyled draft
(d) Arrangement of the appendix. — At the beginning of the appendix there shall be inserted a list of the parts of the record which it contains, in the order in which the parts are set out therein, with references to the pages of the appendix at which each part begins. The relevant docket entries shall be set out following the list of contents. Thereafter, other parts of the record shall be set out in chronological order.[21] When matter contained in the reporter's transcript of proceedings is set out in the appendix, the page of the transcript at which such matter may be found shall be indicated in brackets immediately before the matter which is set out. Omissions in the text of papers or of the transcript must be indicated by asterisks. Immaterial formal matters (captions, subscriptions, acknowledgments, etc.) shall be omitted. A question and its answer may be contained in a single paragraph.	(d) **Arrangement of the Appendix.** The appendix must begin with ~~an ordered list of the parts of the record it contains;~~ a table of contents with a reference to the page at which each part begins. The relevant docket entries must follow the ~~list~~ table of contents. Other parts of the record must follow chronologically. When a part of the transcript of proceedings is placed in the appendix, the ~~relevant~~ included pages must be indicated by placing the transcript page numbers in brackets immediately before the included part. Omissions in the text of papers or of the transcript must be indicated by asterisks. Immaterial formal matters (captions, subscriptions, acknowledgments, etc.) should be omitted. A question and its answer may be set forth in the same paragraph, without a carriage return between each question and its answer.[22]

[21] The language that follows this sentence is murky. — BAG.

[22] This explanatory language seems necessary because, at first, I didn't understand what the sentence was referring to. Although two members of the Style Subcommittee explained what it meant, one member was likewise baffled at first. — BAG.

(e) Reproduction of exhibits. — Exhibits designated for inclusion in the appendix may be contained in a separate volume, or volumes, suitably indexed. Four copies thereof shall be filed with the appendix and one copy shall be served on counsel for each party separately represented. The transcript of a proceeding before an administrative agency, board, commission or officer used in an action in the district court shall be regarded as an exhibit for the purpose of this subdivision.[23]	(e) **Reproduction of Exhibits.** Exhibits designated for inclusion in the appendix may be reproduced in a separate volume, or volumes, ~~appropriately~~ suitably indexed. Four copies must be filed with the appendix, and one copy must be served on counsel for each separately represented party. If a transcript of a proceeding before an administrative agency, board, commission, or officer ~~is~~ was used in a district-court action, the transcript ~~is~~[24] ~~treated~~ must be placed in the appendix as an exhibit.[25]
(f) Hearing of appeals on the original record without the necessity of an appendix. — A court of appeals may by rule applicable to all cases, or to classes of cases, or by order in specific cases, dispense with the requirement of an appendix and permit appeals to be heard on the original record, with such copies of the record or relevant parts thereof, as the court may require.	(f) **Appeal on the Original Record Without an Appendix.** The court may, either by rule for all cases or classes of cases or by order in a particular case, dispense with the appendix and permit appeals to proceed on the original record or relevant parts of it and may order the parties to file.

Note: Meehan notes that the court's rule or order dispensing with an appendix may order the parties to file copies of any part or all of the record.

23 The phrase *for the purpose of this subdivision* seems unnecessary. — BAG. JFS agrees.

24 *Is* or *must be*? There's a choice here between stating a policy and stating a requirement. I've chosen policy language. — BAG. JFS agrees. Meehan -- Original rule seems mandatory. I would do so for uniformity and to distinguish court transcripts.

25 This is an appellate rule that apparently states a direction to district courts. Perhaps it ought not to be here, but changing it would be making a substantive — not a merely stylistic — change. — BAG.

Rule 31. Filing and Service of a Brief	Rule 31. Serving and Filing Briefs[26]
(a) Time for serving and filing briefs. — The appellant shall serve and file a brief within 40 days after the date on which the record is filed. The appellee shall serve and file a brief within 30 days after service of the brief of the appellant. The appellant may serve and file a reply brief within 14 days after service of the brief of the appellee, but, except for good cause shown, a reply brief must be filed at least 3 days before argument. If a court of appeals is prepared to consider cases on the merits promptly after briefs are filed, and its practice is to do so, it may shorten the periods prescribed above for serving and filing briefs, either by rule for all cases or for classes of cases or by order for specific cases.	(a) **Time for Serving and Filing a Brief.** (1) The appellant must serve and file a brief within 40 days after the record is filed. The appellee must serve and file a brief within 30 days after the appellant's brief is served. ~~Except for good cause, a reply brief must be filed at least 3 days before argument. If good cause is shown, the appellant may serve and file a reply brief within 14 days after the appellee's brief is served.~~ <u>The appellant may serve and file a reply brief within 14 days after service of the brief of the appellee, but, except for good cause shown, a reply brief must be filed at least 3 days before argument.</u> (2) If a court of appeals promptly considers cases on the merits after briefs are filed, it may shorten the prescribed periods for serving and filing briefs, either by rule for all cases or classes of cases, or by order in a particular case.
(b) Number of Copies to Be Filed and Served. — Twenty-five copies of each brief must be filed with the clerk, and two copies must be served on counsel for each party separately represented unless the court requires the filing or service of a different number by local rule or by order in a particular case. If a party is allowed to file typewritten ribbon and carbon copies of the brief, the original and three legible copies must be filed with the clerk, and one copy must be served on counsel for each party separately represented.	(b) **Number of Copies.** Twenty-five copies of each brief must be filed with the clerk and two copies must be served on counsel for each separately represented party, unless the court requires serving or filing a different number by local rule or by order in a particular case. If a party is allowed to file typewritten ~~ribbon~~[27] and carbon copies of the brief, the original and three legible copies must be filed with the clerk, and one copy must be served on counsel for each separately represented party.
(c) Consequence of failure to file briefs. — If an appellant fails to file a brief within the time provided by this rule, or within the time as extended, an appellee may move for dismissal of the appeal. If an appellee fails to file a brief, the appellee will not be heard at oral argument except by permission of the court.	(c) **Consequence of Failure to File.** If an appellant fails to file a brief within the time provided by this rule, or within an extended time, an appellee may move to dismiss the appeal. An appellee who fails to file a brief will not be heard at oral argument unless the court grants permission.

[26] In virtually all cases, serving papers precedes their filing. See FRAP 25. I have a mild preference for retaining that chronology throughout this section. JAP seems to want filing before serving. I don't much care which way it comes out, but at least we should be consistent throughout. — GCP.

[27] I'm not sure the word *ribbon* is necessary here. — BAG.

Rule 32. Form of Briefs, the Appendix and Other Papers	Rule 32. Form of a Brief, Appendix, or Other Paper
(a) Form of briefs and the appendix. — Briefs and appendices may be produced by standard typographic printing or by any duplicating or copying process which produces a clear black image on white paper. Carbon copies of briefs and appendices may not be submitted without permission of the court except in behalf of parties allowed to proceed in forma pauperis. All printed matter must appear in at least 11 point type on opaque, unglazed paper. Briefs and appendices produced by the standard typographic process shall be bound in volumes having pages 6 1/8 by 9 1/4 inches and type matter 4 1/6 by 7 1/8 inches. Those produced by any other process shall be bound in volumes having pages not exceeding 8 1/2 by 11 inches and type matter not exceeding 6 1/2 by 9 1/2 inches, with double spacing between each line of text. In patent cases the pages of briefs and appendices may be of such size as is necessary to utilize copies of patent documents. Copies of the reporter's transcript and other papers reproduced in a manner authorized by this rule may be inserted in the appendix; such pages may be informally renumbered if necessary. If briefs are produced by commercial printing or duplicating firms, or, if produced otherwise and the covers to be described are available, the cover of the brief of the appellant should be blue; that of the appellee, red; that of an intervenor or amicus curiae, green; that of any reply brief, gray. The cover of the appendix, if separately printed, should be white. The front covers of the briefs and of appendices, if separately printed, shall contain: (1) the name of the court and the number of the case; (2) the title of the case (see Rule 12(a)); (3) the nature of the proceeding in the court (e.g., Appeal; Petition for Review) and the name of the court, agency, or board below; (4) the title of the document (e.g., Brief for Appellant, Appendix); and (5) the names and addresses of counsel representing the party on whose behalf the document is filed.	(a) **Form of a Brief or Appendix** (1) *Typography and Paper.* A brief or appendix may be produced by standard typographic printing or by any duplicating or copying process that produces a clear black image on white paper. Carbon copies of a brief or appendix must not be submitted without permission of the court, except on behalf of a party allowed to proceed in forma pauperis. All printing must be at least 11 point type. The paper must be opaque and unglazed. (2) *Patent Cases.* In a patent case, the pages of the brief or appendix may be a size necessary to accommodate copies of patent documents. (3) *Reporter's Transcript.* Copies of the reporter's transcript and of other papers reproduced in a manner authorized by this rule may be inserted in the appendix; those pages may be informally renumbered. (4) *Color of Covers.* The cover of a brief or separate appendix ~~produced by commercial printing, by duplicating, or by other copying process~~ must have the following color: • appellant's brief — blue; • appellee's brief — red; • intervenor or amicus curiae — green; • reply brief — gray; and • separately printed appendix — white. (5) *Cover Information.* ~~If separately printed, the~~ The front cover of a brief or appendix must contain: • the name of the court and the number of the case; • the title of the case (see Rule 12(a)); • the nature of the proceeding in the court (e.g., Appeal. Petition for Review); • the title of the document (e.g., Appellant's Brief, Appendix); and • the names and addresses of counsel representing the party on whose behalf the document is filed.
(b) Form of other papers. — Petitions for rehearing shall be produced in a manner prescribed by subdivision (a). Motions and other papers may be produced in like manner, or they may be typewritten upon opaque, unglazed paper 8 1/2 by 11 inches in size. Lines of typewritten text shall be double spaced. Consecutive sheets shall be attached to the left margin. Carbon copies may be used for filing and service if they are legible. A motion or other paper addressed to the court shall contain a caption setting forth the name of the court, the title of the case, the file number, and a brief descriptive title indicating the purpose of the paper.	(b) **Form of Other Papers.** A petition for rehearing must be produced in the manner prescribed by Rule 32(a). Motions and other papers may be produced according to Rule 32(a), or they may be typewritten on 8½x11-inch opaque, unglazed paper. Typewritten text must be double spaced. Consecutive sheets must be attached at the left margin. Carbon copies may be filed and served if they are legible. A motion or other paper addressed to the court must have a caption setting forth the name of the court, the title of the case, the file number, and a brief descriptive title of the paper.

Rule 33. Appeal Conferences	Rule 33. Appeal Conferences
The court may direct the attorneys, and in appropriate cases the parties, to participate in one or more conferences to address any matter that may aid in the disposition of the proceedings, including the simplification of the issues and the possibility of settlement. A conference may be conducted in person or by telephone and be presided over by a judge or other person designated by the court for that purpose. Before a settlement conference, attorneys must consult with their clients and obtain as much authority as feasible to settle the case. As a result of a conference, the court may enter an order controlling the course of the proceedings or implementing any settlement agreement.	The court may direct the attorneys — and, when appropriate, the parties — to participate in one or more conferences to address any matter that may aid in disposing of the proceedings, including simplifying the issues and discussing settlement. A judge or other person designated by the court may preside over the conference, which may be conducted in person or by telephone. Before a settlement conference, the attorneys must consult with their clients and obtain as much authority as feasible to settle the case. The court may, as a result of the conference, enter an order controlling the course of the proceedings or implementing any settlement agreement.

Rule 34. Oral Argument	Rule 34. Oral Argument
(a) In general; local rule. — Oral argument shall be allowed in all cases unless pursuant to local rule a panel of three judges, after examination of the briefs and record, shall be unanimously of the opinion that oral argument is not needed. Any such local rule shall provide any party with an opportunity to file a statement setting forth the reasons why oral argument should be heard. A general statement of the criteria employed in the administration of such local rule shall be published in or with the rule and such criteria shall conform substantially to the following minimum standard[28]: Oral argument will be allowed unless (1) the appeal is frivolous; or (2) the dispositive issue or set of issues has been recently authoritatively decided; or (3) the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument.	(a) **In General; Local Rule.** Oral argument must be allowed in every case unless, under a local rule, a panel of three judges who have examined the briefs and record unanimously rules that oral argument is unnecessary. The local rule must permit any party to file a statement explaining why oral argument should be permitted. The court must publish with the <u>local</u> rule a general statement of the criteria used to review a request for oral argument. These criteria must substantially conform to the following minimum standard: "Oral argument is allowed, unless (1) the appeal is frivolous; (2) the dispositive issue or issues have been authoritatively decided; or (3) the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument."
(b) Notice of argument, postponement. — The clerk shall advise all parties whether oral argument is to be heard, and if so, of the time and place therefor, and the time to be allowed each side. A request for postponement of the argument or for allowance of additional time must be made by motion filed reasonably in advance of the date fixed for hearing.	(b) **Notice of Argument; Postponement.** The clerk must advise all parties whether oral argument will be scheduled, and, if so, the date, time, and place for it, and the length of argument allowed. A motion to postpone the argument or to allow longer argument must be filed reasonably in advance of the date fixed for the hearing.
(c) Order and Content of Argument.- The appellant is entitled to open and conclude the argument. Counsel may not read at length from briefs, records, or authorities.	(c) **Order and Content of Argument.** The appellant opens and concludes the argument. Counsel must not read at length from briefs, records, or authorities.
(d) Cross and separate appeals. — A cross or separate appeal shall be argued with the initial appeal at a single argument, unless the court otherwise directs. If a case involves a cross appeal, the party who first files a notice of appeal, or in the event that the notices are filed on the same day the plaintiff in the proceeding below, shall be deemed the appellant for the purpose of this rule unless the parties otherwise agree or the court otherwise directs.[29] If separate appellants support the same argument, care shall be taken to avoid duplication of argument.	(d) **Cross-Appeals and Separate Appeals.** If there is a cross-appeal, the party who files a notice of appeal first is considered the appellant. If notices are filed on the same day, the plaintiff in the proceeding below is considered the appellant. The parties may agree or the court may designate otherwise. Unless the court directs otherwise, a cross-appeal or separate appeal must be argued when the initial appeal is argued. Separate parties should avoid duplicative argument of the same position.
(e) Non-appearance of parties. — If the appellee fails to appear to present argument, the court will hear argument on behalf of the appellant, if present. If the appellant fails to appear, the court may hear argument on behalf of the appellee, if present. If neither party appears, the case will be decided on the briefs unless the court shall otherwise order.	(e) **Nonappearance of a Party.** If a party fails to appear for argument, the court may hear the other party's argument. If neither party appears, the case will be decided on the briefs, unless the court orders otherwise.

[28] This sentence is unclear. — BAG.

[29] This sentence was stated elsewhere, in Rule 28(h). I question whether it needs to be restated. — BAG.

(f) Submission on briefs. — By agreement of the parties, a case may be submitted for decision on the briefs, but the court may direct that the case be argued.	**(f) Submission on Briefs.** The parties may agree to submit a case for decision on the briefs, but the court may direct that the case be argued.
(g) Use of physical exhibits at argument; removal. — If physical exhibits other than documents are to be used at the argument, counsel shall arrange to have them placed in the court room before the court convenes on the date of the argument. After the argument counsel shall cause the exhibits to be removed from the court room unless the court otherwise directs. If exhibits are not reclaimed by counsel within a reasonable time after notice is given by the clerk, they shall be destroyed or otherwise disposed of as the clerk shall think best.	**(g) Use of Physical Exhibits at Argument; Removal.** Counsel intending to use physical exhibits other than documents at the argument must arrange to place them in the courtroom before the court convenes on the day of the argument ~~before the court convenes~~. After the argument, counsel must remove the exhibits from the courtroom, unless the court directs otherwise. The clerk may destroy or dispose of the exhibits if counsel does not reclaim them within a reasonable time after the clerk gives notice to remove them.

Rule 35. Determination of Causes by the Court in Banc	Rule 35. En[30] Banc Determination
(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 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, or (2) when the proceeding involves a question of exceptional importance.	(a) **When Hearing or Rehearing En Banc Will Be Ordered.** A majority of the circuit judges in regular active service may order that an appeal or other proceeding be heard or reheard by the court en banc. An en banc hearing is not favored and ordinarily will not be ordered unless: (1) consideration by the full court is necessary to secure or maintain uniformity of its decisions; or (2) a question of exceptional importance is involved.
(b) Suggestion of a party for hearing or rehearing in banc. — A party may suggest the appropriateness of a hearing or rehearing in banc. 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.	(b) **Suggestion of a Party for Hearing or Rehearing En Banc.** A party may suggest a hearing or rehearing en banc. No response may be filed unless the court orders it. The clerk must send the suggestion to the panel members and the circuit judges in regular active service. The judges need not vote on the suggestion unless a judge in regular active service or a member of the panel that rendered the decision sought to be reheard requests a vote.
(c) Time for suggestion of a party for hearing or rehearing in banc; suggestion does not stay mandate. — If a party desires to suggest that an appeal be heard initially in banc, the suggestion must be made by the date on which the appellee's brief is filed. A suggestion for a rehearing in banc must be made within the time prescribed by Rule 40 for filing a petition for rehearing, whether the suggestion is made in such a petition or otherwise. The pendency of such a suggestion whether or not included in a petition for rehearing[31] shall not affect the finality of the judgment of the court of appeals or stay the issuance of the mandate.	(c) **Time for a Party to Suggest a Hearing or Rehearing En Banc; Suggestion Does Not Stay Mandate.** A party that suggests a hearing en banc must in the first instance do so by the date when the appellee's brief is filed. A party making such a suggestion must do so within the time prescribed by Rule 40 for filing a petition for rehearing. A pending suggestion for a rehearing en banc does not affect the finality of the appellate judgment 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) **Number of Copies.** The number of copies to be filed may be prescribed by local rule and may be altered by order in a particular case.

[30] A majority of the Style Subcommittee members in regular active service preferred *en banc* over *in banc* in 1992. One hopes that that majority is still intact. See Garner, *A Dictionary of Modern Legal Usage* 213 (1987). — BAG. JAP agrees.

I have a different recollection about `en banc' and `in banc.' While all of the subcommittee would prefer `en banc,' if we were on a clean slate, I thought that my argument based on the statute had prevailed, namely, that the authorization for the court to sit as a unit is set forth in 28 U.S.C. § 46(c), which describes such a hearing as being `before the court in banc.' The rules should not differ from the underlying statute. Until we can persuade Congress to change § 46(c), I think we should retain the bastardized `in banc,' and I thought that is what our committee previously decided. — GCP. Meehan -- But section 46(c) is only declarative of previous law, which I think used en banc.

Until recently, most statutes used the form *subpena*. Thank goodness the rules didn't follow suit. — BAG.

[31] The language *whether or not included in a petition for rehearing* seems unnecessary. — BAG.

L. RALPH MECHAM
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ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
CHIEF, RULES COMMITTEE
SUPPORT OFFICE

VIA FEDERAL EXPRESS

March 17, 1995

MEMORANDUM TO ADVISORY COMMITTEE ON APPELLATE RULES

SUBJECT: *Suggested Revisions of Style Subcommittee's Changes to Rules 36 - 48*

I am sending to you a copy of recommended changes to the "restylized" Appellate Rules 36 - 48, which are proposed by Judge Logan and Justice Thomas. New matter is underlined; matter to be omitted is lined through.

Judge Logan requests that you send any comments or recommendations regarding these rules and proposed changes to my office no later than Tuesday, April 11, 1995, so that I can incorporate them into a new document for consideration of the whole committee.

John K. Rabiej

Attachment

cc: Honorable Alicemarie H. Stotler
Style Subcommittee

Rule 36. Entry of Judgment	Rule 36. Entry of Judgment
The notation of a judgment in the docket constitutes entry of the judgment. The clerk shall prepare, sign and enter the judgment following receipt of the opinion of the court unless the opinion directs settlement of the form of the judgment, in which event the clerk shall prepare, sign and enter the judgment following final settlement by the court. If a judgment is rendered without an opinion, the clerk shall prepare, sign and enter the judgment following instruction from the court. The clerk shall, on the date judgment is entered, mail to all parties a copy of the opinion, if any, or of the judgment if no opinion was written, and notice of the date of entry of the judgment.	**(a)** A judgment is entered ~~by noting it~~ when it is noted on the docket. The clerk must prepare, sign, and enter the judgment ~~at one of the following times~~: (1) after receiving the court's opinion; (2) after final settlement by the court, if the opinion directs settlement of the judgment's form; or (3) ~~following the court's instructions when~~ as the court instructs - if a judgment is rendered without an opinion. **(b)** On the date judgment is entered, the clerk must mail to all parties a copy of the opinion — or the judgment, if no opinion was written — and a notice of the date when the judgment was entered.

Rule 37. Interest on Judgments	Rule 37. Interest on Judgments
Unless otherwise provided by law, if a judgment for money in a civil case is affirmed, whatever interest is allowed by law shall be payable from the date the judgment was entered in the district court. If a judgment is modified or reversed with a direction that a judgment for money be entered in the district court, the mandate shall contain instructions with respect to allowance of interest.	(a) Interest When Court of Appeals Affirms. Unless the law provides otherwise, if a money judgment in a civil case is affirmed, whatever interest is allowed by law is payable from the date ~~when~~ the district court's judgment was entered. (b) Interest When Court of Appeals Reverses. If the court modifies or reverses a judgment with a direction that a money judgment be entered in the district court, the mandate must contain instructions on the allowance of interest. FOR COMMITTEE CONSIDERATION: Judge Logan would not split the rule into two sentences nor use sub-headings. This is so in part because of his view that we should not have one sentence rules.

Rule 38. Damages and Costs for Frivolous Appeals	Rule 38. Frivolous Appeals — Damages and Costs
If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee.	The court may, on an appellee's motion or on ~~its own,~~ the court's own notice -- after giving a reasonable opportunity to respond -- award just damages and single or double costs to the appellee if ~~— after giving notice and a reasonable opportunity to respond —~~ it determines that an appeal is frivolous.

<table>
<tr><th>Rule 39. Costs</th><th>Rule 39. Costs</th></tr>
<tr><td>(a) To whom allowed. — Except as otherwise provided by law, if an appeal is dismissed, costs shall be taxed against the appellant unless otherwise agreed by the parties or ordered by the court; if a judgment is affirmed, costs shall be taxed against the appellant unless otherwise ordered; if a judgment is reversed, costs shall be taxed against the appellee unless otherwise ordered; if a judgment is affirmed or reversed in part, or is vacated, costs shall be allowed only as ordered by the court.</td><td>(a) Against Whom Assessed. The following rules apply unless the law or a court order provides otherwise ~~provided by law~~:[32]

(1) If an appeal is dismissed, costs are taxed against the appellant, unless ~~a law or a court order directs otherwise, or~~ the parties agree otherwise~~.~~;

(2) ~~Unless otherwise ordered,~~ If a judgment is affirmed, costs are taxed against the appellant ~~if~~;

(3) If a judgment is ~~affirmed, and~~ reversed, costs are taxed against the appellee ~~if it is reversed.~~;

(~~3~~4) If a judgment is affirmed in part, reversed in part, or vacated, costs ~~will be~~ are taxed only as the court orders.</td></tr>
<tr><td>(b) Costs for and against the United States. — In cases involving the United States or an agency or officer thereof, if an award of costs against the United States is authorized by law, costs shall be awarded in accordance with the provisions of subdivision (a); otherwise, costs shall not be awarded for or against the United States.</td><td>(b) Costs For and Against the United States. Costs ~~authorized by law to~~ must not be awarded for or against the United States unless such costs are authorized by law. When costs against the United States, its agency, or officer~~,~~ are authorized by law those costs will be assessed under Rule 39(a)~~; otherwise, costs must not be awarded for or against the United States~~.</td></tr>
<tr><td>(c) Costs of briefs, appendices, and copies of records. — By local rule the court of appeals shall fix the maximum rate at which the cost of printing or otherwise producing necessary copies of briefs, appendices, and copies of records authorized by Rule 30(f) shall be taxable. Such rate shall not be higher than that generally charged for such work in the area where the clerk's office is located and shall encourage the use of economical methods of printing and copying.</td><td>(c) Costs of Printing and Reproduction. Each court of appeals must, by local rule, fix the maximum rate for taxing the cost of printing or otherwise producing necessary copies of a brief, appendix, or copy of a record authorized by Rule 30(f). The rate must not exceed that generally charged for such work in the area where the clerk's office is located and should encourage economical methods of printing and copying.</td></tr>
<tr><td>(d) Bill of costs; objections; costs to be inserted in mandate or added later. — A party who desires such costs to be taxed shall state them in an itemized and verified bill of costs which the party shall file with the clerk, with proof of service, within 14 days after the entry of judgment. Objections to the bill of costs must be filed within 10 days of service on the party against whom costs are to be taxed unless the time is extended by the court. The clerk shall prepare and certify an itemized statement of costs taxed in the court of appeals for insertion in the mandate, but the issuance of the mandate shall not be delayed for taxation of costs and if the mandate has been issued before final determination of costs, the statement, or any amendment thereof, shall be added to the mandate upon request by the clerk of the court of appeals to the clerk of the district court.</td><td>(d) Bill of Costs; Claims; Objections; ~~Costs to Be Inserted~~ Insertion in Mandate ~~or Added Later~~.

(1) A party who wants costs taxed must — within 14 days after entry of judgment — file with the circuit clerk, with proof of service, an itemized and verified bill of costs.

(2) Objections must be filed within 10 days after service of the bill of costs, unless the court extends the time.

(3) The clerk must prepare and certify an itemized statement of costs for insertion in the mandate, but issuance of the mandate must not be delayed for taxing costs. If the mandate issues before costs are finally determined, the district clerk must — upon the circuit clerk's request — add the statement of costs, or any amendment, to the mandate.</td></tr>
</table>

[32] Some version of this language is probably necessary because some courts have interpreted the introductory modifier in the original — "Except as otherwise provided by law, . . ." — as applying to all of the situations described in Rule 39(a), that is, dismissal, reversal, affirmance, and partial affirmance/reversal. *See* Trans World Airlines, Inc. v. Hughes, 515 F.2d 173 (2d Cir. 1975); Atonio v. Wards Cove Packing Co., 1991 WL 67530 (W.D. Wash. April 12, 1991); Mason v. Texaco, Inc., 131 F.R.D. 697 (D. Kan. 1990); Graham v. Milky Way Barges, Inc., 122 F.R.D. 18 (E.D. La. 1988). — JAP.

(e) Costs on appeal taxable in the district courts. — Costs incurred in the preparation and transmission of the record, the cost of the reporter's transcript, if necessary for the determination of the appeal,[33] the premiums paid for cost of supersedeas bonds or other bonds to preserve rights pending appeal, and the fee for filing the notice of appeal shall be taxed in the district court as costs of the appeal in favor of the party entitled to costs under this rule.	(e) **Costs on Appeal Taxable in the District Court.** The ~~cost of the~~ following ~~may be taxed~~ costs of appeal are taxable in the district court for the benefit of the party entitled to costs under this rule: (1) the preparation and transmission of the record; (2) the reporter's transcript, if needed for determination of the appeal; (3) premiums paid for a supersedeas bond or other bond to preserve rights pending appeal; and (4) the fee for filing the notice of appeal.

[33] What does the phrase *if necessary for the determination of the appeal* refer to? Though it appears to refer to *transcript*, the syntax is not clear. The revision has made the sense unmistakable. — BAG.

Rule 40. Petition for Rehearing	Rule 40. Petition for Rehearing
(a) Time for Filing; Content; Answer; Action by Court if Granted. — A petition for rehearing may be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order or by local rule. However, in all civil cases in which the United States or an agency or officer thereof is a party, the time within which any party may seek rehearing shall be 45 days after entry of judgment unless the time is shortened or enlarged by order. The petition must state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended and must contain such argument in support of the petition as the petitioner desires to present. Oral argument in support of the petition will not be permitted. No answer to a petition for rehearing will be received unless requested by the court, but a petition for rehearing will ordinarily not be granted in the absence of such a request. If a petition for rehearing is granted, the court may make a final disposition of the cause without reargument or may restore it to the calendar for reargument or resubmission or may make such other orders as are deemed appropriate under the circumstances of the particular case.	**(a) Time for Filing; Content; Answer; Action by the Court if Granted.** (1) **Time.** Unless the time is shortened or extended by order or local rule, a petition for rehearing may be filed within 14 days after entry of judgment. ~~But~~ ; provided that if the United States or its officer or agency is a party, the time within which any party may seek rehearing is 45 days after entry of judgment, unless an order shortens or extends the time. (2) **Contents.** The petition must ~~specify~~ state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended and must argue in support of the petition. Oral argument is not permitted. (3) **Answer.** Unless the court requests, no answer to a petition for rehearing is permitted; but ordinarily rehearing will not be granted in the absence of such a request~~; a petition for rehearing will ordinarily be denied~~. (4) **Action by Court.** If a petition for rehearing is granted, the court may do any of the following: (1) ~~dispose~~ make a final disposition of the case without reargument; (2) restore the case to the calendar for reargument or resubmission; or (3) issue any other appropriate order.
(b) Form of petition; length. — The petition shall be in a form prescribed by Rule 32(a), and copies shall be served and filed as prescribed by Rule 31(b) for the service and filing of briefs. Except by permission of the court, or as specified by local rule of the court of appeals, a petition for rehearing shall not exceed 15 pages.	**(b) Form of Petition; Length.** The petition must comply in form with Rule 32(a). Copies must be served and filed as Rule 31(b) prescribes for serving and filing briefs. Unless the court permits or a local rule specifies otherwise, a petition for rehearing must not exceed 15 pages.

Rule 41. Issuance of Mandate; Stay of Mandate	Rule 41. Mandate - Content; ; Issuance, and ; Effective Date; Stay of Mandate
(a) Date of Issuance. — 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 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 days after entry of the order denying the petition unless the time is shortened or enlarged by order.	**(a) Content.** 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. **(b)** ~~Issuance~~ When Issued. The court's mandate must issue 7 days after the time for filing a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, rehearing en banc, or motion for stay of mandate. The court may shorten or extend the times by order.
(b) Stay of Mandate Pending Petition for Certiorari. — A party who files a motion requesting a stay of mandate pending petition to the Supreme Court for a writ of certiorari must file, at the same time, proof of service on all other parties. The motion must show that a petition for certiorari would present a substantial question and that there is good cause for a stay. The stay 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 that the party who has obtained the stay has filed a petition for the writ, in which case the stay will continue until final disposition by the Supreme Court. 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 as a condition to the grant or continuance of a stay of the mandate.	(c) ~~Stay of Mandate~~ Effective Date. The mandate is effective on the day it is issued by the court. **(d) Staying the Mandate.** (1) On Petition for Rehearing or Motion. The timely filing of a petition for panel rehearing, rehearing en banc, or motion for stay of mandate, stays the mandate until disposition of the petition or motion, unless the court orders otherwise. **(2) Pending Petition for Certiorari.** (i) A ~~party may, by~~ motion, ~~request a~~ for stay of mandate pending the filing of a petition for a writ of certiorari in the Supreme Court. ~~The motion~~ must be served on all parties and must show that the certiorari petition would present a substantial question and that there is good cause for a stay. (ii) The stay must not exceed ~~30~~ 90 days, unless the period is extended for cause shown or a notice from the Supreme Court clerk is filed during the stay indicating that the party who obtained the stay has filed a petition for the writ. In that case, the stay continues until the Supreme Court's final disposition.. (iii) The court may require a bond or other security as a condition to granting or continuing a stay of the mandate. (iv) 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.

Rule 42. Voluntary Dismissal	Rule 42. Voluntary Dismissal
(a) Dismissal in the district court. — If an appeal has not been docketed, the appeal may be dismissed by the district court upon the filing in that court of a stipulation for dismissal signed by all the parties, or upon motion and notice by the appellant.	(a) **Dismissal in the District Court.** ~~The~~ Before an appeal has been docketed with the circuit clerk, the district court may dismiss ~~an~~ the appeal ~~that has not been docketed~~ upon the filing of a stipulation signed by all parties or upon the appellant's motion with notice to all parties.
(b) Dismissal in the court of appeals. — If the parties to an appeal or other proceeding shall sign and file with the clerk of the court of appeals an agreement that the proceeding be dismissed, specifying the terms as to payment of costs, and shall pay whatever fees are due, the clerk shall enter the case dismissed, but no mandate or other process shall issue without an order of the court. An appeal may be dismissed on motion of the appellant upon such terms as may be agreed upon by the parties or fixed by the court.	(b) **Dismissal in the Court of Appeals.** The circuit clerk may dismiss ~~an appeal~~ a docketed appeal (1) on the appellant's motion on terms agreed to by the parties or fixed by the court, or (2) if the parties file a signed dismissal agreement specifying how costs are to be paid and pay any fees that are due. But no mandate or other process may issue without a court order. ~~An appeal may be dismissed on the appellant's motion on terms agreed to by the parties or fixed by the court.~~

Rule 43. Substitution of Parties	Rule 43. Substitution of Parties
(a) Death of a party. — If a party dies after a notice of appeal is filed or while a proceeding is otherwise pending in the court of appeals, the personal representative of the deceased party may be substituted as a party on motion filed by the representative or by any party with the clerk of the court of appeals. The motion of a party shall be served upon the representative in accordance with the provisions of Rule 25. If the deceased party has no representative, any party may suggest the death on the record and proceedings shall then be had as the court of appeals may direct. If a party against whom an appeal may be taken dies after entry of a judgment or order in the district court but before a notice of appeal is filed, an appellant may proceed as if death had not occurred. After the notice of appeal is filed substitution shall be effected in the court of appeals in accordance with this subdivision. If a party entitled to appeal shall die before filing a notice of appeal, the notice of appeal may be filed by that party's personal representative, or, if there is no personal representative by that party's attorney of record within the time prescribed by these rules. After the notice of appeal is filed substitution shall be effected in the court of appeals in accordance with this subdivision.	**(a) Death of a Party.** (1) ***After Notice of Appeal Filed.*** If a party dies after a notice of appeal has been filed or while a proceeding is pending in the court of appeals, the decedent's personal representative may be substituted as a party on motion filed with the circuit clerk by the representative or by any party. A party's motion must be served on the representative in accordance with Rule 25. If the decedent has no representative, any party may suggest the death on the record, and the court of appeals may then direct appropriate proceedings. ~~(2) *Before Notice of Appeal Filed — Potential Appellee.* If a party against whom an appeal may be taken dies after entry of a judgment or order in the district court, but before a notice of appeal is filed, an appellant may proceed as if the death had not occurred. After the notice of appeal is filed, substitution must be in accordance with Rule 43(a)(1).~~ (~~3~~2) ***Before Notice of Appeal Filed — Potential Appellant.*** If a party entitled to appeal dies before filing a notice of appeal, the decedent's personal representative — or, if there is no personal representative, the decedent's attorney of record — may file a notice of appeal within the time prescribed by these rules. After the notice is filed, substitution must be in accordance with Rule 43(a)(1). (3) Before Notice of Appeal Filed - Potential Appellee. If a party against whom an appeal may be taken dies after entry of a judgment or order in the district court, but before a notice of appeal is filed, an appellant may proceed as if the death had not occurred. After the notice of appeal is filed, substitution must be in accordance with Rule 43(a)(1).
(b) Substitution for other causes. — If substitution of a party in the court of appeals is necessary for any reason other than death, substitution shall be effected in accordance with the procedure prescribed in subdivision (a).	**(b) Substitution for a Reason Other Than Death.** If a party needs to be substituted for any reason other than death, the procedure prescribed in Rule 43(a) applies.

(c) Public officers; death or separation from office. — (1) When a public officer is a party to an appeal or other proceeding in the court of appeals in an official capacity and during its pendency dies, resigns or otherwise ceases to hold office, the action does not abate and the public officer's successor is automatically substituted as a party. Proceedings following the substitution shall be in the name of the substituted party, but any misnomer not affecting the substantial rights of the parties shall be disregarded. An order of substitution may be entered at any time, but the omission to enter such an order shall not affect the substitution. (2) When a public officer is a party to an appeal or other proceeding in an official capacity that public officer may be described as a party by the public officer's official title rather than by name; but the court may require the public officer's name to be added.	(c) **Public Officers; Death or Separation from Office.**[34] (1) ***Identification of Party.*** A public officer who is a party to an appeal or other proceeding in an official capacity may be described as a party by the public officer's official title rather than by name. But the court may require the public officer's name to be added. (2) ***Automatic Substitution of Office-Holder.*** When a public officer who is a party to an appeal or other proceeding in an official capacity dies, resigns, or otherwise ceases to hold office, the action does not abate. The public officer's successor is automatically substituted as a party. Proceedings following the substitution ~~may~~ are to be in the name of the substituted party, but any misnomer that does not affect the substantial rights of the parties may be disregarded. An order of substitution may be entered at any time, but failure to enter an order does not affect the substitution.

[34] I've reversed the order of paragraphs in this subdivision to make the organization more logical. — BAG.

Rule 44. Cases Involving Constitutional Questions Where United States Is Not a Party	Rule 44. Case Involving a Constitutional Question When the United States Is Not a Party
It shall be the duty of a party who draws in question the constitutionality of any Act of Congress in any proceeding in a court of appeals to which the United States, or any agency thereof, or any officer or employee thereof, as such officer or employee, is not a party, upon the filing of the record, or as soon thereafter as the question is raised in the court of appeals, to give immediate notice in writing to the court of the existence of said question. The clerk shall thereupon certify such fact to the Attorney General.	★ If a party ~~who~~ questions the constitutionality of an Act of Congress in a proceeding in which the United States or its agency, officer, or employee is not; a party in an official capacity, ~~a~~ the challenging party must give ~~immediate~~ notice in writing to the circuit clerk immediately upon the filing of the record or as soon as the question is raised in the court of appeals.[35] The clerk must then certify that fact to the Attorney General.

[35] The subject in that sentence is awfully long — too long, I think. Another way of phrasing the sentence is as follows: "If a party questions the constitutionality of an Act of Congress in a proceeding in which the United States or its agency, officer, or employee is not a party in an official capacity, the challenging party must give immediate notice in writing to the circuit clerk upon the filing of the record or as soon as the question is raised in the court of appeals." — BAG.

Rule 45. Duties of Clerks	**Rule 45. Clerk's Duties.**
(a) General provisions. — The clerk of a court of appeals shall take the oath and give the bond required by law. Neither the clerk nor any deputy clerk shall practice as an attorney or counselor in any court while continuing in office. The court of appeals shall be deemed always open for the purpose of filing any proper paper, of issuing and returning process and of making motions and orders. The office of the clerk with the clerk or a deputy in attendance shall be open during business hours on all days except Saturdays, Sundays, and legal holidays, but a court may provide by local rule or order that the office of its clerk shall be open for specified hours on Saturdays or on particular legal holidays other than New Year's Day, Birthday of Martin Luther King, Jr., Washington's Birthday,[36] Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, and Christmas Day.	**(a) General Provisions.** (1) Qualifications. The circuit clerk must take the oath and post the bond required by law. Neither the clerk nor any deputy clerk may practice as an attorney or counselor in any court while in office. (2) When Court Is Open. The court of appeals is always open for the filing of any paper, issuing and returning process, and making motions and orders. The clerk's office with the clerk or a deputy in attendance must be open during business hours on all days except Saturdays, Sundays, and legal holidays. ~~But a~~ A court may provide by local rule or by order that the clerk's office be open for specified hours on Saturdays or on legal holidays other than New Year's Day, Martin Luther King, Jr.'s Birthday, Presidents' Day, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, and Christmas Day.

[36] Washington's Birthday is now President's Day.

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<td>(b) The docket; calendar; other records required. — The clerk shall maintain a docket in such form as may be prescribed by the Director of the Administrative Office of the United States Courts. The clerk shall enter a record of all papers filed with the clerk and all process, orders and judgments. An index of cases contained in the docket shall be maintained as prescribed by the Director of the Administrative Office of the United States Courts.
The clerk shall prepare, under the direction of the court, a calendar of cases awaiting argument. In placing cases on the calendar for argument, the clerk shall give preference to appeals in criminal cases and to appeals and other proceedings entitled to preference by law.
The clerk shall keep such other books and records as may be required from time to time by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States, or as may be required by the court.</td>
<td>(b) Records.
(1) The Docket. The <u>circuit</u> clerk must maintain a docket <s>in the form</s> <u>and an index of all docketed cases in the manner</u> prescribed by the Director of the Administrative Office of the United States Courts. The clerk must record all papers filed with the clerk and all process,[37] orders, and judgments. <s>An index of all docketed cases must be maintained as prescribed by the Director of the Administrative Office of the United States Courts.</s>
(2) Calendar. Under the direction of the court, the clerk must prepare a calendar of cases awaiting argument. In placing cases on the calendar for argument, the clerk must give preference to appeals in criminal cases and to other proceedings and appeals entitled to preference by law.
(3) Other Records. The clerk must keep other books and records <s>as</s> required by the Director of the Administrative Office of the United States Courts, with the approval of the Judicial Conference of the United States, or by the court.</td>
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<td>(c) Notice of orders or judgments. — Immediately upon the entry of an order or judgment the clerk shall serve a notice of entry by mail upon each party to the proceeding together with a copy of any opinion respecting the order or judgment, and shall make note in the docket of the mailing. Service on a party represented by counsel shall be made on counsel.</td>
<td>(c) Notice of an Order or Judgment. Upon the entry of an order or judgment, the <u>circuit</u> clerk must immediately serve by mail a notice of entry on each party to the proceeding, with a copy of any opinion, and must note the mailing on the docket. Service on a party represented by counsel must be made on counsel.</td>
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[37] One Style Subcommittee member and one proofreader have suggested making this *processes*. But I have always thought of legal *process*, in the sense of summonses, writs, citations, and the like as being a collective noun.

The *OED* has illustrative quotations that go both ways: (1) a quotation from the Rolls of Parliament in 1482 ("to awarde processe by Capias, and to make other such processes into every Countie of Englond"); and (2) a quotation from Hallam's *Constitutional History* of 1827 ("The chancellor . . . had a court of his own, . . . out of which process to compel appearance of parties might . . . emanate.").

In its definition of sense (13) of *process*, however, the *OED* refers to "a sheriff's officer who serves processes or other summonses." Of course, Sir James A.H. Murray, the principal author of the *OED*, was no lawyer.

Other, better sources ought to lay this highly controversial matter to rest. I have several at my disposal, but I'll cite only the Pennsylvania Constitution as it was worded as of 1839: "the style of all process shall be *The Commonwealth of Pennsylvania*." — BAG.

(d) Custody of records and papers. — The clerk shall have custody of the records and papers of the court. The clerk shall not permit any original record or paper to be taken from the clerk's custody except as authorized by the orders or instructions of the court. Original papers transmitted as the record on appeal or review shall upon disposition of the case be returned to the court or agency from which they were received. The clerk shall preserve copies of briefs and appendices and other printed[38] papers filed.	(d) **Custody of Records and Papers.** The circuit clerk has custody of the court's records and papers. Unless the court orders or instructs otherwise, the clerk must not permit an original record or paper to be taken from the clerk's office. Upon disposition of the case, original papers constituting the record on appeal or review must be returned to the court or agency from which they were received. The clerk must preserve a copy of any brief, appendix, or other printed paper that has been filed.

[38] The word *printed* may be unnecessary. — BAG.

Printed briefs and other *printed* documents are placed on library shelves (sometimes are bound). Other papers are placed in files. I believe the word *printed* is important. — JFS.

The word *printed* is not unnecessary, but it is somewhat inaccurate. What is referred to are the kinds of papers that get reproduced under R30, whether by printing or other reproduction methods. Original exhibits and the other original papers referred to earlier in the paragraph are also "filed," so something like *printed* is necessary to distinguish what is to be preserved in the court files from what must be returned, either to the court or to the agency, or, in some cases, to counsel themselves. — GCP.

Rule 46. Attorneys	Rule 46. Attorneys
(a) Admission to the bar of a court of appeals; eligibility; procedure for admission. — An attorney who has been admitted to practice before the Supreme Court of the United States, or the highest court of a state, or another United States court of appeals, or a United States district court (including the district courts for the Canal Zone, Guam and the Virgin Islands), and who is of good moral and professional character, is eligible for admission to the bar of a court of appeals. An applicant shall file with the clerk of the court of appeals, on a form approved by the court and furnished by the clerk, an application for admission containing the applicant's personal statement showing eligibility for membership. At the foot of the application the applicant shall take and subscribe to the following oath or affirmation. I, _______________, do solemnly swear (or affirm) that I will demean myself as an attorney and counselor of this court, uprightly and according to law; and that I will support the Constitution of the United States. Thereafter, upon written or oral motion of a member of the bar of the court, the court will act upon the application. An applicant may be admitted by oral motion in open court, but it is not necessary that the applicant appear before the court for the purpose of being admitted, unless the court shall otherwise order. An applicant shall upon admission pay to the clerk the fee prescribed by rule or order of the court.	**(a) Admission to the Bar.** (1) *Eligibility*. An attorney admitted to practice before the ~~United States~~ Supreme Court of the United States, or the highest court of a state, or another United States court of appeals, or a United States district court (including the district courts for ~~the Canal Zone,~~ Guam, the Northern Mariana Islands,[39] and the Virgin Islands) who is of good moral and professional character, is eligible for admission to the bar of a court of appeals. FOR COMMITTEE CONSIDERATION: JCT asks whether we should continue to refer to the Canal Zone in order that the eligibility rule will not exclude someone who was admitted in the Canal Zone but did not seek the practice in one of the Circuit Courts until the name change for the Canal Zone had occurred. (2) *Application*. An applicant must file an application for admission, on a form approved by the court and furnished by the clerk, that contains the applicant's personal statement showing eligibility for membership. At the foot of the application the applicant must take and subscribe to the following oath or affirmation: "I, _____, do solemnly swear [or affirm] that I will conduct myself as an attorney and counselor of this court, uprightly and according to law; and that I will support the Constitution of the United States." (3) *Admission Procedures*. The court will act on the application upon written or oral motion of a member of the bar of the court. An applicant may be admitted by oral motion in open court. But, unless the court orders otherwise, an applicant need not appear before the court to be admitted. Upon admission, an applicant must pay the clerk the fee prescribed by rule or court order.
(b) Suspension or disbarment. — When it is shown to the court that any member of its bar has been suspended or disbarred from practice in any other court of record, or has been guilty of conduct unbecoming a member of the bar of the court, the member will be subject to suspension or disbarment by the court. The member shall be afforded an opportunity to show good cause, within such time as the court shall prescribe, why the member should not be suspended or disbarred. Upon the member's response to the rule to show cause, and after hearing, if requested, or upon expiration of the time prescribed for a response if no response is made, the court shall enter an appropriate order.	**(b) Suspension or Disbarment.** If a member of a court's bar has been suspended or disbarred from practice in any other court of record — or is guilty of conduct unbecoming a member of the bar of the court — the member is subject to suspension or disbarment by the court. The member must be given an opportunity to show good cause, within time prescribed by the court, why the member should not be suspended or disbarred. The court must enter an appropriate order after the member responds and a hearing is held, if requested, or after the time prescribed for a response expires, if no response is made.

[39] The Canal Zone no longer exists, and a new district court has been created for the Northern Mariana Islands. — JFS.

But what about lawyers who practiced in the Canal Zone when it did exist? Are they now ineligible, or must we wait a few more years to drop Canal Zone? — BAG.

Current Rule	Restyled Rule
(c) Disciplinary power of the court over attorneys. — A court of appeals may, after reasonable notice and an opportunity to show cause to the contrary, and after hearing, if requested, take any appropriate disciplinary action against any attorney who practices before it for conduct unbecoming a member of the bar or for failure to comply with these rules or any rule of the court.	(c) **Disciplinary Power Over Attorneys.** A court of appeals may take any appropriate disciplinary action against an attorney who practices before it for conduct unbecoming a member of the bar or for failure to comply with these rules or any court rule. First, however, the court must afford the attorney each of the following: (1) reasonable notice; (2) an opportunity to show cause to the contrary; and (3) a hearing, if requested.

Rule 47. Rules by Courts of Appeals	Rule 47. Rules by Courts of Appeals
Each court of appeals by action of a majority of the circuit judges in regular active service may from time to time make and amend rules governing its practice not inconsistent with these rules. In all cases not provided for by rule,[40] 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.	A majority of a court's circuit judges in regular active service may make and amend rules governing its practice consistent with these rules. In all cases not provided for by rule, a court of appeals may regulate its practice in any manner consistent with these rules. Copies of all rules must, when promulgated, be furnished to the Administrative Office of the United States Courts and made readily available to those who practice before the court. FOR COMMITTEE CONSIDERATION: Judge Logan and JCT recommend the language which is added at the end of Rule 47. However, because we think this language works a substantive change we thought compelled to point it out to you..

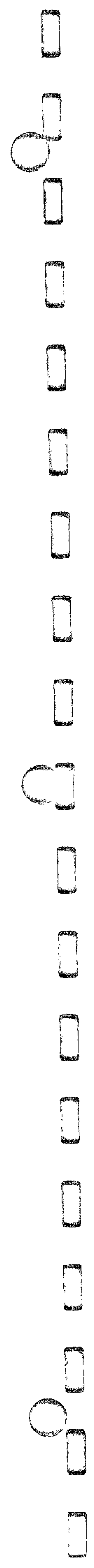
[40] *In all cases not provided for by rule* seems unnecessary, and I am not sure what it means. — BAG.

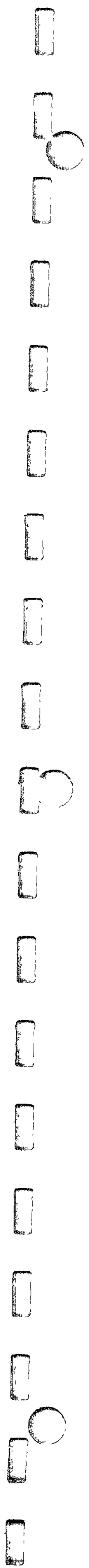
I think the language *in all cases not provided for by rule* is intended to apply to those rare cases that don't fit the usual categories of litigation. An application under the All Writs Act might be an example. If I am correct, then both the first and the second sentences of this rule are necessary. — GCP.

Rule 48. Masters.	Rule 48. Masters
A court of appeals may appoint a special master to hold hearings, if necessary, and to make recommendations as to factual findings and disposition in matters ancillary to proceedings in the court. Unless the order referring a matter to a master specifies or limits the master's powers, a master shall have power to regulate all proceedings in every hearing before the master and to do all acts and take all measures necessary or[41] proper for the efficient performance of the master's duties under the order including, but not limited to, requiring the production of evidence upon all matters embraced in the reference and putting witnesses and parties on oath and examining them. If the master is not a judge or court employee, the court shall determine the master's compensation and whether the cost will be charged to any of the parties.	(a) A court of appeals may appoint a special master to hold hearings, recommend factual findings, and dispose of matters ancillary to the court proceedings. Unless the order referring a matter to a master specifies or limits the master's powers, those powers include, but are not limited to, the following: (1) regulating all aspects of a hearing; (2) taking all appropriate ~~measures~~ actions for the efficient performance of the master's duties under the order; (3) requiring the production of evidence on all matters ~~relating to~~ embraced in the reference; and (4) putting witnesses and parties under oath and examining them. (b) If the master is not a judge or court employee, the court must determine the master's compensation and whether the cost is to be charged to any party.

[41] Shouldn't this be *and*? — BAG.

I think *or* is intended and required. To use *and* would greatly restrict the master's authority. — GCP.





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A Self-Study of Federal Judicial Rulemaking

A Report from the Subcommittee on Long Range Planning to the Committee on Rules of Practice, Procedure and Evidence of the Judicial Conference of the United States

January 1995

Introduction

At the June 1993 meeting, the Standing Committee authorized our Subcommittee on Long Range Planning to undertake a thorough self-study evaluation of the federal judicial rulemaking procedures to include: (1) a description of existing procedures; (2) a summary of criticisms and concerns; (3) an assessment of how existing procedures might be improved; and (4) appropriate proposed recommendations.

The self-study was suspended, in effect, in anticipation of the January 1994 Executive Session and related discussion. At that meeting, it was decided to solicit public comments from interested parties. APPENDIX A to this Report contains a Summary of the Comments Received. In addition, the Subcommittee canvassed the secondary literature. APPENDIX B to this Report is an Annotated Bibliography. An Interim Report was circulated in anticipation of the June 1994 meeting of the Standing Committee. The Interim Report raised several particular issues for discussion at that meeting and solicited further written comments from those in attendance.

The following sections organize this Self-Study Report on the federal judicial rulemaking procedures: a History of the origins of modern rulemaking; a description of Current Procedures; a discussion of Evaluative Norms; the Issues and Recommendations for reforms; and a brief Conclusion.

History[1]

Modern federal judicial rulemaking dates from 1958. A few paragraphs of history inform our understanding of current practice.

The Judiciary Act of 1789 first authorized federal courts to fashion necessary rules of practice.[2] However, a lesser known statute enacted a few days later provided that in actions at law the federal procedure should be the same as in the state courts.[3] This created a system that seems odd to us today: a distinctly national procedure for equity and admiralty, coupled with a static procedure, conforming to the procedure in each state as of September 1789, for actions at law; the procedure for actions at law remained the same while state courts altered their procedures. The system became more odd, or at least more uneven, in 1828 when Congress passed a statute that required federal courts in subsequently admitted states to conform to 1828 state procedures. The same statute provided that all federal courts were to follow 1828 state procedures, with some discretion, in proceedings for writs of execution and other enforcement procedures.[4] This unsatisfactory statutory system prevented the federal courts from following the lead of innovative state procedural reform such as the New York Code of 1848, which merged law and equity and simplified pleading.[5]

The next legislative change came in 1872 when Congress withdrew rulemaking authority from the federal courts and required that all actions in law conform with the corresponding state forum's rules and procedures.[6] Under the Conformity Act here was no national uniformity in federal procedure, because there were as many different sets of federal rules and procedures as there were states.[7]

This Report is not the place to retell the history of the Federal Rules of Civil Procedure "told in large part in terms of dedicated individuals who worked and campaigned to bring them into existence."[8] What bears emphasis is that until 1938, that is, for the Nation's first 150 years, things were very different from what they are today.

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1 This portion of this Report is adapted from Thomas E. Baker, An Introduction to Federal Court Rulemaking Procedure, 22 Tex. Tech L. Rev. 323, 324-28 (1991).

2 Act of Sept. 24, 1789, ch. 20, §17, 1 Stat. 73, 83.

3 Act of Sept. 29, 1789, ch. 21, §2, 1 Stat. 93.

4 Act of May 19, 1828, ch. 68, 4 Stat. 278.

5 Charles E. Clark, The Challenge of a New Federal Judicial Procedure, 20 Cornell L.Q. 443, 499-50 (1935).

6 Act of June 1, 1872, ch. 255, 17 Stat. 197 (repealed 1934).

7 "[T]he procedural law continued to operate in an atmosphere of uncertainty and confusion, aggravated by the growing tendency of federal courts to develop their own rules of procedure under the licensing words of the 1872 Act that conformity was to be 'as near as may be.'" Charles Alan Wright & Arthur R. Miller, 4 Federal Practice and Procedure §1002 at 14 (2d ed. 1987).

8 Id. §1004 at 21.

Before 1938, the federal courts followed state procedural law and federal substantive law, even in diversity cases. Of course, the substantive law of the forum state was recognized to be controlling in the famous 1938 Supreme Court diversity decision of *Erie Railroad Co. v. Tompkins*,[9] overruling *Swift v. Tyson*, which had stood since 1842.[10]

And in the same year, after more than two decades of effort, national rules of procedure were drafted by an ad hoc Advisory Committee appointed by the Supreme Court under the provision of the Rules Enabling Act of 1934.[11] Those 1938 rules—still recognizable today desppite numerous amendments—established a single nationally-uniform set of federal procedures, abolished the distinction between law and equity, created one form of action, provided for liberal joinder of claims and parties, and authorized extensive discovery.

The Supreme Court's ad hoc Advisory Committee was comprised of distinguished lawyers and law professors. While the ad hoc Committee members have been deservedly lionized for their accomplishment of drafting the rules themselves, their more subtle but equally lasting achievement was to establish the basic traditions of federal procedural reform.[12] Two features of that nascent experience have characterized federal judicial rulemaking ever since. First, the ad hoc Committee took care to elicit the thinking and the experience of the bench and bar by widely distributing drafts and soliciting comments with a pronounced willingness to reconsider and redraft its recommendations. Second, "the work of the Committee was viewed as intellectual, rather than a mere exercise in counting noses."[13] The ad hoc Committee demonstrated a shared sense of responsibility to recommend to the Supreme Court the best and most workable rules rather than rules that might be supported most widely or might appease special interests. Although the rulemaking process has been revised over the years since, these two traditions have endured.

This positive early experience located rulemaking responsibility inside the judicial branch, but the modern rulemaking process took a few more years to evolve. A year after the new rules went into effect, the Supreme Court called upon the ad hoc Advisory Committee to submit amendments which the Court accepted and sent to Congress and which became effective in 1941.[14] The next year, the Supreme Court designated the ad hoc Committee as a continuing Advisory Committee, which thereafter periodically submitted rules amendments through the

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9 304 U.S. 64 (1938).

10 44 U.S. (16 Pet.) 11 (1842).

11 Act of June 19, 1934, ch. 651, §§1-2, 48 Stat. 1064; Order Appointing Committee to Draft Unified System of Equity and Law Rules, 295 U.S. 774 (1934).

12 Wright & Miller, supra note 7, §1005.

13 Id.

14 Order Requesting Amendments from the Advisory Committee, 308 U.S. 642 (1939).

1940s and early 1950s.[15] In 1955, the continuing Advisory Committee submitted an extensive report to the Supreme Court with numerous suggested amendments. The Court rather mysteriously took no action on the Report. Instead, the Justices ordered the Committee "discharged with thanks" and revoked the Committee's authority as a continuing body.[16]

The resulting void in rulemaking procedure was an object of concern expressed by the American Bar Association, the Judicial Conference and other groups.[17] At the time, there was no small controversy over whether the Court should designate a new continuing committee and how the members might be selected. Dissatisfaction was expressed that the Supreme Court was merely rubber-stamping the recommendations from the previous Advisory Committee and several of the Justices were heard to agree with that criticism, dissenting from orders, from time to time, to complain that the proposals were not actually the work of the Court.[18] Apparently, there were misgivings expressed behind the scenes about the tenure and influence of the members of the continuing Advisory Committee, who served indeterminate terms until they resigned or died. This discrete Third Branch discussion took place alongside the perennial separation of powers debate between the Judiciary and Congress over which institution should make rules and how.

A consensus emerged that some ongoing rulemaking process was desirable, but that the process had to be reformed. The replacement rulemaking procedures were designed by Chief Justice Earl Warren, Justice Tom C. Clark, and Chief Judge John J. Parker, of the Fourth Circuit, during their cruise to attend the 1957 American Bar Association Convention. Later, Justice Clark recalled, "On our daily walks around the deck of the Queen Mary, we thrashed out the problem thoroughly, finally agreeing that the Chief Justice, as the Chair of the Judicial Conference, should appoint the committees which would give them the tag of 'Chief Justice Committees.'"[19] This "Queen Mary Compromise" led to a statutory amendment by which Congress assigned responsibility to the Judicial Conference for advising the Supreme Court regarding changes in the various sets of federal rules—admiralty, appellate, bankruptcy, civil and criminal—which only the Court had formal statutory authority to amend.[20] The rulemaking

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15C ontinuance of Advisory Committee, 314 U.S. 720 (1941); Charles E. Clark, "Clarifying" Amendments to the Federal Rules?, 14 Ohio St. L. J. 241 (1953).

16 Order Discharging the Advisory Committee, 352 U.S. 803 (1956).

17 The Rule-Making Function and the Judicial Conference of the United States, 44 A.B.A. J. 42 (1958) (panel discussion).

18 E.g., Order Amending the Rules of Civil Procedure, 329 U.S. 843 (1946) (noting Justice Frankfurter's reliance on the judgment of the Advisory Committee); Order Amending the Rules of Civil Procedure, 308 U.S. 643 (1939) (noting Justice Black's disapproval); Order Adopting the Rules of Procedure for the District Courts of the United States, 302 U.S. 783 (1937) (noting Justice Brandeis' disapproval).

19 Tom C. Clark, Foreword to Wright & Miller, supra note 7, at ix.

20 Act of July 11, 1958, Pub. L. No. 93-12, 72 Stat. 356; Panel Discussion, The Rule-Making Function of the Judicial Conference of the United States, 44 A.B.A.J. 42 (1958).

process today follows the basic 1958 design.[21] Only two developments in rulemaking since then are sufficiently noteworthy to deserve brief mention in this history.

First, there was a showdown over the Federal Rules of Evidence. An Advisory Committee on Rules of Evidence was created in 1965. Following standard rulemaking procedures, after extensive study, the Advisory Committee promulgated a set of proposed rules in 1972. Those proposed rules were highly controversial, especially the particular rules dealing with evidentiary privileges. Congress ended up mandating, by statute, that the evidence rules would not take effect until expressly approved by legislation. Then Congress reviewed the proposed rules and made substantial revisions in the Federal Rules of Evidence before enacting them into law, effective in 1975.[22] The legislative veto provision that attached to all rules of evidence has since been discarded, but the applicable statute still provides that any revision of the rules governing evidentiary privileges shall have no force unless approved by Congress.[23] After a twenty year hiatus the Judicial Conference re-established an Advisory Committee on the Rules of Evidence in 1990. This committee has embarked on a comprehensive review.

Second, Congress amended the Rules Enabling Act in 1988 to require the rules committees to hold open meetings, maintain public minutes, and afford wider notice and longer periods for public commentary on proposed rules.[24] These amendments were designed to increase attention to rules initiatives and public participation. Rulemaking today is more accessible to interested parties than ever before. It is also slower, and the exchange is not an unmixed blessing. In the wake of the 1988 changes, only Congress can change rules with dispatch. This means that any group with a perceived pressing need seeks its forum in the legislature rather than the judiciary, and today Congress regularly demonstrates its interest in federal rules matters by holding committee hearings and amending the rules themselves.

Current Procedures[25]

Congress has authorized the federal judiciary to prescribe the rules of practice, procedure, and evidence, subject to an expressly reserved legislative power to reject, modify, or defer any

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21 The Justices continue to express their individual concerns about the Supreme Court's appropriate role in judicial rulemaking. Statement of Justice White, 113 S.Ct. 575 (Apr. 22, 1993); Dissenting Statement of Justice Scalia, joined by Justices Thomas and Souter, 113 S.Ct. 581 (Apr. 22, 1993); Order Amending the Rules of Civil Procedure, 374 U.S. 861 (1963) (opposing statements of Justices Black and Douglas).

22 Act of January 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926; Edward W. Cleary, Preliminary Notes on Reading the Rules of Evidence, 57 Neb. L. Rev. 908 (1978).

23 28 U.S.C. §2074(b).

24 Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, 102 Stat. 4642 (codified at 28 U.S.C. §2073(c)).

25 This portion of this Report is adapted from Baker, supra note 1, at 328-31 and Administrative Office of the U.S. Courts, The Federal Rules of Practice and Procedure — A Summary for Bench and Bar (Oct. 1993) (hereinafter A Summary for Bench and Bar). Thomas E. Baker, Recent Developments in the Federal Rules of Procedure: The 1993 Changes and Beyond, 11 Fifth Cir. Reptr. 531 (June 1994).

judicially-made rules. This statutory authorization is found in the Rules Enabling Act.[26] Pursuant to this statutory authorization and responsibility, the judicial branch has developed an elaborate committee structure with attendant rulemaking procedures. The *Procedures for the Conduct of Business by the Judicial Conference Committees on Rules of Practice and Procedure* describe the current procedures for judicial rulemaking.[27] These rulemaking procedures were adopted by the Judicial Conference of the United States. They govern the operations of the Standing Committee and the various Advisory Committees in drafting and recommending new rules or amendments to the present sets of federal rules of practice and procedure.

The Judicial Conference of the United States consists of the Chief Justice of the United States (Chair), the chief judges of the 13 United States courts of appeals, the Chief Judge of the Court of International Trade, and 12 district judges chosen for a term of 3 years by the judges of each circuit. The Judicial Conference holds plenary meetings twice every year to consider administrative problems and policy issues affecting the federal judiciary and to make recommendations to Congress concerning legislation affecting the federal judicial system.[28] It also acts through an Executive Committee on some matters.

By statute, the Judicial Conference is charged with carrying on a "continuous study of the operation and effect of the general rules of practice and procedure."[29] The Conference is empowered to recommend changes and additions in the federal rules "from time to time" to the Supreme Court, in order to "promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay."[30]

To perform these responsibilities of study and drafting, the Judicial Conference has created the Committee on Rules of Practice, Procedure, and Evidence (Standing Committee)[31] and various Advisory Committees (currently one each on Appellate Rules, Bankruptcy Rules, Civil Rules, Criminal Rules and Evidence Rules). All appointments are made by the Chief Justice of the United States, for a three-year, once-renewable term. Members are federal and state judges, practicing attorneys, and scholars. The chair of each committee appoints a reporter, usually a prominent professor of law, to serve the committee as an expert advisor. The reporter coordinates the committee's agenda and drafts the rules amendments and the explanatory committee notes.

The Standing Committee coordinates the rulemaking responsibilities of the Judicial Conference. The Standing Committee reviews the recommendations of the various Advisory Committees and makes recommendations to the Judicial Conference for proposed rules changes

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26 28 U.S.C. §§2071-2077.

27 Announcement, 54 Fed. Reg. 13,752 (Apr. 5, 1989) (publishing Procedures adopted by the Judicial Conference of the United States on Mar. 14, 1989).

28 28 U.S.C. §331.

29Id.

30 Id.

31 28 U.S.C. §2073(b). The convention has been to refer to this Committee as the "Standing Committee on Rules of Practice and Procedure" or simply the "Standing Committee."

"as may be necessary to maintain consistency and otherwise promote the interest of justice."32 The Secretary to the Standing Committee, currently the Assistant Director for Judges Programs of the Administrative Office of the U.S. Courts, coordinates the operational aspects of the entire rulemaking process and maintains the official records of the rules committees. The Rules Committee Support Office of the Administrative Office provides day-to-day administrative and legal support for the Secretary and the various committees.33

Rulemaking procedures are elaborate:

> The pervasive and substantial impact of the rules on the practice of law in the federal courts demands exacting and meticulous care in drafting rule changes. The rulemaking process is time-consuming and involves a minimum of seven stages of formal comment and review. From beginning to end, it usually takes two to three years for a suggestion to be enacted.34

By delegation from the Judicial Conference, authorized by the relevant statute, each Advisory Committee is charged to carry out a "continuous study of the operation and effect of the general rules of practice and procedure" in its particular field.35 An Advisory Committee considers suggestions and recommendations received from any source, new statutes and court decisions affecting the rules, and other relevant legal commentary. In fact, "[p]roposed changes in the rules are suggested by judges, clerks of court, lawyers, professors, government agencies, or other individuals and organizations."36 Copies or summations of all written recommendations and suggestions that are received are first acknowledged in writing and then forwarded to each member. The Advisory Committees meet at the call of the chair. Each meeting is preceded by notice of the time and place, including publication in the FEDERAL REGISTER, and meetings are open to the public.37 Upon considering a suggestion for a rules change, the Advisory Committee has several options, including: (1) accepting the suggestion, either completely or with modifications or limitations; (2) deferring action on the suggestion or seeking additional information regarding its operation and impact; (3) rejecting the suggestion because it does not have merit or would be inconsistent with other rules or a statute; or (4) rejecting the suggestion

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322 8 U.S.C. §2073(b).

33Meetings of the rules committees are open to the public and are widely announced. All records of the committees, including minutes of committee meetings, suggestions and comments submitted by the public, statements of witnesses, transcripts of public hearings, and memoranda prepared by the reporters, are public and are maintained by the secretary. Copies of the rules and proposed amendments are available from the Rules Committee Support Office.

A Summary for Bench and Bar, supra note 7.

34 A Summary for Bench and Bar, supra note 7.

35 28 U.S.C. §2073(b).

36 A Summary for Bench and Bar, supra note 7.

37 Notice of Public Meeting, 59 Fed. Reg. 59,793 (Nov. 18, 1994).

because, while it may have some merit, it is not really necessary or sufficiently important to warrant a formal amendment.[38]

The Reporter to the Advisory Committee, under the direction of the Advisory Committee or its Chair, prepares the initial drafts of rules changes and "Committee Notes" explaining their purpose or intent. The Advisory Committee then meets to consider and revise these drafts and submits them, along with an Advisory Committee Report which includes any minority or separate views, to the Standing Committee. The reporters of all the Advisory Committees are encouraged to work together, with the reporter to the Standing Committee, to promote clarity and consistency among the various sets of federal rules; the Standing Committee has created a Style Subcommittee, with its own Reporter, that works with the Advisory Committees to help achieve clear and consistent drafts of proposed amendments.

Once the Standing Committee approves the drafts for publication, the proposed rules changes are printed and circulated to the bench and bar, and to the public generally. Every effort is made to publish the proposed rules widely. More than 10,000 persons and organizations are on the mailing list, including: federal judges and other federal court officials; United States Attorneys; other federal government agencies and officials; state chief justices; state attorneys general; law schools; bar associations; and interested lawyers, individuals and organizations who request to be included on the distribution list.[39] A notice is published in the FEDERAL REGISTER, and the proposed rules changes also are reproduced with explanatory committee notes and supporting documents in the West Publishing Company's advance sheets of SUPREME COURT REPORTER, FEDERAL REPORTER-THIRD SERIES, and FEDERAL SUPPLEMENT.[40] As a matter of routine, copies are provided to other legal publishing firms. Anyone who requests a copy of any particular set of proposed changes may obtain one.

The comment period runs six months from the FEDERAL REGISTER notice date. The Advisory Committee usually conducts public hearings on proposed rule changes, again preceded by widely-published notice. The hearings typically are held in several geographically diverse cities to allow for regional comment. Transcripts of the hearings are generally available. The six-month time period may be abbreviated, and the public hearing cut out, only if the Standing Committee or its Chair determines that the administration of justice requires that the process be expedited.

At the conclusion of the comment period, the reporter prepares a summary of the written comments received and the testimony presented at public hearing for the Advisory Committee, which may make additional changes in the proposed rules. If there are substantial new changes, there may be an additional period for public notice and comment. The Advisory Committee then submits the proposed rule changes and Committee Notes to the Standing Committee. Each submission is accompanied by a separate report of the comments received which explains any changes made subsequent to the original publication. The report also includes the minority views of Advisory Committee members who chose to have their separate views recorded.

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38 Id.

39 A Summary for Bench and Bar, supra note 7.

40 E.g., 115 S.Ct. No. 1, at cxvi (Nov. 1, 1994).

The Standing Committee coordinates the work of the several Advisory Committees, individually and jointly. Although on occasion the Standing Committee suggests actual proposals to be studied, its chief function is to review the proposed rules changes recommended by the Advisory Committees. Meetings of the Standing Committee are generally open to the public and are preceded by public notice in the FEDERAL REGISTER.[41] Minutes of all meetings are maintained as public records and made available to interested parties.

The Chair and Reporter of the Advisory Committee attend the meetings of the Standing Committee to present the proposed rules changes and Committee Notes. The Standing Committee may accept, reject, or modify a proposal. If a Standing Committee modification effects a substantial change, the proposal may be returned to the Advisory Committee with appropriate instructions, including the possibility of a second publication for another period of public comment and public hearings. The Standing Committee transmits the proposed rule changes and Committee Notes approved by it, together with the Advisory Committee report, to the Judicial Conference. The Standing Committee's report to the Judicial Conference includes its recommendations and explanations of any changes it has made, along with the minority views of any members who wish to record their separate statements.

The Judicial Conference, in turn, transmits those recommendations it approves to the Supreme Court of the United States. Formally, the Supreme Court retains the ultimate responsibility for the adoption of changes in the rules, accomplished by an Order of the Court.[42] The Supreme Court has at times played an active part, refusing to adopt rules proposed to it and making changes in the text of rules.[43] In practice, however, the Advisory Committees and the Standing Committee are the main engines for procedural reform in the federal courts. Under the enabling statutes,[44] amendments to the rules may be reported by the Chief Justice to the Congress at or after the beginning of a regular session of Congress but not later than May 1st. The amendments become effective no earlier than December 1 of the year of transmittal, if Congress takes no adverse action.[45]

Since 1958 this rulemaking procedure has been followed regularly, almost biennially.[46] Spirited debates have been generated, from time to time, over particular proposals and sets of amendments.

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41 Notice of Meeting, 55 Fed. Reg. 25,384 (1990).

42 Order Amending the Federal Rules of Civil Procedure (Apr. 22, 1993), H.R. Doc. 103-74, 103d Cong., 1st Sess., reprinted at 113 S.Ct. 478 (1993).

43 The Supreme Court actually made changes in the original adoption of the civil and criminal rules. Wright & Miller, supra note 7, §§2 n.8 & 1004 n.18. Charles E. Clark, The Role of the Supreme Court in Federal Rulemaking, 46 J. Am. Jud. Soc. 250 (1963). And the Court continues to do so. Order, 129 F.R.D. 559 (May 1, 1990).

44 28 U.S.C. §§2071-77.

45 But see Act of March 30, 1973, Pub. L. 93-12, 87 Stat. 9 (providing that the proposed Rules of Evidence should have no effect until expressly approved by Act of Congress).

46 Order Amending the Rules of Civil Procedure, 480 U.S. 955 (1987); Order Amending the Rules of Civil Procedure, 471 U.S. 1155 (1985); Order Amending the Rules of Civil Procedure, 461 U.S. 1097 (1983).

Some of these controversies have been resolved within the Third Branch. In recent years, these rulemaking procedures have been followed with the result that particular proposals have been rejected at each level of consideration—at the Advisory Committees, at the Standing Committee, at the Judicial Conference, and at the Supreme Court—often with attendant public debate and occasionally with high controversy. Debate likewise has attended proposals that have been approved. For example, the last package of wholesale changes to the discovery provisions in the Civil Rules drew a separate statement from one member of the Supreme Court and a dissenting statement from three others.

Other controversies have played out in the Congress. For example, the 1993 amendments were the subject of hearings in both the Senate and the House of Representatives. A bill to rescind some of the discovery rules changes in that package passed the House, but did not reach the floor of the Senate. Controversy akin to the separation of powers doctrine often surrounds exercises of the legislative prerogative to pass a statute to effectuate a change in the federal rules of procedure. Most recently, Congress included three new rules of evidence in the Violent Crime Control and Law Enforcement Act of 1994.[47] But over the years judges and the judiciary regularly have been heard to urge that Congress should feel obliged to exercise greater self-restraint in this regard and defer to the Rules Enabling Act process.

Evaluative Norms[48]

It is worth a few pages to consider rulemaking procedures from a normative vantage, to ask what are the explicit and implicit norms that overlay the entire enterprise of federal judicial rulemaking, beyond the more familiar first level of abstraction that would consider the policy underlying some specific rule change. This normative vantage includes rulemaking norms as they are currently understood as well as how they might be "reimagined," as it were. If rulemaking procedures are a meta-procedure, in the sense they are the procedures followed to promulgate new court procedures, then this segment of this Report, for what it is worth, might be described as a meta-meta-procedure. To describe it this way is to admit that this part has the smell of the lamp about it.

Inadequacies. Some argue that the existing norms to be found in the federal rules are not adequate and do not contemplate all that must be taken into account in a meaningful assessment of rulemaking as a process. Rule 1's goal for the federal civil rules is the "just, speedy, and inexpensive determination of every action." Although the three specified norms of justice, speed, and economy in civil litigation are rooted in common sense, they seem to beg some of the most important questions that face rulemakers.

In a world in which time is money, speed and economy are two sides of the same figurative coin—and the sides are indistinguishable. Standing alone, they would argue for deciding every

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47 Pub. L. No. 103-322, 108 Stat. 1796; H.R. Rep. No. 103-711, 103d Cong., 2nd Sess. (1994).

48 This part of this Report is adapted, with permission, from a letter from Professor Oakley to the Chair of the Subcommittee. John B. Oakley, An Open Letter on Reforming the Process of Revising the Federal Rules, 55 Mont. L. Rev. 435 (1994).

case by the quickest (and therefore cheapest) means possible—such as the flip of a more conventional coin on which the head does not mirror the tail. Of course a "heads or tails" system of resolving civil disputes would be intolerable, because it would be unjust. But the norm of justice lends itself more easily to condemnation of offered measures, rather than to a constructive way to sort proffered reforms, because it conceals at least two competing conceptions of what justice requires.

On the one hand, justice has something to do with fairness to individuals. Civil cases ought to reach the "right" result—the outcome that would follow if every relevant fact were known with absolute accuracy, if all uncertainty in meaning or application were wrung out of every relevant proposition of law, and if society itself could by some extraordinary plebiscite resolve whether the application of the general law to the unique circumstances of a particular case should be tempered by overriding concerns of the situational equity.

On the other hand, justice also has something to do with concerns of equality and aggregate social efficiency. If we were to allocate all of our resources to attaining the Nth degree of accuracy and absolute equity in our determinations of legal liability in a particular case, there would be far less, if any, resources left to adjudicate other deserving cases, let alone to accomplish all of the other functions government performs besides deciding civil disputes. Moreover, if equity were given a standing veto over pre-existing legal rules as applied to the actual facts of any given case, we would subvert to the point of extinction the system of reliance on protected expectations that permits a society to function amid a welter of conflicting interests without every such conflict becoming a contested dispute brought into court.

The fact that Rule 1 speaks of a just determination in every case, not just the one before a judge at any given moment, is more a reminder of the inevitable tension between concerns of fairness and efficiency than a criterion for resolving that tension. It should therefore be no surprise that the history of federal civil procedure under the Federal Rules has featured a continuous but seldom explicitly elaborated struggle between what might be labeled the "primacy of fairness" versus the "primacy of efficiency." The "primacy of fairness" argues for subordination of procedural rules in favor of reaching the merits of the parties' dispute under the substantive law, and conditioning the finality of determination on liberal opportunities for amendment of pleadings, reconsideration by the trial court, and appellate review. The "primacy of efficiency" argues for rigorous enforcement of procedural rules to narrow the range of the parties' dispute and to expedite decision, and limiting the opportunity for, and scope of, appellate review.

Alternatives. What alternative or additional norms might be imagined for federal judicial rulemaking, beyond the norms that might be considered for the particular rules and procedures themselves? Federal rules of procedure should be adopted, construed, and administered to promote five related norms: efficiency, fairness, simplicity, consensus, and uniformity.

The application of the norm of efficiency to the rulemaking process requires an assessment of how costly it is to initiate consideration of a rule change and for that proposal to proceed to implementation by the federal courts. That assessment is itself rather complicated, requiring, for instance, consideration of the social cost of the rulemaking process in terms of how much more time the rulemakers would have spent adjudicating cases, representing clients, or teaching students and conducting research, had they not been involved in the rulemaking process.

The assessment of the efficiency of the rulemaking process is further complicated by being interactive with assessment of the efficiency of the actual rules the rulemaking process produces.

A conservative and time-consuming process of rulemaking may be less costly than fast-track rulemaking that taxes the litigation system with a constant need for retraining and a high rate of error attributable to unfamiliarity with as-yet unconstrued new rules, unless it can be shown that the long-run efficiency gains of new rules are consistently high. The inefficiency of frequently changing the rules might argue either for keeping the rulemaking process inefficient and thus resistant to proposals for change, or for adopting some form of staging process by which rule changes are limited, absent exceptional circumstances, to a prescribed schedule of once every so many years. Moreover, since the Judicial Conference does not have monopoly power in rulemaking, the relative efficiency of either an inert or a volatile judicial rulemaking process will be determined, in part, by the efficiency or inefficiency of the rules likely to be produced by direct Congressional action, or by Congressional delegation of local rulemaking power to individual district courts, should centralized rulemaking by the Judicial Conference committee structure be deemed unduly torpid.

As applied to the rulemaking process, the norm of fairness calls not only for receptivity to proposals for change by those not directly vested with rulemaking power, but also for access to the process of implementing a proposed rule change by those whose interests are most likely to be affected by any proposed change. How seriously is public comment encouraged and facilitated, and is this a pro forma gesture or is there evidence that adverse public comment makes a difference in the progression of a proposal into a rule change? As applied to the rules that the process produces, the norm of fairness requires evaluation of whether changes in the rules promote or retard the likelihood that individual cases will come to the right result, whether by adjudication or pro tanto by settlement, in relation to the efficiency gains or losses that result from such changes. Is the rulemaking system biased in favor of ratcheting up efficiency at the expense of fairness, or vice versa?

The norm of simplicity, specified in 28 U.S.C. §331, serves the related interests of both efficiency and fairness. Unduly complex rules of procedure not only increase the cost of training, compliance, and enforcement, but also increase the likelihood of mistaken and hence unfair application. Any rulemaking process that regularly produces unduly complex rules of procedure or unduly complicates existing simple rules threatens the systemic goals of efficiency and fairness.

As applied to the rulemaking process, the norm of consensus overlaps, but does not duplicate, the norm of fairness. The norm of consensus demands, first, that the rulemaking process be sufficiently open to public input to be fairly representative of, or at least sensitive to, the interests of those who will be most affected by the rules it produces. But this norm demands more than mere notice and the opportunity to be heard. There must be some sharing of, or at least constraint upon, the power to make new rules, so that a lack of consensus about the wisdom of problematic proposed rules will normally suffice to block the adoption of such rules. Consensus should not be too strong a norm, however, because it favors the status quo. At the same time, the expectation for consensus should render the rulemaking process sufficiently inert to resist utopian reform by policymakers who are so detached from the arena of litigation to which the rules are directed that they are indifferent to the practical impact of rule changes upon those most affected by them.

The norm of uniformity is fundamental to the rulemaking process first set in place by the 1934 Rules Enabling Act. The Act was intended to promote a system of federal procedure that was not only trans-substantive but, with minor local variations, uniform in application in all federal district courts.

Geographical uniformity is more important than trans-substantive application of the federal rules. Deviations from trans-substantive uniformity can, where necessary and appropriate, be expressly specified within the rules. Current examples are the special rules for class actions brought derivatively by shareholders, and the entire set of discrete rules of procedure for bankruptcy cases. But geographical disuniformity, even when expressly permitted by local opt-out provisions inserted into the national rules, operates insidiously and often covertly to impair the norms of both efficiency and fairness.

The norm of uniformity demands that the procedure for litigating actions in federal courts remain essentially similar nationwide. If each district court's rules of civil procedure are allowed to become sufficiently distinct that venue may affect outcome and that a special aptitude in local procedure becomes essential to competent representation in that court, forum-shopping would be encouraged. Moreover, litigants must either risk the unfairness of inadvertent mistake in conforming to localized rules of procedure or incur inefficient costs of insuring against the idiosyncrasies of local practice by ad hoc procedural research or the prophylactic retention of local counsel.

Issues and Recommendations

In this section of this Report, we turn to issues, analyses, and recommendations. The organization to be followed will take up issues related to the five entities in rulemaking: Advisory Committees; Standing Committee; Judicial Conference; Supreme Court; and Congress.[49]

A. Advisory Committees

Memberships: Criticisms have been leveled at the composition of the various rules committees. First, there have been allegations of an under-representation of the bar, particularly active practitioners, and of other identifiable interest groups within the bar, such as public interest lawyers. The often implied but sometimes explicit objection is that the Advisory Committees are dominated by federal judges. Second, there have been allegations of a lack of diversity of members. The argument is that the diversity of the Advisory Committees ought to mirror the diversity of the federal bar, which includes more women and minorities than are currently found on the federal bench.

These are considerations for the attention of the appointing authority, the Chief Justice. In recent years, the Advisory Committees have been enlarged to include more non-judges. Whether they (and the Standing Committee) have already become too large for sustained exchanges and careful discussion is an interesting question; drafting by large committees is rarely successful. We doubt that they should be much larger; perhaps they should be smaller. At all events, the rules committees are committees of the Judicial Conference of the United States, the policy-making entity of the Third Branch. They are not "bar" committees. The notion of representativeness, i.e., that there ought to be a seat on the Advisory Committee for each identifiable faction of the bar contravenes the tradition of federal rulemaking based on a disinterested expertise, as opposed to interest-group politics. Rulemaking ought not follow public opinion or bar polls.

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49 Professor Carl Tobias assisted in the compilation of issues for consideration in this part of this Report.

Federal judges ought to remain a majority of the members of the Advisory Committees. They have the expertise and time to act in the best interest of the public those courts serve. This is not to say that the appointing power ought to be exercised without regard to the concerns we have mentioned. It is enough to suggest that these considerations be given appropriate attention within the present appointment process and that efforts be made to identify well-qualified candidates with diverse personal and professional experiences. Some recognition may appropriately be given to enduring divisions in the practice of law. For example, the Advisory Committee on the Criminal Rules includes a representative of the Department of Justice and a Federal Public Defender. Analogously, the Civil Justice Reform Act of 1990 required that advisory groups be "balanced and include attorneys and other persons who are representative of major categories of litigants" in each district.[50]

To help achieve these goal, the Chief Justice now solicits advice widely from within the federal judiciary and the Administrative Office of the U.S. Courts. The Chief Justice could consider seeking suggestions from the American Bar Association and similar other organizations as well.

[1] Recommendation to the Chief Justice: Appointments to the Advisory Committees reflect the personal and professional diversity in the federal bench and bar.

Length of terms: Members' terms on the Advisory Committee should be long enough to maintain continuity and to allow a member to see a proposal through to adoption, but not so long as to create inflexibility and to render rulemaking an "insider's game." The present practice is to appoint members for an initial three-year term followed by a second three-year term. On balance, this seems a reasonable normal term of years for members, but the Chief Justice should make exceptions when appropriate to help committees follow through with extended rulemaking projects.

Members must master a potentially bewildering number of proposals within a rather Byzantine process. The Chair, Reporter, and veteran members of the Advisory Committee can be of great assistance. The rotation on and off of the Advisory Committee affords new members a break-in period. This by-product is reason to maintain the staggered terms. Still, more formal assistance might be appropriate. This might take the form of an orientation meeting scheduled the day before the regular meeting of the Advisory Committee, attended by the new members, the Chair, and the Reporter, and perhaps others. Additionally, the Standing Committee and the Advisory Committees should continue to invite members whose terms have expired to attend the meeting after their term ends, in order to promote continuity.

[2] Recommendation to the Advisory Committees: Chairs and Reporters of the Advisory Committees schedule orientation meetings with new members.

Somewhat different considerations obtain for Chairs. Rulemaking projects take three years from beginning to end. A Chair with a three-year term therefore can see a project through only if it commences at the outset of his or her tenure. A leader ought to be granted some time to think through proposals, to make them, and still have time to see them through. Reporters now serve

50 28 U.S.C. §478(b).

indefinitely; making a non-member of the committee the only enduring voice is questionable. A Chair, too, ought to provide continuity within the Advisory Committee and the Standing Committee. It is not uncommon for the Chairs to represent the judicial branch before the Congress. The practice of elevating an experienced member to the Chair is appropriate. If a Chair is designated at the end of one three-year term, a term of five years as Chair would be appropriate, increasing total service to eight years. This duration is not out of line in a life time-tenured institution. The shorter terms of members preserve sufficient opportunity for widespread involvement in rulemaking.

[3] Recommendation to the Chief Justice: The term for Chairs of the Advisory Committees should be five years.

Resources and support: Members of the Advisory Committees need sufficient resources and support for their part-time but nonetheless important duties. The permanent staff from the Administrative Office provides necessary logistical support for attending meetings and related duties. The Reporters provide important expertise and drafting assistance. Members exchange information about new developments as a matter of routine. Liaison members of the Standing Committee also contribute to the smooth operation of the committee system. The paper-flow through the Advisory Committees is substantial. The relevant literature in each of these areas of the law is growing rapidly.

Because committee members are part-time rulemakers it might be useful to provide them with some regular entrée to the secondary literature, including law journals and social-science publications that have some bearing on their responsibilities. The Reporters are the most logical bibliographers.

Various Advisory Committees have planned in-house seminars, presentations by panels of experts in their field, to bring members up-to-date on recent developments. These "continuing education" events should be continued.

[4] Recommendation to the Advisory Committees: Each Advisory Committee ought to consider adding to the Reporter's duties two tasks: first, regularly circulating law journal articles, social-science publications, and other pertinent articles; second, arranging and organizing in-house seminars.

Outreach and intake: One frequently heard criticism of federal rulemaking is that it is a closed process dominated by insiders and elites. The twin complaints are that some worthy proposals go begging for lack of a sponsor and some equally unworthy proposals are pushed through the process by members with an agenda. In fact, anyone can suggest a rules amendment; the Committees' meetings are open to the public, periods for public comment and public hearings are routine steps; proposed rules changes are widely published and distributed; and the official records of the various rulemaking entities are public documents. Unless a flood of comments prevents it, the Advisory Committee (through its Secretary) acknowledges correspondence and later advises every correspondent of the action taken on his or her proposal. But even inaccurate perceptions have a way of overtaking reality, and they cannot go unchallenged. The Administrative Office's brochure entitled, *The Federal Rules of Practice and Procedure—A Summary for Bench and Bar*, is a good example of the ongoing effort to correct misconceptions about federal rulemaking.

To promote both the appearance and reality of openness, greater uses of technology should be explored. The 10,000+ mailing list for requests for comments on proposed rules changes usually generates only a few dozen responses. Not infrequently, public hearings scheduled for proposals are canceled for lack of interest.

There are alternate ways to reach interested persons. For example, the public hearing before the April 1994 meeting of the Advisory Committee on the Criminal Rules was broadcast on C-SPAN. Other things might be tried. Public hearings might be conducted relying on closed-circuit television. Proposed rules changes, now appearing in print media, can be made available electronically on the Internet promptly. The judiciary could establish a Gopher or World Wide Web server at minimal cost. These servers could be the source of rapid dissemination through services such as Westlaw, LEXIS, and COUNSEL–CONNECT. If the committees operate their own server, persons with connecting should be permitted to lodge their comments online for collection and transmittal to the Advisory Committee. E-mail availability networked internally within the Advisory Committee might be feasible, once the judiciary-wide network is operational.

[5] Recommendation to the Administrative Office: Electronic technologies should be used to promote rapid dissemination of proposals and receipt of comments.

The need for research: It is frequently asserted, most often by academic critics,[51] that federal rulemaking today is too dependent on anecdotal information rather than empirical research. Rules changes more often than not depend on the legal research of the Reporters combined with the informed judgment of the members of the rules committees. To make this argument is not necessarily to find fault with the model of disinterested experts as rulemakers. Nor does the argument deny the not-infrequent, well-documented instances when rulemakers have relied on empirical research.[52] Yet not enough has been done to incorporate empirical research into rulemaking on a regular basis. The major difficulties: research is expensive, it takes a long time, and the results are of doubtful utility when they come from demonstration projects rather than controlled experiments—which are rare indeed.

We cannot expect members of the rules committees to be experts in empirical research techniques, although over the years a few have been. We can expect the Reporters to be well-versed in the literature related to their expertise, including interdisciplinary writings and writings in other disciplines that have some bearing. Indeed, this ought to be a criterion for appointment of Reporters. It might also be prudent for the Reporters to recruit colleagues in other disciplines whose expertise complements their own, as a kind of informal group of advisors. Additionally, the Administrative Office and the Federal Judicial Center may be called on to gather, digest, and synthesize empirical work of other institutions. The Advisory Committees should be expected to notify these institutions about what data ought to be collected. The Federal Judicial Center, in particular, should engage in original rules-related empirical research to determine how procedures are working. Likewise, the Center is adept at field-studies and pilot programs—although, as we have observed, these are not a source of reliable data. Advisory Committees must

51 Baker, supra note 1, at 334-35. See particularly Stephen B. Burbank, Ignorance and Procedural Law Reform: A Call for a Moratorium, 59 Brooklyn L. Rev. 841 (1993).

52 Id. at 335 n.66.

take advantage of these possibilities. Finally, a program might be developed for commissioning independent studies to be performed by outside experts under contract with the Advisory Committee.

In sum: the Standing Committee ought to be able to expect that the Advisory Committees will rely to the maximum possible extent on empirical data as a basis for proposing rules changes.

> **[6] Recommendation to all the Advisory Committees: Each Advisory Committee should ground its proposals on available data and develop mechanisms for gathering and evaluating data that are not otherwise available.**

An empirical research project of national scope is taking place under the auspices of the Civil Justice Reform Act of 1990.[53] Indeed, some have suggested that the program of district-by-district plans for case management has effectively created a second track of federal rulemaking that threatens the policy goals of national uniformity and political neutrality behind the Rules Enabling Act process. The pilot programs and district plans present an unparalleled opportunity for empirical research into the effectiveness of reforms, within districts and comparing districts with other districts. The Judicial Conference delegated primary responsibility for oversight and evaluation under the Act to the Committee on Court Administration and Case Management. But, as members of the Standing Committee will recall, the Standing Committee has established a liaison with that Committee. Congress has extended the deadline for reporting to December 31, 1996.[54]

The Advisory Committee on the Civil Rules has the most direct interest in the evaluation of the delay and cost reduction plans. That Advisory Committee will be obliged to conduct its own assessment of the final report to Congress with the expectation that some local innovations in practice and procedure will deserve to be incorporated into the Federal Rules of Civil Procedure—and that less successful innovations will be abandoned, if necessary by being forbidden in the national rules. (We return below to the subject of uniformity.) The final report of the RAND study will provide the Advisory Committee with data for assessing future proposals for rules changes. In the long run, the Advisory Committees and the Standing Committee ought to be expected to learn to better utilize empirical research during the evaluation and reporting cycle. To this end, the Standing Committee should request that the Advisory Committee on Civil Rules provide a written report generalizing from the experience with the 1990 Act.

> **[7] Recommendation to the Advisory Committee on the Civil Rules: The Advisory Committee should report on and make suggestions about how data gathered from the experience under the Civil Justice Reform Act of 1990 might effectively be used in rulemaking.**

Finally, the Standing Committee ought to go about gathering information about the experiences with the phenomenon of local options in the national rules. As part of the 1993 amendments to the Federal Rules of Civil Procedure, districts were afforded the discretion to

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53 Pub. L. No. 101-650, 104 Stat. 5089 (1990).

54 Pub. L. No. 103-420, 103rd Cong., 2nd Sess. (Oct. 25, 1994).

opt-in or opt-out of various discovery rules changes. The resulting patchwork provides the equivalent of field experiments in the effectiveness of the optioned rules changes. The Federal Judicial Center has begun to collect data on the experience with opting in and out. The Standing Committee should recommend that the Advisory Committee on Civil Rules, in conjunction with the Federal Judicial Center and scholars, seek to evaluate and compare the experiences between districts that opted-in and those that opted-out. This study ought to assess the particular measures involved and offer guidance to the Standing Committee on the future appropriateness of writing local options into the national rules. There should be no bias in this inquiry: although it has long been a belief of the Standing Committee that uniform rules would facilitate a national practice, this belief should be investigated rather than treated as a shibboleth.

[8] Recommendation to the Advisory Committee on the Civil Rules: The Advisory Committee should assess the effects of creating local options in the national rules.

B. Standing Committee

Membership: The discussion about the composition of membership on the Advisory Committees will not be rehearsed here. Much of it applies to the Standing Committee.

It has been suggested that the Standing Committee should be reconstituted to consist only of an independent chair plus the chairs of the various Advisory Committees—or perhaps to have overlapping membership with the Advisory Committees, comprising the Chair plus one or two members of each Advisory Committee. Such a change would reduce the effectiveness of the Standing Committee as an independent voice (and a check), but it would increase continuity and ensure that each member is more thoroughly versed in the subject. The Chief Justice should consider each side of this balance in selecting the composition of the Standing Committee. One middle position between constituting the Standing Committee wholly from members of the Advisory Committees would be to make the Chairs full members of the Standing Committee, giving then *de jure* the roles that many have assumed *de facto* in recent years, participating in the discussion of subjects of Advisory Committees other than their own and exercising substantial influence (but not voting). We make no concrete suggestion here but again commend this possibility to the consideration of the Chief Justice.

The criticism that the committees do not "represent" the bar resonate more for the Advisory Committees, which have principal drafting responsibility, than for the Standing Committee. Therefore, we do not suggest enlarging the membership of the Standing Committee to include more attorneys. Nevertheless, it is altogether fitting and proper to take into account goals of diversity in membership.

[9] Recommendation to the Chief Justice: Appointments to the Standing Committees should reflect the personal and professional diversity in the federal bench and bar.

Assuring uniformity. The Rules Enabling Act process is supposed to achieve and maintain a uniform national system of federal practice and procedure. National uniformity has been undermined by three factors. First, the ADR movement has created a menu of "nouveaux procedures"[55] that present choices of different resolution procedures for different kinds of

55 Baker, supra note 1, at 334.

disputes. Second, the Civil Justice Reform Act of 1990 balkanized rulemaking authority. Third, the Standing Committee has followed something of a reverse King James Version of rulemaking that "taketh away" and then "giveth": the Standing Committee's Local Rules Project has harmonized local rules with the national rules, but in recent rules amendments, e.g., Fed. R. Civ. P. 26(a), the Standing Committee has authorized district courts to strike off on their own paths, even to reject the national rule.

To identify these three developments is not to pass judgment on them, although the worry often heard is that the federal courts are reverting to the pre-1938 era of local procedure. It would not be appropriate for our Subcommittee of the Standing Committee to recommend a once-and-for-all "solution" to these variables—though we have already suggested taking a good hard look at the consequences. Our exercise in taking the long-range view would not be complete if we did not at least draw attention to a worry expressed by many on the bench and in the bar. The worry is that the national rules and rulemaking are well on their way to becoming merely the lounge act and not the main room attraction in federal practice and procedure.

[10] Recommendation to the Standing Committee: The Standing Committee ought to keep the goal of national uniformity prominent in its expectations and decisionmaking. The Local Rules Project initiatives should be understood as a part of the continuing duty of the Standing Committee. There ought to be a strong but rebuttable presumption against local options in the national rules.

Redrafting proposals. The main task of drafting proposed rules is assigned to the Advisory Committees. The Advisory Committees possess the requisite expertise and serve as the focal point for suggestions and public commentary on the present and proposed rules. Rulemaking procedures and tradition, however, recognize that the Standing Committee may revise drafts of proposed rules submitted by the Advisory Committees, before or after the public comment period. Those procedures and traditions likewise anticipate that the Standing Committee will exercise self-restraint. Members of the Standing Committee should communicate concerns about style and grammar to the Chairs of the Advisory Committees before the meeting of the Standing Committee begins, to permit these matters to be rectified off the floor (it is easier to draft in small, peaceful groups) and presented to the Standing Committee in writing to facilitate careful reflection. Them meetings of the Standing Committee can focus on substance. We recognize, of course, that style and substance may be inseparable. If in the considered opinion of the Standing Committee a proposal requires substantial changes for either style or substance, the proposal ought to be returned to the Advisory Committee. This division of the rulemaking labor obliges the Standing Committee to be aware of its function and respectful of the role of the Advisory Committees.

[11] Recommendation to the Standing Committee: The Standing Committee and its members must be mindful that the primary responsibility for drafting rules changes is assigned to the Advisory Committees. Members of the Standing Committee should facilitate careful changes in language. If in the opinion of the Standing Committee a proposal requires substantial changes, the Standing Committee return the measure to the Advisory Committee for further consideration.

Reporter. The Reporter to the Standing Committee has duties different from the those of the Reporters to the Advisory Committees. The former serves as a drafter, but the limited drafting function of the Standing Committee likewise limits this responsibility of its Reporter. The Reporter facilitates communication between the Advisory Committees and the Standing Committee, especially between regular meetings of the Standing Committee, by attending the meetings of the Advisory Committees and by communicating with their Reporters. The Reporter advises the Chair, assists the Administrative Office rules committee staff, and cooperates with the Federal Judicial Center. The Reporter monitors Congressional activities that are related to rulemaking and rules proposals. The Reporter keeps the Standing Committee abreast of commentary and literature related to the rules and rulemaking. The Reporter performs outreach efforts such as appearing before bar groups to familiarize the profession and the public with the rulemaking process and particular proposals. The Reporter serves as a director for special projects, such as the Local Rules Project. The Reporter serves as an advisor to the Standing Committee, as for example with the pending challenge to the Ninth Circuit Rules jointly filed by several states' attorneys general. The Reporter, as the "scholar-in-residence" of the Standing Committee, pursues long range proposals for rulemaking.

If these duties continue to increase and become more time-consuming, the Standing Committee may eventually decide to appoint an Associate Reporter to assist the Reporter. The sense of the Subcommittee is that things have not yet reached that point. If the Standing Committee accepts the recommendation below to allow the Subcommittee on Long Range Planning to lapse as well as other recommendations made here that would add to the duties of the Reporter, then an Associate Reporter might be needed sooner rather than later. Therefore, our recommendation is open-ended.

[12] Recommendation to the Standing Committee: The Standing Committee should take cognizance of the growing demands being placed on its Reporter and eventually should consider whether to appoint an Associate Reporter.

Liaison members. Liaison members from the Standing Committee attend and have the privilege of the floor at meetings of the Advisory Committees. This innovation ought to be continued with some attention to developing a more definite role for the liaison members.

[13] Recommendation to the Chair and Liaison Members: The Standing Committee recommends the continuation of the practice of appointing liaison members from the Standing Committee to the various Advisory Committees.

Subcommittee on Style. The immediate past Chair of the Standing Committee established a Subcommittee on Style and charged it with undertaking a restyling of the various sets of federal rules. That Subcommittee appointed a Reporter who has written a manual on rules drafting. The Subcommittee regularly has contributed to the efforts of the Advisory Committees and the Standing Committee to achieve greater consistency and clarity in the language of the federal rules. The Federal Rules of Civil Procedure have gone through several drafts of complete restyling; the Appellate Rules are halfway through. What remains undetermined, however, is what to do with the sets of restyled rules. The Standing Committee needs to decide what should become of the work product of the restyling effort.

[14] Recommendation to the Standing Committee: The Standing Committee should decide what is to become of the restyled sets of federal rules.

Subcommittee on Numerical and Substantive Integration: In 1992 the Standing
Committee created a Subcommittee on Numerical and Substantive Integration. As its name
suggests, the Subcommittee is charged with two tasks: (1) explore the feasibility of integrating
subjects common to the different sets of rules and dealing with them in a single rule that would
then be considered part of all the other sets of rules and (2) develop a single numbering system
that includes all the different sets of federal rules. This Subcommittee has lapsed into desuetude.
We do not make a recommendation concerning it—beyond wishing that our own Subcommittee
suffer the same fate (on which see the next recommendation).

Subcommittee on Long Range Planning. The immediate past Chair of the Standing
Committee established a Subcommittee for Long Range Planning. Since then, the
Subcommittee has planned to find a role, without substantial long range success. The rulemaking
process *is* a form of long-range planning, which suggests that there is no need for a separate
long-range planning organ. The subcommittee has filed reports with the Standing Committee
about long range proposals already in the rulemaking pipeline and recommended the
introduction of other such proposals. It has recommended that Advisory Committees study
comprehensive packages of procedural reforms proposed by scholars, committees, and bar
groups. (In the two years since the Standing Committee adopted this recommendation, no
Advisory Committee has reported back to the Standing Committee on any of these proposals.)
The Subcommittee has attempted to monitor the work of the Judicial Conference's Committee
on Long Range Planning. It recommended and performed this self-study of rulemaking
procedures.

The term of one member of the Subcommittee as a member of the Standing Committee
expired; his vacancy on the Subcommittee has not been filled. The two remaining members
unanimously and enthusiastically recommend that with the completion of this Report the
Standing Committee disband the Subcommittee on Long Range Planning. What long range
issues remain can be handled by the member of the Standing Committee appointed as liaison
with the Judicial Conference Committee on Long Range Planning. That member, who is the
present chair of this Subcommittee, ought to be expected to become more involved in the
ongoing work of the Judicial Conference's Committee. This will include participating in the
ongoing process of refining the PROPOSED LONG RANGE PLAN FOR THE FEDERAL COURTS
(NOV. 1994 DRAFT). Another option is to reassign long range planning in rulemaking to the
reportorial function, perhaps on the occasion of creating the position of Associate Reporter, as is
anticipated in a previous recommendation.

**[15] Recommendation to the Chair of the Standing Committee: The Subcommittee
on Long Range Planning should be abolished. Any issues regarding long range
planning in the rules process ought to be reassigned to the individual member of
the Standing Committee who serves as liaison to the Committee on Long Range
Planning of the Judicial Conference and to the Reporter.**

C. Judicial Conference

The Judicial Conference performs a function somewhere between the Standing
Committee's and the Supreme Court's. For the most part, the Judicial Conference evaluates
proposals on the basis of the paper record compiled by the Advisory Committees and the
Standing Committee, and it gives thumbs up or thumbs down (the latter rarely) without making
changes. We do not make any recommendations concerning the way the Judicial Conference
deals with proposals from the Standing Committee—except for the obvious implication that a

change in the role of the Supreme Court (discussed below) would alter the role of the Judicial Conference.

D. Supreme Court

The main issue regarding the Supreme Court's participation in judicial rulemaking is whether the High Court should continue its role in the statutory scheme. Congress has designated the Supreme Court as the entity with power to promulgate rules for the federal courts, subject to the possibility of legislation during the six months between proposal and effective date.

Historically, the Court's role has been justified on two levels. First, the Supreme Court, as the highest federal court, exercises supervisory powers over the lower federal courts. Second, the prestige of the Court lends legitimacy and authority to the rules.

Commentators and individual Justices have questioned these justifications and argued that the Court's role is, in the pejorative, to serve as a "rubber stamp." Others on and off the Court have answered that the historic rationales still apply. They draw attention to the occasions when the Supreme Court has disapproved or altered draft rules and to the dissenting statements from some of the Justices regarding particular rules. There is the further, but inevitable, complication that the Supreme Court frequently is called on to interpret the rules and to decide whether they are valid under the Rules Enabling Act and the Constitution.

Justice White's statement regarding the 1993 package of amendments summed up his 31 years of experience in judicial rulemaking.[56] He concluded that the Supreme Court's "promulgation" of rules functionally amounts to a certification to the Congress that the Rules Enabling Act procedures are in place and operating properly and that the particular proposals before the Court are the careful products of that rulemaking process. The transmittal letters from the Chief Justice since then have made the same point. Admittedly, over the years different Justices have had different views of their role in judicial rulemaking, but a majority of the Court has never questioned the appropriateness of its participation. We accordingly leave to the Justices themselves the question whether there should be any change in their role.

There is one possible change worth mentioning. A few years ago, the British Embassy sent a diplomatic note to the Court concerning the implications of a proposal for service in foreign countries . The measure was returned to the Judicial Conference for further consideration. After the concerns of the foreign governments were addressed, the proposal went forward. In the aftermath of that round of rulemaking, the Justices informed the Standing Committee that they wanted to be alerted to any controversy or objections to particular proposals, as part of the written record forwarded with the rules packages. The Supreme Court may want to consider whether it wishes to invite public comments on the rules in the wake of these transmissions—for there is no other opportunity for public comment after the Advisory Committees hold hearings.

[16] Recommendation to the Judicial Conference and the Supreme Court: The Conference and the Justices should consider whether it is advisable to establish a

56 Statement of Justice White, 113 S.Ct. at 575 (Apr. 22, 1993).

procedure for a period of public notice and written comment during the Supreme Court's evaluation of proposed rules.

E. Congress

The separation of powers that is part of the structure of the Constitution is not designed for efficiency. By creating federal courts and defining their jurisdiction, Congress keeps the promise of the Preamble to "establish justice." Rulemaking is a legislative power delegated to the Third Branch. The line drawn in the statutory authorization allows rules dealing with "practice and procedure" but prohibits rules that "abridge, enlarge or modify any substantive rights."57 On the judicial side, this distinction requires careful discernment.

Congress has the power to adopt rules and procedures for the federal courts.58 "May" does not imply "should." The wisdom behind the Rules Enabling Act procedures is deep. The Third Branch has of the expertise to write rules of practice and procedure. Respect for the independence of the coordinate judicial branch, and the overarching values that independence protects, also counsels moderation in legislative promulgation or amendment of rules.

The Judicial Conference has the responsibility to represent before Congress the interests of the federal courts and the citizens they serve. The Standing Committee has the responsibility to aid the Judicial Conference in performing this role. The Standing Committee should continue to monitor legislative activity and serve as a resource to the Judicial Conference to remind Congress of the values behind the Rules Enabling Act. Existing links between the Advisory Committees (and the AO) and Members of Congress and committee staffs should be maintained and, if possible, reinforced. It may be necessary to remind Congress, too, that the 1988 legislation increasing the time needed to amend a rule affects the relation between legislative and judicial branches in the way we discussed above.

[17] Recommendation to the Standing Committee: The Standing Committee must be vigilant and alert to rulemaking initiatives in Congress and must be prepared to assist the Judicial Conference in the Conference's efforts to protect the integrity of the Rules Enabling Act procedures.

F. Miscellaneous

The rulemaking calendar/cycle: The debate among those involved in federal rulemaking and observers is whether the rulemaking cycle is too long and cumbersome; critics of the status quo described above insist that we should rethink the relative roles of the Advisory Committees, the Standing Committee, the Judicial Conference, the Supreme Court, and Congress in order to streamline the process.

****[To be written]****

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57 28 U.S.C. §2072 (a) & (b).

58 U.S. Const. art. III, §1.

Conclusion

The Subcommittee's overall impression of federal rulemaking echoes the hackneyed phrase, "If it ain't broke, don't fix it." There is nothing "broken" about the procedures for amending the federal rules. Federal court practices and procedures "continue to be the outstanding system of procedure in the world,"59 admired and emulated by the state court systems and by the court systems of other countries. The procedure that has evolved for maintaining that system of rules deserves substantial credit for this. Nevertheless, we offer these constructive criticisms and recommendations.

Our hope for this Self-Study Report is that it will assist the Standing Committee to consider and then recommend adjustments in the federal judicial rulemaking mechanism.

Respectfully submitted,

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59 Charles Alan Wright, Amendments to the Federal Rules: The Function of a Continuing Rules Committee, 7 Vand. L. Rev. 521, 555 (1954).