Agenda
Advisory Committee on Appellate Rules
Meeting - October 19, 20, and 21, 1995

I. Approval of Minutes of April 1995

II. ACTION ITEMS

A. Review of restylized rules 1-23 (Materials previously sent)

B. Initial discussion of restylized rules 24-48 (Materials previously sent)

C. Review of rules 27, 28, and 32. Rules 27, 28, and 32 were submitted to the Standing Committee with a request for publication. The request was denied and the rules referred back to the Advisory Committee for further work.

D. Appointment of a liaison for each circuit in accordance with the 1987 Judicial Conference Committee Procedures (Oral report)

III. DISCUSSION ITEMS

A. Marketing the restylized rules

B. Self-study prepared by the Long Range Planning Subcommittee of the Standing Committee

C. Role of the Committee Notes

D. FRAP 47 and uniform numbering of local rules

E. Report from the subcommittee on sanctions (Oral report)

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Agenda Item I

MINUTES OF THE MEETING OF THE ADVISORY COMMITTEE ON APPELLATE RULES APRIL 17 & 18, 1995

Judge James K. Logan called the meeting to order at 8:30 a.m. in the Ritz-Carlton Hotel in Pasadena, California. In addition to Judge Logan, the Committee Chair, the following Committee members were present: Chief Justice Pascal Calogero, Judge Will L. Garwood, Judge Alex Kozinski, Mr. Michael Meehan, Mr. Luther Munford, Mr. John Charles Thomas, and Judge Stephen Williams. Mr. Robert Kopp attended the meeting on behalf of Solicitor General Days. Judge Alicemarie Stotler, the Chair of the Standing Rules Committee attended. Mr. Robert Hoecker, the Circuit Executive for the Tenth Circuit and that circuit's former clerk, and Ms. Cathy A. Catterson, the Clerk of the Ninth Circuit, attended on behalf of the clerks. Professor Carol Mooney, the Reporter for the Advisory Committee was present. Mr. Peter McCabe, the Secretary, and Mr. John Rabiej, the Chief of the Rules Committee Support Office were present along with Ms. Judith McKenna of the Federal Judicial Center, and Mr. Joseph Spaniol, consultant.

Judge Logan began by introducing the new member, Chief Justice Pascal Calogero of the Louisiana Supreme Court. Judge Logan welcomed Chief Justice Calogero to the Committee and introduced the other members of the Committee.

The minutes of the October 1994 meeting were approved as submitted.

Mr. Munford pointed out that the minutes state that the subcommittee on sanctions should prepare a report for the fall 1995 meeting. Because Mr. Munford is the sole remaining member on that subcommittee, he requested that Judge Logan appoint additional members, especially a judicial member, to the subcommittee. Judge Logan asked Professor Mooney to work with Mr. Munford but promised to appoint at least one additional member.

Mr. Rabiej reported that the Supreme Court was still considering the rule amendments approved by the Judicial Conference last September. Mr. Rabiej stated that the Supreme Court decided to change "must" back to "shall" in all the rules under consideration so that the language of the rules would be uniform. Whether a consistent use of "must" would be acceptable to the Court remains uncertain. Having changed "must" back to "shall," the Supreme Court planned to send the rule amendments to Congress by May 1.

I. RULES PUBLISHED SEPTEMBER 1, 1994

Judge Logan asked the Committee to turn its attention to the rules that had been published for comment on September 1, 1994. The comment period closed on February 28, 1995. Judge Logan stated that the Advisory Committee's

task was to consider all the comments and decide whether to amend the published rules.

Rule 21 - Mandamus

The published amendments provide that the trial judge is not named in a petition for mandamus 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 a petition. The only issue that had been controversial among the Committee members was whether a trial judge should have the right to respond to a petition for mandamus. Some members of the Advisory Committee, as well as some members of the Standing Committee, believe that a judge should have the right to respond.

The reporter summarized the post-publication changes that she suggested in her redraft. First, the draft was amended to state directly that a trial judge may not respond unless requested to do so by the court of appeals. In the published rule the judge's inability to participate without court of appeals authorization was implicit but not stated directly except in the Committee Note. Second, the redraft authorizes a court of appeals to "invite" the judge's participation as well as order it. The only other changes suggested were stylistic.

A motion to adopt the redraft was made and seconded. The motion passed by a vote of 7 to 2.

In a recent circuit court proceeding one of the parties asked the trial judge to write to the court of appeals concerning the proceeding. An opposing party pointed out that the judge's letter was not a pleading to which the party could respond. The redraft permits a court of appeals to "invite" the trial judge to respond to a petition for mandamus. When extending such an invitation, a court of appeals may also authorize the opposing party to respond.

One member expressed agreement with the decision to delete the trial judge as a party, but wanted the judge to have notice of the proceeding. Another member responded that the philosophy of the published rule is that the trial judge is no longer the respondent. The focus is shifted to the real parties in interest.

Judge Logan agreed that the rule should ensure that notice of a mandamus petition is given to the trial judge. He suggested that language might be added at line 84 of the redraft. Lines 71-72 permit a court to deny a petition without an answer, but lines 72-74 state that in all other instances the respondent must be ordered to answer. Lines 82-84 require the clerk to serve a notice to respond on all persons directed to answer. Judge Logan suggested that a trial court does not

need notice of a petition if the court of appeals denies it without ordering any response. Therefore, he suggested that line 84 could require service on the trial judge only when there is an order to respond. Since the majority of mandamus petitions are disposed of without requiring a response, some members of the Committee supported this suggestion on the assumption that the trial judge need not be concerned about such petitions.

Other members of the Committee disagreed. They said that if a judge is to be given notice, it would be simpler and more efficient if the notice is given at the inception of the proceeding and in all cases. Therefore, it was agreed to amend line 15 so that notification is given to the judge when the petition is filed. In order to be consistent with the fact that the judge is not treated as a respondent, the Committee decided to require that a copy of the petition be sent to the clerk of the trial court rather than directly to the judge.

A motion was made and seconded to amend line 15 to include a new sentence as follows: "The party shall also file a copy with the clerk of the trial court." The motion passed with 8 members voting in favor of it, none in opposition, and 1 abstention.

Judge Stotler asked whether the language at lines 78-81 of the redraft would permit a trial judge who had received notice of the proceeding to request permission to participate. A trial judge may have information that should be brought to the court's attention and the judge may want to seek permission to do so. The Committee consensus was that the language would permit a trial judge to request authorization to respond to a petition.

The newly approved amendment requires a petitioner to file a copy of a petition for mandamus with the trial court. Filing a copy of the petition with the trial court clerk will result in the docketing of the petition. The Committee considered whether it should require the court of appeals to send a copy of its order disposing of the petition to the trial court. Some members of the Committee believe that it is unnecessary to do anything other than notify the trial judge of the commencement of the proceeding. If the court of appeals orders the trial court to do something, the trial court will receive notice of that order. In other instances, notice is unnecessary. The majority of the Committee, however, believe it better to ensure that the trial court has notice of both the beginning and ending of a mandamus proceeding. A motion was made and seconded to add a new paragraph (7) after line 97. The new paragraph would say: "The circuit clerk shall send a copy of the final disposition to the clerk of the trial court." The motion passed by a vote of 7 to 2.

The numbered paragraphs of subdivision (b) were also rearranged. A motion was made and seconded to move paragraph (2) of the draft below

paragraphs (3) and (4). The motion passed with 6 voting in favor of it, no one opposing it, and 3 abstentions.

Rules 25 and 26 - Filing and Service

The published amendments to Rule 25 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 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.

The published amendment to Rule 26 gives a party who must respond within a specified time after service of a document 3 additional days to respond when service is by "reliable commercial carrier," just as a party has a 3-day extension when service is by "mail."

Some of the commentators suggested that the rules need not permit the use of commercial carriers. As a preliminary matter Judge Logan asked whether there was any sentiment on the Committee to prescind from the possible use of commercial carriers. Only one member spoke in favor of omitting use of commercial carriers.

A member of the Committee noted that one of the commentators suggested that there should be a specific preemption of local rules. Because that suggestion is not specific to Rule 25, the member asked that it be discussed at a later time.

One of the commentators on Rule 26 stated that the proposed amendment highlights the fact that there is no clear dividing line between personal service and other kinds of service. If a messenger service can be used to make personal service on a party residing in the same city as the person making service, it is not clear that using a private courier service to make service on a party residing in another city is not personal, especially if the carrier leaves the document with a "clerk or other responsible person." Yet the proposed Rule 26(c) gives a 3-day extension when service is by reliable commercial carrier, but not when it is personal. To the extent that it is unclear whether service is personal or by commercial carrier, it is unclear whether the 3-day extension is applicable or not.

One possible solution would be to require use of next-day service and to provide only a one-day extension when commercial carriers are used. Then in the ordinary course of events there would be no confusion. Personal service is

complete upon delivery, but service by commercial carrier is complete upon delivery to the carrier. If the carrier makes delivery the next day, it would be pragmatically irrelevant to the recipient whether service was personal or by commercial carrier; the time for response would (as a practical matter) be counted from the day of receipt. One problem with that approach is that the United States Postal Service also provides next-day service and service in that manner should be treated like next-day service provided by a commercial carrier. Another problem is that there are places in the ninth circuit where next-day service is not available.

A motion was made and seconded to adopt yet another approach -- to eliminate subdivision (c) and any extension of time. Eliminating the extension following service by mail might provide an incentive to use more expeditious forms of service. If a paper is served by mail and takes several days to arrive and the response time is computed from the date of service, it is likely that a motion to extend the response time will be made and granted. To avoid such a delay, the serving party has an incentive to personally serve the paper or to use expedited commercial or postal delivery. The motion failed by a vote of 3 in favor and 6 in opposition.

Another possible solution was considered -- to provide the 3-day extension whenever a document is not delivered to the party being served on the same day that it is "served." The 3-day extension was created because service by mail is complete on the date of mailing. Since the party being served by mail does not receive the paper on that date, an extension is provided. Making the extension available whenever the party does not receive the document on the date it is served achieves the original objective and avoids the confusion arising from the need to know the type of service.

A motion was made and seconded to adopt that approach. The motion was to amend Rule 26(c) to state that when a party must act within a "prescribed period after service of a paper upon that party, unless the paper is delivered on or before the date of service stated in the proof or acknowledgement of service" three days are added to the prescribed period. Since the party being served will receive a copy of the proof of service which states the date and manner of service and the party will know when he or she receives the document, the party should have no difficulty knowing whether he or she has the benefit of the 3-day extension.

The discussion made it clear that the rule should not tie the extension to whether or not the paper is delivered on or before the day it is "filed." A paper may be "served" before it is filed, as when a paper is mailed to the court for filing and hand-delivered to opposing counsel on the day of mailing. The party being served would not know the filing date and would need to contact the court

to ascertain that date.

The motion passed by a vote of 8 to 1.

Lines 8 through 10 of the redraft addressed another problem raised by the comments. The problem 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 by mail 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? Assume that 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 and if the separate 3 day period is governed by 26(a), the appellee's brief is due Wednesday (30 days ends on Friday, then the additional 3-day period is computed excluding weekend days). On the basis of a recent D.C. Circuit case construing the parallel civil rule, Fed. R. Civ. P. 6, the Committee decided that the 3-day extension should mean 3 calendar days so that weekends and holidays are counted. A motion was made and seconded to adopt the substance of the suggestion but to do so by omitting the sentence at lines 8-10 of the redraft and inserting the word "calendar" before the word "days" on line 5. The motion passed by a vote of 6 to 3. The consensus was that the Committee Note should be amended to explain that the insertion of "calendar days" is intended to clarify the relationship of the 3-day extension with subdivision (a).

Having completed its discussion of Rule 26, the Committee returned to Rule 25.

The published rule made the mailbox rule applicable when a brief or appendix is mailed on or before the last day for filing by First-Class Mail. In order to permit the use of Express Mail or Priority Mail, language was added that makes the mailbox rule applicable not only to First-Class Mail but also to any other "class of mail that is at least as expeditious." The Committee did not want to require use of Express or Priority Mail but did not want to preclude their use.

Several commentators opposed the provision requiring that when feasible service should be accomplished in as expeditious a manner as the manner used to file the paper with the court. An equal number of commentators expressed support for the change. The purpose of the change was to preclude a party from using an overnight courier to file with the court but serving opposing parties by some significantly slower method, sometimes in an obvious effort to shorten the response time available to the party being served. This is a special problem when the time to respond runs from the date of filing rather than the date of service. The redraft eliminated the "when feasible" language and stated that "when

reasonable considering such factors as distance and cost, service on a party must be by a manner at least as expeditious as the manner used to file the paper with the court."

One member stated that the standard, even in the redraft, is too vague. He favored the approach suggested by one of the commentators that the requirement of comparable service should apply only when a document is hand-delivered to a court for filing. Another member asked how the provision would be enforced and suggested deleting the language from the rule and moving it to the Committee Note. Another member indicated that he envisioned the provision being invoked only when a party who had been the victim of "slow service" sought an extension or there was an argument about the timeliness of a responsive document.

Another member favored the new language but suggested adding to it. He suggested that one of the factors that should bear upon the reasonableness of using comparable service is the immediacy of the relief requested. The method of service is not nearly so critical with a brief, where the response time is relatively long, as it is with a motion.

A motion was made and seconded to amend line 96 as follows: "considering such factors as immediacy of the relief sought, distance, and cost . . ." The motion passed by a vote of 8 to 1.

Four commentators said that using the term "reliable commercial carrier" was undesirable because disputes about "reliability" are likely to arise. In response to those commentators, and to coordinate with the amendments to Rule 26 regarding the 3-day extension of time, a motion was made to amend the language at lines 35 and 36 on page 46. The motion would make the mailbox rule applicable if a brief or appendix is dispatched to the clerk on or before the last day for filing "for delivery within 3 calendar days by a third-party commercial carrier." The motion was seconded and unanimously approved. The reporter was instructed to make any coordinating changes necessary, e.g. at lines 96 and 97.

On page 50, the second sentence of the shaded material in the Committee Note accompanying subdivision (c) was deleted upon motion and unanimous approval.

The Committee adjourned for lunch at 12:15 and reconvened at 1:30 p.m. Upon reconvening, the Committee was joined by Bryan Garner, Esq., the consultant to the Style Subcommittee of the Standing Committee, and by a visitor, Miriam Krinsky of the United States Attorney's Office in Los Angeles.

Judge Logan asked Mr. Garner to review the changes to Rules 21, 25, and

26, that were approved by the Committee during the morning session, and began the afternoon session with discussion of Rule 27.

Rule 27 - Motions

Judge Logan asked the Reporter to explain the changes made in the redraft. She noted that at page 95 lines 67 through 79 are new. These lines, like the Department of Justice's original draft, expressly authorize inclusion of a request for affirmative relief in a response to a motion. The provision states that the time for response to the new request and for a reply to that response are governed by the general rule.

The reporter further noted that at page 96 lines 107-109 are new. The rule permits a court to act upon a motion for a procedural order without awaiting a response from the opposing party. The published rule stated that if timely opposition to a motion is filed after the motion is granted, the opposition does not constitute a request to reconsider, vacate, or modify the disposition. The new language states that a motion requesting such relief must be filed. Although that was implicit in the published draft, the redraft makes it explicit.

Two changes were made in the Committee Note in response to comments. Paragraph (a) of Subdivision (a) permits a reply to a response and states that a reply generally must not "reargue propositions presented in the motion or present matters that do not reply to the response." The first addition to the Committee Note recognizes that matters relevant to a motion sometime arise after the motion is filed. The Note states that treatment of such matters in the reply is appropriate even though strictly speaking it is not in reply to the response.

As previously noted, subdivision (b) permits a court to dispose of a procedural motion without awaiting a response from the opposing party. If the party opposing the motion files the response shortly before the court issues its order, the party may be uncertain whether the court considered the response before issuing the order. It would be helpful to the party deciding whether to request reconsideration to know whether the court considered its response. The second addition to the Committee Note states that if a court has received and considered the response before issuing its order, it is desirable for the court to indicate that it has done so.

In keeping with the procedure followed in the morning, the changes in the redraft were treated as having the status of a motion made and seconded. The changes were approved by a vote of 7 in favor and none in opposition.

Two commentators said that the time periods for responding to a motion (7 days) and for replying to a response (3 days) are too short. One of those

commentators suggested providing longer response periods for "dispositive" motions and retaining the shorter time periods for "non-dispositive" motions. A member of the Committee agreed that the time periods are too short for substantive motions but because of the difficulty of distinguishing between substantive/non-substantive or dispositive/non-dispositive motions, he rejected the idea of different time periods depending upon the nature of the motion. He suggested lengthening the time for the initial response to 10 days (page 94, line 53) and for the reply to 5 days (page 95, line 83).

Although some members of the Committee favored different time periods for substantive motions, the Committee decided that it would be better to have a single set of time limitations; having different time limits depending upon the nature of the motion would create difficulties for the clerk's office. It was further noted that as to procedural orders, subdivision (b) permits the court to act prior to receipt of a response. A motion was made and seconded to change the time for an initial response from 7 to 10 days. The motion passed by a vote of 5 to 3.

A motion was then made and seconded to change the time for filing a reply from 3 to 5 days. That motion was approved by a vote of 8 to 1.

The following style changes were also approved:

1. On page 95, lines 68 and 71, the word "request" was changed to "motion."
2. On page 96, line 90, the words "determination" was changed to "disposition."
3. On page 97, lines 112-114, the words "request for relief that under these rules may properly be sought by motion" were deleted and replaced by the word "motion", and at lines 114-115, the words "a single judge must" were deleted and replaced by the word "may".
4. On page 97, lines 118 through 122 were amended to change from the passive to the active voice. At line 118, the words "only the court may act on" were inserted after the word "that", and at line 119, the words "must be acted upon by the court" were deleted. At line 120, the words "court may review the" were inserted after the word "The" and before the word "action". At lines 121-122, the words "may be reviewed by the court" were stricken.

The Committee did not believe that republication would be necessary because the post-publication changes, including the changes in time periods, were not significant. The consensus was that all the suggested changes are logical outgrowths of the published rule.

Style Changes to Rules 21 and 26

Mr. Garner, having had the opportunity to review the changes approved during the morning session, suggested the following stylistic changes, all of which were approved.

1. Rule 21
   a. At page 20, line 11, and page 24, line 88, the word "must" was changed to "shall" in light of the Supreme Court's recent decision regarding the rules before it. In contrast at page 24, line 95, and page 25, line 111, the "must" was retained because "shall" should be used only when the subject of the sentence is the actor who has a duty.
   b. At page 21, lines 27 through 29 were combined as subparagraph (A) and the words "The petition must" were inserted at line 30 before the word "state." At page 22, line 21, the words "The petition must" were inserted before the word "include."
   c. At page 24, line 87, the word "briefs" was changed to "briefing" and the word "are" was changed to "is".

2. Rule 26
   a. At page 65 line 2, the word "Whenever" was changed to "When"; at line 3, the words "do an" were omitted.
   b. At page 65 the words "3 calendar days are added to the prescribed period" were deleted from lines 5 and 6 and inserted in line 4 after the word "party."

Rule 28 - Briefs

Rule 28 as published was amended to delete the page limitations for a brief and to make the correct cross-reference in subdivision (h) to paragraphs in subdivision (a). The length limitations are being moved to Rule 32. The only change made in the redraft as a result of the comments on the published amendments was to note that subdivision (g) is reserved and to leave the current labels on the remaining Rule 28 subdivisions. Those changes were approved by the Committee unanimously.

Mr. Garner, however, suggested a number of style revisions in subdivision (h) all of which were approved. As amended, subdivision (h) reads as follows:

> (h) *Briefs in a Cases Involving a Cross-Appeals.* If a cross-appeal is filed, the party who ~~first~~ files a notice of appeal first, or if ~~in the event that~~ the notices are filed on the same day, the plaintiff in the proceeding below is ~~shall be~~ deemed the appellant for the purposes of this rule and Rules 30,

~~and~~ 31, and 34, unless the parties agree otherwise ~~agree~~ or the court ~~otherwise~~ orders otherwise. The appellee's brief must ~~of the appellee shall~~ conform to the requirements of Rule 28 ~~subdivisions~~ (a)(1)-(7) ~~(6) of this rule~~ with respect to the appellee's cross-appeal as well as respond to the appellant's brief, ~~of the appellant~~ except that a statement of the case need not be made unless the appellee is dissatisfied with the appellant's statement ~~of the appellant~~.

Rule 32 - Form of Briefs and Other Papers

Judge Logan began the discussion of Rule 32 with the topics that drew the most comment. He asked the Committee to initially make substantive decisions on the issues rather than deal with specific language.

1. Double-sided printing

Thirty-one commentators opposed double-sided printing of a brief or appendix. Judge Logan suggested that any reference to printing on both sides be eliminated. A motion was made and seconded to eliminate the reference. The motion passed unanimously. A motion was then made to go one step further and prohibit printing on both sides, at least for 8-1/2 by 11" briefs. That motion passed by a vote of 7 to 1.

2. Proportional type

Nine commentators expressed opposition to the use of proportional type; another 15 commentators would delete the preference for proportional type. A motion was made and seconded to eliminate the preference for proportional type. The motion passed unanimously. A motion was then made and seconded to include a preference for monospaced type. The motion failed by a vote of 1 in favor and 8 in opposition.

Twenty-seven commentators said that if proportional type is permitted it should be required to be larger than 12 point. Most of the commentators said that it should be at least 14 or 15 point. A motion was made and seconded that the minimum size should be 14 point. Some members of the Committee believed that the published rule may have been too subtle in using word limitations to both eliminate the incentive to squeeze as much material as possible on a page and to free practitioners to use the most attractive and most legible type. Yet other members of the Committee believed the word limitation approach is sufficient and should be retained. They believed that the change to a pure word limit would eliminate the incentive for game playing and the sole remaining incentive would be to make a brief legible. Reference was made to the font samples included in Judge Easterbrook's letter to the Committee. Some members of the

Committee believed that a 14 point minimum would be too large in some fonts. The motion to require a minimum of 14 points passed by a vote of 6 to 2.

3. Monospaced type

Nineteen commentators said that the monospaced type permitted under the rule should 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 cpi. A motion was made and seconded to change to 10 cpi. The motion failed by a vote of 3 to 6. A motion was then made and seconded to specify no more than 10-1/2 cpi. The motion was approved.

4. Length

Regarding the length limitation, twelve commentators opposed use of word limitations (both total words per brief and average number of words per page); one other opposed applying word limits to *pro se* litigants proceeding *in forma pauperis*. Another five commentators implicitly rejected the word limitations by saying that the rule should use page limits. A motion was made to use word counts. The motion passed unanimously.

One commentator suggested that the word counts should be replaced by a character count because a character count eliminates the variations resulting from the different word counting methods used by software programs. Although various word processing programs count words differently, a difference of 200 or 300 words per brief is insignificant compared to the variation possible under the current rule. No motion was made to use a character count.

Having decided to retain word limits, Judge Logan asked whether the limits should be increased. Seven commentators objected to the 12,500 word limit in the published rule on the ground that it reduces the length below the traditional 50 page limit. The commentators suggested increasing the total number of words to 14,000 or 14,500. A motion was made and seconded to raise the limit to 14,000 words.

Some members of the Committee believed that even if 12,500 words is shorter than the traditional 50 page brief in pica type, that 12,500 words is sufficient. A local rule in the D.C. Circuit limits a principal brief to 12,500 words and that length seems sufficient. Other members of the Committee were concerned that some cases warrant a longer brief and that it is more of a problem to cut short helpful discussion than to have some briefs longer than need be. A

longer, more complete brief can be of significant assistance to the court.

The Committee examined some of the sample brief pages prepared by Microsoft using proportional typefaces and complying with the 280 word per page limit in the published rule. The pages were attractive and easily legible. If each page has no more than 280 words, a 50 page brief would have 14,000 words. Although some members continued to support 12,500 as sufficient, it was argued that it would be better to provide more leeway because of the variation in word counting methods.

The motion to increase the word limit to 14,000 passed by a vote of 7 to 1.

The next issue considered was retention of the 280 words per page limit. Retention was unanimously approved.

5. Certification of compliance & safe harbors

Three commentators objected to the requirement that a brief must include a certification that it does not exceed either the total word count or the limit on the average number of words per page. The commentators stated that the requirement is demeaning. The Committee approved retention of the requirement. The person preparing a brief has easy access to the information through use of the computer equipment used to prepare the brief; the clerk's office does not.

A certification of compliance is not required if the brief falls in the safe harbor. The next issue considered was whether to retain the safe-harbor provisions. If the safe-harbor provisions are generous enough, a person preparing a brief using a typewriter will use the safe harbor and will not be forced to manually count words in order to make certification.

Ms. Catterson, the Clerk of the Ninth Circuit, stated that her office had flow-charted the operation of the published rule to indicate all the various requirements and the things that would need to be checked by a deputy clerk. On the basis of that exercise, she recommended that all briefs contain a certification of compliance with the rule and indicate the method of compliance being used.

The Committee first decided, by a vote of 7 to 1 with 1 abstention, to delete the safe-harbor provisions for proportional type and retain a safe harbor only for monospaced type.

The discussion then turned to the length of a monospaced brief permitted under the safe-harbor provision. The published rule set the maximum length under the safe harbor for a principal brief at 40 pages. A member of the

Committee argued that it should be 50 pages. He argued that the primary method of "cheating" under the current length limitation is the use of proportional type; if the safe harbor applies only to monospaced briefs (with a typeface producing no more than 10-1/2 cpi), he asked why the length should be any less than 50 pages. Another member responded that in addition to the use of small proportional type, single-spaced footnotes and quotations are also used to pack more material into a brief. Most members of the Committee agreed that the safe harbor should be shorter than 50 pages. A motion was made to retain a 40 page limit for the safe harbor. The motion passed by a vote of 6 to 3.

6. Inclusion in an appendix of electronically retrieved opinions

Seven commentators objected to that portion of the Committee Note stating that decisions retrieved electronically from Lexis or Westlaw may not be included in an appendix. If an opinion is unpublished or not yet published but citation to it 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. Paragraph (a)(7) of the published rule said that an appendix may include a legible photocopy of any document found in the record or of a printed court or agency decision. The language limiting inclusion to "printed" decisions was the source of the objections.

One member asked why a Rule 30 appendix would ever include copies of decisions in other cases. It was pointed out that although the classical appendix contains only documents pertaining to the case being appealed, in some circuits it is common practice for a lawyer who believes that he or she has found some new authority relevant to the case to prepare an appendix to the brief containing that authority. A motion was made to delete the words "or of a printed court or agency decision" from paragraph (a)(7). The motion passed by a vote of 8 to 1. A further problem was, however, noted. Even as to the decision being appealed, it is far more convenient to have the published decision, if any, rather than the typewritten decision. A motion was made to amend the Committee Note to state that if any opinion that is included in the appendix has been published, a copy of the published decision should be provided.

7. Margins

Five commentators opposed having different margins depending upon whether a brief is prepared with monospaced or proportional type. The draft rule prescribed different margins because proportional type is easier to read if the line length does not exceed 6 inches. Given the change to requiring a minimum of 14 point proportional type, a motion was made to have side margins of not less than 1 inch regardless of the type style used. The motion passed by a vote of 6 to 3.

8. Requiring a brief to lie flat when open

Four commentators opposed requiring a brief to lie flat when open. A motion was made to eliminate that requirement. The motion failed by a vote of 2 in favor, 6 opposed and 1 abstention. A motion was made to require a brief to lie "reasonably" flat when open. The motion passed.

9. Pamphlet briefs

Given the infrequent use in the courts of appeals of pamphlet briefs, a motion was made to simplify the rule by eliminating pamphlet briefs. The ninth circuit eliminated pamphlet briefs because the circuit's rules committee believed that a party submitting a pamphlet brief has an advantage. Some members of the Advisory Committee concluded, on the same basis, that pamphlet briefs should be encouraged; while other members of the Committee concluded that pamphlet briefs should be prohibited because they can be used only by parties with sufficient economic resources to pay for the printing. A motion to eliminate pamphlet briefs passed by a vote of 7 to 2.

10. 300 dots per inch

Six commentators recommended deleting the requirement that briefs be printed with a resolution of 300 dots per inch or more. The commentators stated that the requirement is too technical and that requiring "legibility" is sufficient. A motion to eliminate the 300 dots per inch requirement passed unanimously. But the Committee favored inserting a statement in the Committee Note that would encourage the use of print with a resolution of 300 dots per inch or more.

11. Serifs, bold type, underlining, and italics

Several commentators objected to requiring type with serifs. A motion was made to eliminate that requirement. The motion passed by a vote of 5 in favor, 2 in opposition, and one abstention.

Other commentators objected to the prohibitions on use of bold type, underlining, and italics. The objection was that the rule should not be concerned with such technical matters and should leave such matters to the discretion of the person preparing the brief. Mr. Garner pointed out that the misuse of bold type, etc. is very distracting and should be controlled. A motion was made to eliminate (a)(4) and (5). The motion passed by a vote of 6 to 3.

12. Preemption of local rules

The question of whether Rule 32 should include a provision preempting all

local rules dealing with brief length, printing and format was postponed until later discussion. Rule 47 says that a local rule cannot be inconsistent with the national rules. But a question remains with regard to local variations that are not squarely inconsistent with the national rule. For example, on the basis of the preceding discussion, Rule 32 will permit both monospaced and proportional typefaces but will not express a preference for either one. A local rule that expressed a preference for monospaced type would not be inconsistent with the national rule. Should the national rule, in the interest of nation-wide uniformity, prohibit any such local rule? That question was postponed for later discussion because it has broad-ranging impact.

Given the breadth of the changes approved by the Committee, the sense of the Committee was that Rule 32 should be republished for comment.

The chair thanked the Committee for its work on the rule and promised that he and the reporter would prepare a new draft that evening for the Committee's consideration the next morning.

The Committee adjourned for the evening at 5:15 p.m.

The Committee reconvened at 8:30 a.m. on April 18.

The chair and reporter had prepared the following redraft of Rule 32 for the Committee's consideration.

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

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

(1) *In General.* ~~Briefs and appendices~~ A brief may be produced by ~~standard typographic printing or by any duplicating or copying process which produces~~ any process that results in a clear black image on white paper, including typing, printing, or photocopying. The paper must be opaque and unglazed, and only one side may be used. Carbon copies ~~of briefs and appendices may not be submitted without~~ may be used only with the court's permission ~~of the court, except in behalf of parties allowed to proceed~~ or by pro se persons

proceeding 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 7-1/6 inches. Those produced by any other process shall be bound in volumes having pages 8-1/2 by 11 inches and type matter not exceeding 6-1/2 by 9-1/2 inches with double spacing between each line of text. In patent cases the pages of briefs and appendices may be of such size as is necessary to utilize copies of patent documents.~~

(2) *Typeface.* Either a proportionately spaced typeface of 14 points or more, or a monospaced typeface of no more than 10-1/2 characters per inch may be used in a brief. A proportionately spaced typeface is one that has characters with different widths. The design must be in roman, non-script type. A monospaced typeface is a typeface in which all characters are the same width.

(3) *Paper Size, Line Spacing, and Margins.* A brief must be on 8-1/2 by 11 inch paper. The text must be double-spaced, but quotations more than two lines long may be indented and single-spaced. Headings and footnotes may be single-spaced. The side margins must be at least 1 inch, and the top and bottom margins must be at least 1-1/4 inch.

(4) *Length.*

(A) Proportionately spaced briefs. A principal brief must not exceed 14,000 words, and a reply brief must not exceed 7,000 words. No brief may have an average of more than 280 words per page, including headings, footnotes, and quotations.

(B) Monospaced or typewritten briefs. A brief prepared in a monospaced typeface must either:

(i) comply with the word counts, both total and average per page, for a proportionately spaced brief; or

(ii) not exceed 40 pages for a principal brief and 20 pages for a reply brief.

(C) Exclusions. Word and page counts do not include any of the following: corporate disclosure statement, table of contents, table of citations, certificate of service, or any addendum containing statutes, rules, regulations, etc.

(D) A party may move for permission to exceed the brief lengths established by this rule.

(5) *Certificate of Compliance.* The brief must be accompanied by a certificate of compliance with (A) or (B) above. A party preparing this certificate may rely on the word count of the word-processing system used to prepare the brief.

(6) *Appendix.* An appendix must be in the same form as a brief, but may include a legible photocopy of any document found in the record.

~~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.~~

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

(A) the number of the case centered at the top;

~~(1)~~ (B) the name of the court ~~and the number of the case~~;

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

~~(3)~~ (D) 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)~~ (E) the title of the document, identifying the party or parties for whom the document is filed ~~(e.g., Brief for (Appellant, Appendix)~~; and

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

(8) *Binding*. A brief or appendix must be stapled or bound in any manner that is secure, does not obscure the text, and permits the document to lie reasonably flat when open.

(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 at 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.~~

(1) *Motion*. The form for a motion is governed by Rule 27(d).

(2) *Other Papers*. Other papers, including a petition for rehearing and a suggestion for rehearing in banc, and any response to such petition or suggestion, must be produced in a manner prescribed by

subdivision (a), but paragraph (a)(6) does not apply, and

(A) consecutive sheets may be attached at the left margin; and

(B) a cover is not necessary if the paper has a caption that includes the case number, the name of the court, the title of the case, and a brief descriptive title indicating the purpose of the paper and identifying the party or parties for whom it is filed.

The Committee made several additional changes.

Because use of carbon paper is so rare, a motion was made to eliminate any reference to carbon copies. Because the rule prohibits the use of carbon copies unless the court grants permission to use them, some members of the Committee favored retention of the rule provision. The motion to eliminate the sentence at lines 7 through 10 of the redraft passed by a vote of 6 to 3.

With regard to the definitions of proportionately spaced typeface and monospaced typeface, it was noted that it is incorrect to omit the notion of advance width. Even in Courier the characters are different widths; an "i" is narrower than a "w". The real difference between monospaced and proportionately spaced typefaces is that a monospaced type advances the same width across the page for each letter regardless of the width of the character. The sentences at lines 22 through 25 were rewritten as follows:

> "A proportionately spaced typeface has characters with different advance widths. . . . A monospaced typeface has characters with the same advance width."

The Committee asked that the Committee Note be amended to explain the notion of "advance width" and to make it clear that use of pica type on a standard typewriter is a monospaced typeface having 10 characters per inch. Although the Committee had voted to require that type be "roman" (meaning non-italic), the Committee also requested that the Note should make it clear that italics may be used for case names or occasional emphasis. Typographers agree that use of italics is preferable to underlining, which distracts the reader.

The Committee approved by divided vote (5 to 4) deletion of (a)(4)(D); it provides that a party may move for permission to exceed the length limits

established in Rule 32. Several members of the Committee believed that inclusion of such language looks like an invitation to file such a motion and it is unnecessary. Although a motion may be filed without any such authorizing language, the dissenting members believed that retention of the language clarifies how one should seek permission to exceed the standard length. Although the Committee voted to delete the language, the consensus was that the Committee Note should say that removal of the corollary language ("Except by permission of the court") from the current rule does not mean that the Committee intends to prohibit motions to deviate from the requirements of the rule.

With regard to the certificate of compliance required by (a)(5), it was pointed out that the draft does not require the certificate to indicate the manner of compliance. In contrast, Rule 25 requires a certificate of service to indicate the date and manner of service, the names of persons served, the addresses, etc. Rule 32 also should require specification of those items that the attorney knows but the clerk's office does not necessarily know and cannot ascertain by a cursory examination of the brief. Following discussion, the provision was renumbered as (a)(5) and was amended to read as follows:

> (5) Certificate of Compliance. The attorney, or party proceeding pro se, shall include a certificate of compliance with Rule 32(a)(1)-(4) which states the brief's line spacing, and states either:
>
> (i) that the brief is proportionately spaced, together with the typeface, point size, and word count; or
>
> (ii) that the brief uses a monospaced typeface, together with the number of characters per inch, and word count or number of counted pages.
>
> The person preparing this certificate may rely on the word count of the word-processing system used to prepare the brief.

The possibility of developing a standard form that could be included in the appendix to the rules was discussed. Use of the forms is not mandatory, but they are helpful to practitioners. The rule, however, should require inclusion of all information that the Committee wants in every certificate.

The Committee discussed the sufficiency of simply stating that a brief contains less than 14,000 words rather than specifying the exact word count. Some members said that a person who prepares a 15 page brief should not spend any time counting words. Whereas other members said that it is so simple to get a word count from the computer that requiring inclusion of a word count is not an imposition. In addition, even a 7 page proportionately spaced brief must comply with the average number of words per page requirement and requiring the exact word count can make it clear that the number of words per page is excessive. The specific requirement also helps to focus the lawyer's attention. Because the

Committee contemplated that the rule will be republished, it decided (by a vote of 5 to 4) to publish the more stringent requirement because it is easier to back away from a stringent requirement than to insert one. Furthermore, inclusion of specific information in the brief, such as typeface, point size, word count, etc. will allow the courts to study and refine the requirements.

The Committee defeated (by a vote of 2 to 6) a motion to move to the Committee Note the statement that the person preparing the certificate may rely on the word count of the word-processing.

The Committee discussed whether Rule 28 should be amended to reflect the fact that every brief must include a certificate of compliance. The language just approved by the Committee requires that a brief "include" a certificate of compliance. One member suggested that it might not be necessary to amend Rule 28 if the rule simply required that a brief be "accompanied" by a certificate of compliance or if the rule said that the certificate must be "attached" rather than "included." One member pointed out that although a certificate of service is required, Rule 28 does not list that as an essential part of a brief. Another member argued that it would be more helpful to a lawyer if Rule 28 listed everything that must be included. If that approach were taken, it might be necessary to also include mention in Rule 28 of the certificate of service. There is, however, a significant difference between a certificate of service and a certificate of compliance. Proof of service frequently is completed after the brief is completed and the proof of service may be filed after the brief; whereas, all the facts necessary for completion of the certificate of compliance are known at the time the brief is filed. It was concluded, therefore, that it would be inappropriate for Rule 28 to require that each brief "include" a certificate of service.

A motion was made to amend Rule 28 to require that each brief include a certificate of compliance. The motion passed by a vote of 5 to 3.

With regard to the binding provision in (a)(9), the words "stapled or" were deleted. Deletion of those words does not prohibit stapling. In fact, the new language would permit stapling a brief at the upper left-hand corner. The change makes it clear that however a brief is bound the binding must "be secure," "not obscure the text" and done in a manner that "permits the document to lie reasonably flat when open."

Subdivision (b) deals with the form of other papers. A number of stylistic changes in that subdivision were approved. The Committee also decided to delete (b)(2)(A) of the redraft. That subparagraph said that "consecutive sheets may be attached at the left margin." Because the rule amendments delete the requirement that a brief or appendix be bound along the left margin, that subparagraph is no longer necessary.

The Committee concluded the discussion of Rule 32 by returning to the question of the need to republish the rule. The Advisory Committee voted, 7 to 2, to recommend that Rule 32 be republished. The Committee concluded that the elimination of the pamphlet brief and the increased level of specificity being required in the certificate of compliance are substantial changes.

A suggestion was received that Rule 32 should specify the brief colors in a cross-appeal. The Committee decided to take no further action on that suggestion.

Style Changes to Rules 25 and 27

In response to Judge Logan's earlier request, Mr. Garner suggested additional style revisions to the rules considered the preceding morning prior to his arrival.

1. Rule 25

On page 46 Mr. Garner proposed eliminating the separate paragraphs (i) and (ii). The Committee voted, however, to retain the paragraphs and the indentations.

The published rule requires a party using the mailbox rule to file a certificate that the brief was mailed or dispatched to the clerk by commercial carrier on or before the last day for filing. The language on page 46, however, states that the brief is timely "if accompanied by a certification that" it was so mailed. Taking that language literally, a brief would be timely even if mailed after the deadline as long as it is accompanied by certificate (however false) that it was timely mailed. To avoid that problem, lines 24 and 25 were amended by dropping the words "accompanied by a certification that." It was proposed that the certification requirement be moved to a later section of the rule.

Consideration of the language on page 46 highlighted the fact that as to a brief or appendix, three separate "certificates" may be required. Rule 25(d) requires all papers to have proof of service in the form of either a certificate of service or an acknowledgement of service. Proposed Rule 32 requires a brief to "include" a certificate of compliance with Rule 32. Under proposed Rule 25(a)(2)(B), if a party makes use of the mailbox rule, there must be a certificate stating that the brief was mailed or dispatched by commercial carrier on or before the last day for filing.

In order to make it clear that Rule 25 has been amended to require a certificate of filing, a motion was made to amend the caption to the rule so that it includes mention of "proof of filing." The motion passed by a vote of 7 to 1.

Another motion was made to amend 25(d) so that its heading reads "Proof of Service; Filing" and its text includes the following language:

> When a brief or appendix is filed by mailing or dispatch in accordance with Rule 25(a)(2)(B), the proof of service must also state the date and manner by which the document was mailed or dispatched to the clerk.

That language combines the two certificates required by Rule 25. The motion passed unanimously.

2. Rule 27

Mr. Garner suggested that on page 92, lines 4-6 should be changed to active voice so that it would read: "unless these rules prescribe another form." The change was accepted.

On page 93, lines 26 through 29 were amended to remove an ambiguity. As amended the sentence states: "An affidavit must contain only factual information, not legal argument."

On page 98, lines 136 through 141, dealing with carbon copies, were deleted. The change was in keeping with the decision previously made to delete the language in Rule 32 dealing with carbon copies.

II. RULES FOR INITIAL PUBLICATION

At its meeting last October, the Advisory Committee approved several rule amendments but decided to delay a request for publication for two reasons. First, there already were a number of rules in the pipeline including the substantial package of rules published in September. The Committee did not want two sets of rules out for publication at the same time. Second, delay in publication would permit the Style Subcommittee to review the rules and make suggestions for improvement prior to publication.

Mr. Garner had reviewed the rules and was present to discuss his suggestions with the Committee.

Rule 26.1 - Corporate Disclosure

The proposed amendments to Rule 26.1 simplify the disclosures that must be made by a corporate party. The amendment deletes the requirement that a corporate party identify subsidiaries and affiliates that have issued shares to the public. The committee does not believe that it is necessary to make such disclosures. Instead, the amended rule requires disclosure only of a parent corporation and of any stockholders that are publicly held companies owning 10% or more of the party's stock.

Mr. Garner suggested a number of language changes. The Advisory Committee adopted his suggestions and made several changes of its own, including subdividing the rule into three subdivisions. As amended, the rule would read as follows:

Rule 26.1 Corporate Disclosure Statement

(a) *Who Shall File.* Any nongovernmental corporate party to a proceeding in a court of appeals shall file a statement identifying any parent corporation and listing stockholders that are publicly held companies owning 10% or more of the party's stock.

(b) *Time for Filing.* A party shall 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. Even if

the statement has already been filed, the party's principal brief must include the statement before the table of contents.

(c) *Number of Copies.* If the statement is filed before the principal brief, the party shall file an original and three copies, unless the court requires the filing of a different number by local rule or by order in a particular case.

Some local rules require much broader disclosure than Rule 26.1 requires. The Committee Notes make it clear that such local rules are not preempted by the national rule. The Advisory Committee had previously attempted to formulate a rule requiring broader disclosure but was unable to develop a consensus among the circuits for such a rule.

Judge Stotler recommended that the Committee submit the proposed amendments to the Judicial Conduct Committee for its review.

Rule 29 - Amicus Curiae Briefs

Mr. Garner suggested a number of language changes in Rule 29; they were approved by the Committee. The rule as amended reads as follows:

Rule 29. Brief of an Amicus Curiae

(a) *When Permitted.* 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 court. Any other amicus curiae may file a brief only if:

(1) it is accompanied by written consent of all parties;

(2) the court grants leave on motion; or

(3) the court so requests.

(b) *Motion for Leave to File.* The motion must be accompanied by the proposed brief, and must state:

(1) the movant's interest;

(2) the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case.

(c) *Contents and Form.* An amicus brief must comply with Rule 32. In addition to the requirements of Rule 32(a), the cover must identify the party or parties supported or indicate whether the brief supports affirmance or reversal. If an amicus curiae is a corporation, the brief must include a disclosure statement like that required of parties by Rule 26.1. With respect to Rule 28, an amicus brief must include the following:

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

(2) a concise statement of the identity of the amicus and its interest in the case; and

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

(d) *Length.* An amicus brief may be no more than one-half the length of a principal brief as specified in Rule 32.

(e) *Time for Filing.* An amicus curiae shall file its brief, accompanied by a motion for filing when necessary, within the time allowed to the party being supported. If an amicus does not support either party, the amicus shall file its brief within the time allowed to the appellant or petitioner. A

court may grant leave for later filing, specifying the time within which an opposing party may answer.

(f) *Reply Brief.* An amicus curiae is not entitled to file a reply brief.

(g) *Oral Argument.* An amicus curiae's motion to participate in oral argument will be granted only for extraordinary reasons.

The Committee discussed the possibility of dividing (b)(2) into two paragraphs making it (b)(2) and (b)(3). By vote of 7 to 1, the Committee decided to leave it one paragraph. The majority of the Committee believed that the two ideas are interdependent and that it would be unwise to separate them.

With regard to oral argument, it was pointed out that if the party being supported cedes a portion of its time to an amicus, the court of appeals is likely to approve the participation of the amicus. It is only when an amicus seeks its own time that it is unusual for a court to grant the time. The Committee consensus, however, was that the language of subdivision (g) should remain as drafted.

Rule 35 - En Banc Proceedings

Rule 35 is amended to treat a request for a rehearing en banc like a petition for panel rehearing. As amended, a request for a rehearing en banc also will suspend the finality of the court of appeals' judgment and extend the period for filing a petition for writ of certiorari. The amendments delete the sentence stating that a request for a rehearing en banc does not affect the finality of the judgment or stay the issuance of the mandate. In order to affirmatively extend the period for filing a petition for writ of certiorari, however, Sup. Ct. R. 13.3 must be amended. In keeping with the intent to treat a request for a panel rehearing and a request for a rehearing en banc similarly, the term "petition" for rehearing en banc is substituted for the term "suggestion" for rehearing en banc.

The amendments add intercircuit conflict as a reason for determining that a proceeding involves a question of "exceptional importance" -- one of the traditional criteria for granting an en banc hearing.

The amendments also establish a 15 page limit on such petitions.

The first issue the Committee discussed was the use of "en" banc or "in" banc. Judge Logan recounted his extensive discussion with Judge Newman concerning the issue. The Committee voted 7 to 1 to use "en" banc.

Mr. Spaniol was troubled by the repetition in (b)(1)(A) and (B) of language in (a)(1) and (2). Several members of the Committee responded that the arrangement of that particular material in the rule was the result of much negotiating. The Solicitor General requested the addition of intercircuit conflict as a reason for granting an en banc hearing. The Advisory Committee was unwilling to expand the criteria for en banc consideration beyond two existing criteria set forth in subdivision (a): 1) the need to secure or maintain uniformity, and 2) a case involving a question of exceptional importance. The Committee was willing, however, to state that the existence of an intercircuit conflict may lead to the conclusion that the proceeding involves a question of exceptional importance. The Committee concluded that the repetition may be necessary to preserve the carefully negotiated compromise.

Mr. Garner objected to the inclusion in (b)(1)(B) of two sentences when (b)(1)(A) and (B) are intended to be alternative portions of a single sentence. The Committee experienced difficulty in attempting to redraft (B) and asked Mr. Garner to work with the reporter to try to improve the structure of the subparagraphs.

Mr. Garner suggested additional language changes in Rule 35; the Committee approved those changes.

Rule 41 - Mandate

Mr. Garner suggested minor language changes, all of which were approved by the Committee.

In (a)(2) he would move the words "unless the court orders otherwise," to the beginning of the second sentence.

In (b) he suggested changing the words "A party may, by motion, request a stay of mandate . . ." to "A party may move to stay the mandate . . .." In that same subdivision, he would change language in the third sentence from "unless the period is extended for cause shown" to "unless the period is extended for good cause".

The meeting adjourned at 4:15 p.m. The Committee will reconvene in Washington, D.C. on October 19, 20, and 21. The fall meeting will be devoted solely to style revisions.

Respectfully submitted,

Carol Ann Mooney
Reporter

Advisory Committee on the Federal Appellate Rules
Table of Agenda Items -- Revised October 1995

FRAP Item	Proposal	Source	Current Status
86-24	Rule to permit sanctioning of attorneys for bringing frivolous appeals.	Chief Justice Vincent McKusick (ME)	See notes under item 86-19 and 92-8 Subcommittee appointed to monitor; no need for action at this time 4/93 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 Subcommittee to report - 10/95
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 Published 9/95
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
91-3	Final decision by rule/expanding inter-locutory 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

FRAP Item	Proposal	Source	Current Status
91-4	Typeface, re: rule 32.	Mr. Greacen (CA-5)	Reporter asked to draft language 12/91 Approved for submission to Standing Committee 11/92 Approved by Standing Committee for publication to bench and bar 12/92 Advisory Committee approved new drafts for submission to Standing Committee for re-publication 5/93 Standing Committee approved new draft for re-publication 6/93 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 New draft approved by Advisory Committee 4/95 Standing Committee referred back to Advisory Committee 6/96
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 New draft approved by Advisory Committee 4/95 Standing Committee referred back to Advisory Committee 6/95

FRAP Item	Proposal	Source	Current Status
91-14	Amendment of Rule 21 so that a petition for mandamus does not bear the name of the district judge and the judge is represented pro forma by counsel for the party opposing the relief unless the judge requests an order permitting the judge to appear.	Local Rules Project	Reporter asked to draft language 12/91 Approved for submission to Standing Committee 10/92 Standing Committee referred the proposal back to to Advisory Committee for further consideration 12/92 New draft approved for submission to Standing Committee 4/93 Approved by Standing Committee for publication to bench and bar 6/93 Published 11/93 Advisory Committee approved new draft for submission to Standing Committee for republication 4/94 Approved by Standing Committee for republication 6/94 Published 9/94 Approved for resubmission to Standing Committee 4/95 Standing Committee approved forwarding to Judicial Conference 6/95
91-17	Uniform plan for publication of opinions.	Local Rules Project & Federal Courts Study Committee	Further study recommended 12/91
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 Revised draft approved for submission to Standing Committee 4/95 Published 9/95

FRAP Item	Proposal	Source	Current Status
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 Revised draft approved for submission to Standing Committee 4/95 Published 9/95
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 Approved for resubmission to Standing Committee 4/95 Standing Committee referred back to Advisory Committee 6/95

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 Supreme Court forwarded to Congress 4/95
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 Revised draft approved for submission to Standing Committee 4/95 Published 9/95

FRAP Item	Proposal	Source	Current Status
92-5	Amendment of Rule 25 re "most expeditious form . . . except special delivery".	Advisory Committee	Approved for submission to Standing Committee 4/93 Approved by Standing Committee for publication to bench and bar 6/93 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 Revised draft approved for resubmission to Standing Committee 4/95 Standing Committee approved forwarding to Judicial Conference 6/95
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 Subcommittee to report, 10/95
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 Supreme Court forwarded to Congress 4/95

FRAP Item	Proposal	Source	Current Status
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 Supreme Court forwarded to Congress 4/95
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
93-2	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 Supreme Court forwarded to Congress 4/95
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 Revised draft approved for submission to Standing Committee 4/95 Published 9/95

FRAP Item	Proposal	Source	Current Status
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 Revised draft approved for submission to Standing Committee 4/95 Published 9/95
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 Revised draft approved for submission to Standing Committee 4/95 Published 9/95
93-6	Amend Rule 41 re: effective date of mandate.	Solicitor General Days	Draft approved 10/94 to be submitted to Style Subcommittee] Revised draft approved for submission to Standing Committee 4/95 Published 9/95
95-1	Amend Civil Rule 23 so class members do not need to intervene to appeal	Mr. Alan Morrison	Awaiting initial discussion
95-2	Amend Rules 3 and 24 re: denial of in forma pauperis status	Mr. Wm. Johnson, Sr. & Mr. Kenneth Bonds	Awaiting initial discussion
95-3	Amend Rule 15(f) to conform to recent amendments to 4(a)(4)	Hon. Stephen Williams (CA-DC)	Awaiting initial discussion
95-4	Amend computation of time to conform to Civil Rules method	Mr. James B. Doyle	Awaiting initial discussion
95-5	Amend Rule 31 to require submission of digitally readable copy of brief, when available	Hon. Frank Easterbrook (CA-7)	Awaiting initial discussion

Agenda Item IIC

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

FROM: Carol Ann Mooney, Reporter

DATE: October 3, 1995

SUBJECT: Rule 32 and companion amendments to Rule 27 and 28

At its July meeting, the Standing Committee remanded Rule 32 to the Advisory Committee for further consideration. Some members of the Standing Committee objected to the level of detail in the rule, others thought the detail necessary but not quite right. For a variety of reasons the Committee concluded that Rule 32, which has already been published more times than I care to remember, was not quite ripe for republication.

Following the meeting, Judge Easterbrook wrote to Judge Logan and provided a new draft for the Advisory Committee's consideration. The new draft contains much that will be familiar to you, but Judge Easterbrook has done some very helpful reorganizing and includes some new ideas. Judge Logan and I have carefully studied Judge Easterbrook's draft. We think that it is very good and have decided to present it to you with only minor tinkering. A copy of Judge Easterbrook's letter and a copy of Rule 32 as presented to the Standing Committee are attached to this memorandum for your convenience.

Judge Easterbrook's draft has been retyped with line numbering and minor changes that Judge Logan and I agree upon. The Committee Note is new and was prepared by me using the old note, some of Judge Easterbrook's thoughts from his letter, and a little glue of my own. It too should be carefully reviewed by you. The success of the rule in this round of publication may depend in some significant part upon its "presentation" in the note.

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

(a) *Form of a Brief.*

(1) *Reproduction.*

(A) A brief may be reproduced by any process that yields a clear black image on light paper. The paper must be opaque and unglazed. Only one side of the paper may be used.

(B) Text must be reproduced with a clarity that equals or exceeds the output of a laser printer.

(C) Photographs, illustrations, and tables may be reproduced by any method that results in a good copy of the original; a glossy finish is acceptable if the original is glossy.

(2) *Cover.* Except for filings of pro se parties, the cover of the appellant's brief must be blue, the appellee's, red; an intervenor's or amicus curiae's green; and any reply brief, gray. The front cover of a brief must contain:

(A) the number of the case centered at the top;

(B) the name of the court;

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

(D) the nature of the proceeding (e.g., Appeal, Petition for Review) and the name of the court,

agency, or board below;

(E) the title of the document, identifying the party or parties for whom the document is filed; and

(F) the name, office address, and telephone number of counsel representing the party for whom the document is filed. Counsel of record must be identified by an asterisk.

(3) *Binding.* The document must be bound in any manner that is secure, does not obscure the text, and permits the document to lie reasonably flat when open.

(4) *Paper Size, Line Spacing, and Margins.* The document must be on 8½ by 11 inch paper. The text must be double-spaced, but quotations more than two lines long may be indented and single-spaced. Headings and footnotes may be single-spaced. Margins must be at least one inch on all four sides. Page numbers may be placed in the margins, but no text may appear there.

(5) *Typeface.* Either a proportionally spaced or a monospaced face may be used.

(A) A proportionally spaced face must include serifs, but sans-serif type may be used in

headings and captions. A proportionally spaced face must be 14-point or larger, but 12-point type may be used in footnotes.

(B) A monospaced face may not contain more the 10½ characters per inch.

(6) *Type Styles.* A brief must be set in a plain, roman style, although italics may be used for emphasis. Case names must be italicized or underlined. A brief may use boldface only for case captions, section names, and argument headings. A brief may use all-capitals text only for case captions and section names.

(7) *Length.*

(A) *Page Limitation.* A principal brief may not exceed 30 pages, or a reply brief 15 pages, unless it complies with Rule 32(a)(7)(B) and (C).

(B) *Type Volume Limitation.*

(i) A principal brief is acceptable if it contains no more than 14,000 words or 90,000 characters and does not average more than 280 words or 1,800 characters per page. A brief using a monospaced

face also is acceptable if it does not contain more than 1,300 lines of text.

(ii) A reply brief is acceptable if it contains no more than half of the type volume specified in Rule 32(a)(7)(B)(i).

(iii) Headings, footnotes, and quotations count toward the word, character, and line limitations. The corporate disclosure statement, table of contents, table of citations, statement with respect to oral argument, and any addendum containing statutes, rules or regulations, and any certificates of counsel do not count toward the limitation.

(C) *Certificate of Compliance.* A brief submitted under Rule 32(a)(7)(B) must include a certificate by the attorney, or a party proceeding pro se, that the brief complies with the type volume limitation. The person preparing the certificate may rely on the word or character count of the word-processing system used to prepare the brief. The

certificate must state either:

(i) the number of words or characters in the brief and the average number per page, or

(ii) the number of lines of type in the brief.

(b) *Form of an Appendix.* An appendix must comply with Rule 32(a)(1), (2), (3), and (4), with the following exceptions:

(1) The cover of a separately bound appendix must be white.

(2) An appendix may include a legible photocopy of any document found in the record or of a printed judicial or agency decision. A photocopy of a photocopy, or of a fax transmission, is not acceptable. A photocopy must be the same size as the original.

(3) When necessary to facilitate inclusion of odd-sized documents such as technical drawings, an appendix may be a size other than 8½ by 11 inches, and need not lie reasonably flat when opened.

(c) *Form of Other Papers.*

(1) *Motion.* The form of a motion is governed by Rule 27(d).

(2) *Other Papers.* Any other paper, including a petition

for rehearing and a petition for rehearing en banc, and any response to such a petition, must be reproduced in the manner prescribed by Rule 32(a), with the following exceptions:

(A) a cover is not necessary if the caption and signature page of the paper together contain the information required by Rule 32(a)(2); and

(B) Rule 32 (a)(7) does not apply.

(d) *Local Variation.* Every court of appeals must accept documents that comply with this rule. By local rule or order in a particular case a court of appeals may accept documents that do not meet all of the requirements of this rule.

Committee Note

The rule has been entirely rewritten.

Subpart (a). Form of a Brief.

Paragraph (a)(1). Reproduction.

The rule permits the use of "light" paper, not just "white" paper. Cream and buff colored paper, including recycled paper, are acceptable. The rule permits printing on only one side of the paper. Although some argue that paper could be saved by allowing double-sided printing, others argue that in order to preserve legibility a heavier weight paper would be needed, resulting in little, if any, paper saving. In addition, the blank sides of a brief are commonly used by judges and their clerks for making notes about the case.

Because photocopying is inexpensive and widely available and because use of carbon paper is now very rare, all references to the use of carbon copies have been deleted.

The rule requires that the text be reproduced with a clarity that equals or exceeds the output of a laser printer. That means that the method used must have a print resolution of 300 dots per inch (dpi) or more. This will ensure the legibility of the brief. A brief produced by a typewriter or a daisy wheel printer, as well as one produced by a laser printer, has a print resolution of 300 dpi or more. But a brief produced by a dot-matrix printer, fax machine, or portable printer that uses heat or dye transfer methods does not. Some ink jet printers are 300 dpi or more, but some are 216 dpi and would not be sufficient.

Photographs, illustrations, and tables may be reproduced by any method that results in a good copy.

Paragraph (a)(2). Cover.

The rule requires that the number of the case be centered at the top of the front cover of a brief. This will aid in identification of the document and 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, the information is necessary to the court. If, however, the document is filed on behalf of all appellants or 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.

Paragraph (a)(3). Binding.

The rule requires a brief to be bound in any manner that is secure, does not obscure the text, and that permits the document to lie reasonably 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. One circuit already has such a requirement and another 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. Stapling a brief at the upper left-hand corner also satisfies this requirement as long as it is sufficiently secure.

Paragraph (a)(4). Paper Size, Line Spacing, and Margins.

Paragraph (a)(5). Typeface.

This paragraph and the next one, governing type style, are

new. The old rule simply stated that a brief 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 computer. The availability of computer fonts in a variety of sizes and styles has given rise to local rules limiting type styles. The 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.

With regard to typeface there are two options: proportionally spaced typeface or monospaced typeface.

A proportionally spaced typeface gives a different amount of horizontal space to characters depending upon the width of the character. A capital "m" is given more horizontal space than a lower case "i." The rule requires that a proportionally spaced typeface have serifs. A serif is a smaller line used to finish off a main stroke of a letter, for example at the top and bottom of a capital "M." Long blocks of text are easier to read in serif type. Books and newspapers as well as all professionally printed briefs are printed in proportionally-spaced, serif type. The rule requires a minimum type size of 14 points so that the type is easily legible. But a 12-point type may be used in footnotes.

A monospaced typeface is 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. The rule requires use of a monospaced typeface that produces no more than 10½ characters per inch. A standard typewriter with pica type produces a monospaced typeface with 10 characters per inch (cpi). That is the ideal monospaced typeface. The rule permits up to 10½ cpi because some computer software programs contain monospaced fonts that purport to produce 10 cpi but that in fact produce slightly more than 10 cpi. In order to avoid the need to reprint a brief produced in good faith reliance upon such a program, the rule permits a bit of leeway. A monospaced typeface with no more than 10 cpi is preferred.

Paragraph (a)(6). Type Styles.

The rule requires use of plain roman, that is not italic or script, type. Italics may be used only for emphasis and in case

names. The use of boldface is also restricted; it may be used only for case captions, section names, and argument headings. All-capitals may be used only for case captions and section names. These rules also aid legibility.

Paragraph (a)(7). Type Volume Limitation

Subparagraph (a)(7)(A) contains a safe-harbor provision. A principal brief that does not exceed 30 pages complies with the type volume limitation without further question or certification. A reply brief that does not exceed 15 pages is similarly treated. The current limit is 50 pages but that limit was established when most briefs were produced on typewriters. The widespread use of personal computers has made a multitude of printing options available to practitioners. Use of a proportional typeface alone can greatly increase the amount of material per page as compared with use of a monospaced typeface. Even though the rule requires use of 14-point proportional type, there is great variation in the x-height of different 14-point typefaces. Selection of a typeface with a small x-height increases the amount of text per page. Computers also make possible fine gradations in spacing between lines and tight tracking between letters and words. All of this, and more, have made the 50 page limit virtually meaningless. Establishing a safe-harbor of 50 pages would permit a person who makes use of the multitude of printing "tricks" available with most personal computers to file a brief far longer than the "old" 50-page brief. Therefore, as to those briefs not subject to any other volume control than a page limit, a 30 page limit is imposed.

The limits in subparagraph (B) approximate the current 50-page limit and compliance with them is easy even for a person without a personal computer. The aim of these provision is to create a level playing field. The rule gives every party an equal opportunity to make arguments, without permitting those with the best in-house typesetting an opportunity to expand their submissions.

The length can be determined either by counting words, characters, or lines. That is, the length of a brief is determined not by the number of pages but by the number of words, characters, or lines in the brief. 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 word or character counting methods can be used with

any typeface. One can choose to count either words or characters. A character count (count of each letter, number, punctuation mark, etc.) is highly consistent across word processing programs but is not required by the rule because it is not easily done with some programs. A person using a typewriter, however, can easily determine the maximum number of characters per line and certify that the number of characters per page and in the brief does not exceed the maximum. (For example, a typewriter with pica type produces no more than 10 characters per inch. One line of text, therefore, has no more than 65 characters per line.) Different word processing programs do not produce as consistent a word count, but the rule permits use of word counts because the variations from program to program are small and some programs do not count characters. The rule imposes not only an overall word/character limit (the number of words or characters in the brief) but also limits the average number of words or characters per page. This latter provision ensures legibility; it does not permit a person to squeeze too many words on a page.

A monospaced brief can meet the volume limitation by using the word or character count, or a line count. If the line counting method is used, the number of lines may not exceed 1,300 -- 26 lines per page in a 50 page brief. The number of lines is easily counted manually. Line counting is not sufficient if a proportionally spaced typeface is used, because the amount of material per line can vary widely.

A brief using the type volume limitations in subparagraph (B) must include a certificate by the attorney, or party proceeding pro se, that the brief complies with the limitation. The rule permits the person preparing the certification to rely upon the word or character count of the word processing system used to prepare the brief.

Until adoption of these amendments, Rule 28(g) governed the length of briefs. Rule 28(g) began with the words "[e]xcept by permission of the court," signalling that a party could file a motion to exceed the limits established in the rule. The absence of similar language in Rule 32 does not mean that the Committee intends to prohibit motions to deviate from the requirements of the rule. The Committee does not believe that any such language is needed to authorize such a motion.

Subpart (b). Form of an Appendix.

The provisions governing the form of a brief generally apply

to an appendix. The rule recognizes, however, that an appendix is usually produced by photocopying existing documents. The rule requires that the photocopies be legible. Photocopies of the original documents are required.

The rule permits inclusion not only of documents from the record but also copies of a printed judicial or agency decision. If a decision that is part of the record in the case has been published, it is helpful to provide a copy of the published decision in place of a copy of the decision from the record.

Subpart (c). Form of Other Papers.

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 petition for rehearing en banc and a response to either a petition for panel rehearing or a petition for rehearing en banc be prepared in the same manner. But the length limitations of paragraph (a)(7) do not apply to those documents and a cover is not required if all the information needed by the court to properly identify the document and the parties is included in the caption or signature page.

Former subdivision (b) stated that other papers "may be produced in like manner, or they may be typewritten upon opaque, unglazed paper 8½ by 11 inches in size." That language has been deleted but that method of preparing documents is not eliminated because (a)(5)(B) permits use of standard pica type. The only change is that the rule now specifies margins for these typewritten documents.

Subpart (d). Local Variation.

A brief that complies with the national rule should be acceptable in every court. Local rules may move in one direction only: they may authorize non-compliance with certain of the national norms. For example, a court that wishes to do so may authorize printing of briefs on both sides of the paper, or the use of smaller type size or sans-serif proportional type. A local rule may not, however, impose requirements that are not in the national rule.

Re: Rule 27

The Standing Committee also "remanded" Rule 27 to the Advisory Committee. There were two reasons for the remand:

1. The format provisions in (d)(2) were not well coordinated with the proposed amendments to Rule 32. I have made the (d)(2) provisions parallel with those in the preceding version of Rule 32 while keeping the content of the (d)(2) provisions consistent with the "substantive" decisions the Advisory Committee had previously made concerning them.

2. Shortly before the meeting, Judge Logan and I noted a substantive error that had been made at the April meeting in paragraph (a)(3) in an effort to improve the "style" of the rule.

When published paragraph (a)(3) read as follows:

(3) *Response.* Any party may file a response to a motion. The provisions of (2) apply to a response. The response must be filed within 7 days after service of the motion unless the court shortens or extends the time, but

(A) a motion for a procedural order is governed by subdivision (b) of this rule; and

(B) a motion authorized by Rules 8, 9, 18, or 41 may be acted upon after reasonable notice.

On the basis of the public comments, the Advisory Committee decided to extend the response time to 10 days. In addition, Mr. Garner did not like using the word "but" as the lead in to the (A) and (B) clauses. He suggested deleting the word "but" and replacing it with the words "with the following exceptions:". The Advisory Committee approved that change.

Therefore, the rule submitted to the Standing Committee read as follows:

(3) *Response.*

(A) Any party may file a response to a motion. Rule 27 (a)(2) applies to a response. The response must be filed

within 10 days after service of the motion unless the court shortens or extends the time, with the following exceptions:

(i) a motion for a procedural order is governed by Rule 27(b); and

(ii) a motion authorized by Rule 8, 9, 18, or 41 may be acted upon after reasonable notice.

(B) . . .

The "with the following exceptions" language works an unintended substantive change. The new language makes it appear that a response to a motion for a procedural order, or to a motion authorized by Rule 8, 9, 18, or 41, is not due within 10 days. That was not the Committee's intent. A response is due within 10 days. The cross-reference to subpart (b) was simply intended to make it clear that the court may act before receiving a response. As to the motions in (ii), the court may act after reasonable notice.

As you will see below, I suggest a return to language similar to that in the published rule.

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 other 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, shall state with particularity the grounds 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 a procedural order [for which see subdivision (b)] within 7 days after service of the motion, but motions authorized by Rules 8, 9, 18 and 41 may be acted upon after reasonable notice, and the court may shorten or extend the time for responding to any motion.

(b) *Determination of motions for procedural orders.* Notwithstanding the provisions of (a) of this Rule 27 as to motions generally, motions for procedural orders, including any motion under Rule 26(b), may be acted upon at any time, without awaiting a response thereto, and pursuant to rule or order of the court, motions for specified types of procedural orders may be disposed of by the clerk. Any party adversely affected by such action may by application to the court request consideration, vacation or modification of such action.

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

~~judge may be reviewed by the court.~~

~~(d) *Form of Papers; Number of Copies.* All papers relating to 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.~~

(a) *In General.*

(1) *Application for Relief.* An application for an order or other relief is made by motion unless these rules prescribe another form.

(2) *Content of a Motion.*

(A) *Grounds and relief sought.* A motion must state with particularity the grounds for the motion and the relief sought. The motion must contain the legal argument necessary to support it.

(B) *Accompanying documents.* If a motion is supported by affidavits or other papers, they must be served and filed with the motion.

(i) Only affidavits and papers necessary for determining the motion may be attached.

(ii) An affidavit must contain only factual

information, not legal argument.

(iii) A motion seeking substantive relief must include a copy of the trial court's opinion or agency's decision as a separately identified exhibit.

(C) *Documents not required.*

(i) A separate brief supporting or responding to a motion must not be filed.

(ii) A notice of motion is not required.

(iii) A proposed order is not required.

(3) *Response.*

(A) Any party may file a response to a motion. Rule 27(a)(2) applies to a response. The response must be filed within 10 days after service of the motion unless the court shortens or extends the time. But a motion for a procedural order is governed by Rule 27(b) and a motion authorized by Rules 8, 9, 18, or 41 may be acted upon after reasonable notice.

(B) A response may include a motion for affirmative relief. The times for response to

the new motion, and for reply to that response, are governed by Rule 27(a)(3)(A) and (a)(4). The title of the response must, under Rule 27(d)(2)(D), alert the court to the request for relief.

(4) *Reply to Response.* The moving party may file a reply to a response. A reply must be filed no later than 5 days after service of the response, unless the court shortens or extends the time. A reply must not reargue propositions presented in the motion or present matters that do not reply to the response.

(b) *Disposition of a Motion for a Procedural Order.* A motion for a procedural order -- including any motion under Rule 26(b) -- may be acted upon at any time without awaiting a response. A court may, by rule or by order in a particular case, authorize the clerk to dispose of motions for specified types of procedural orders. A party adversely affected by the court's, or the clerk's, disposition may file a motion requesting reconsideration, vacation, or modification of such action. Timely opposition to a motion that is filed after the motion is granted in whole or in part does not constitute a request to reconsider, vacate, or modify the disposition; a

motion requesting that relief must be filed.

(c) *Power of a Single Judge to Entertain a Motion.* A single judge of a court of appeals may act on any motion, but may not dismiss or otherwise determine an appeal or other proceeding. A court of appeals may provide by rule or by order in a particular case that only the court may act on any motion or class of motions. The court may review the action of a single judge.

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

(1) *In Writing.* A motion must be in writing unless the court permits otherwise.

(2) *Format.*

(A) *Reproduction.* A motion, response, or reply may be reproduced by any process that yields a clear black image on light paper. The paper must be opaque, unglazed paper. Only one side of the paper may be used.

(B) *Cover.* A cover is not required but there must be a caption that includes the case number, the name of the court, the title of the case, and a brief descriptive title indicating the purpose of the motion and identifying the party or parties

for whom it is filed.

(C) *Binding.* The document must be bound in any manner that is secure, does not obscure the text, and permits the document to lie reasonably flat when open.

(D) *Paper Size, Line Spacing, and Margins.* The document must be on 8½ by 11 inch paper. The text must be double spaced, but quotations more than two lines long may be indented and single-spaced. Headings and footnotes may be single-spaced. Margins must be at least one inch on all four sides. Page numbers may be placed in the margins, but no text may appear there.

(3) *Page limits.* A motion or a response to a motion must not exceed twenty pages, exclusive of the corporate disclosure statement and accompanying documents authorized by Rule 27(a)(2)(B), unless the court permits or directs otherwise. A reply to a response must not exceed ten pages.

(4) *Number of Copies.* 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.

(e) *Oral Argument.* A motion will be decided without oral argument unless the 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 trial court's opinion or agency's 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 except that

the time for responding has been expanded to 10 days rather than 7 days. Because the time periods in the rule apply to a substantive motion as well as a procedural motion, the longer time period may help reduce the number of motions for extension of time, or at least provide a more realistic time frame within which to make and dispose of such a motion. 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 it 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 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 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.

Re: Rule 28

The proposed amendments to Rule 28 are necessary to conform it to proposed amendments to Rule 32.

a. Proposed Rule 32 requires a certificate of compliance with the length limitations of that rule unless the brief falls within the safe-harbor. Because every brief will not need a certificate of compliance with Rule 32, it may be unnecessary to add the certificate of compliance to Rule 28's list of items that must be included in a brief. On the other hand, including a reminder of the certificate in the Rule 28 list could prove helpful to practitioners and court alike. The draft does so.

b. Rule 28(g) must be amended to delete the page limitations for a brief; the length limitations are being moved to Rule 32.

c. Rule 28(h) is amended so that the cross-reference to 28(a) includes paragraph (8).

Rule 28. Briefs.

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

* * * * *

(8) The certificate of compliance, if required by Rule 32(a)(7).

(b) *Appellee's Brief.* The appellee's brief ~~of the appellee~~ must conform to the requirements of ~~paragraphs~~ Rule 28(a)(1)-(6) and (8), except that none of the following need appear unless the appellee is dissatisfied with the appellant's 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.

* * * * *

(g) [reserved]

~~*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.~~

(h) *Briefs in ~~a~~ Cases Involving a Cross-Appeals*. If a cross-appeal is filed, the party who ~~first~~ files a notice of appeal first, or ~~in the event that~~ if the notices are filed on the same day, the plaintiff in the proceeding below ~~shall be~~ is deemed the appellant for the purposes of this rule and Rules 30, ~~and~~ 31, and 34, unless the parties agree otherwise ~~agree~~ or the court orders otherwise ~~orders~~. The appellee's brief ~~of the appellee~~ ~~shall~~ must conform to the requirements of ~~subdivision~~ Rule 28(a)(1)- ~~(6)~~ (8) ~~of this rule~~ with respect to the appellee's cross-appeal as well as respond to the appellant's brief ~~of the appellant~~ except that a statement of the case need not be made unless the appellee is dissatisfied with the appellant's statement ~~of the appellant~~.

Committee Note

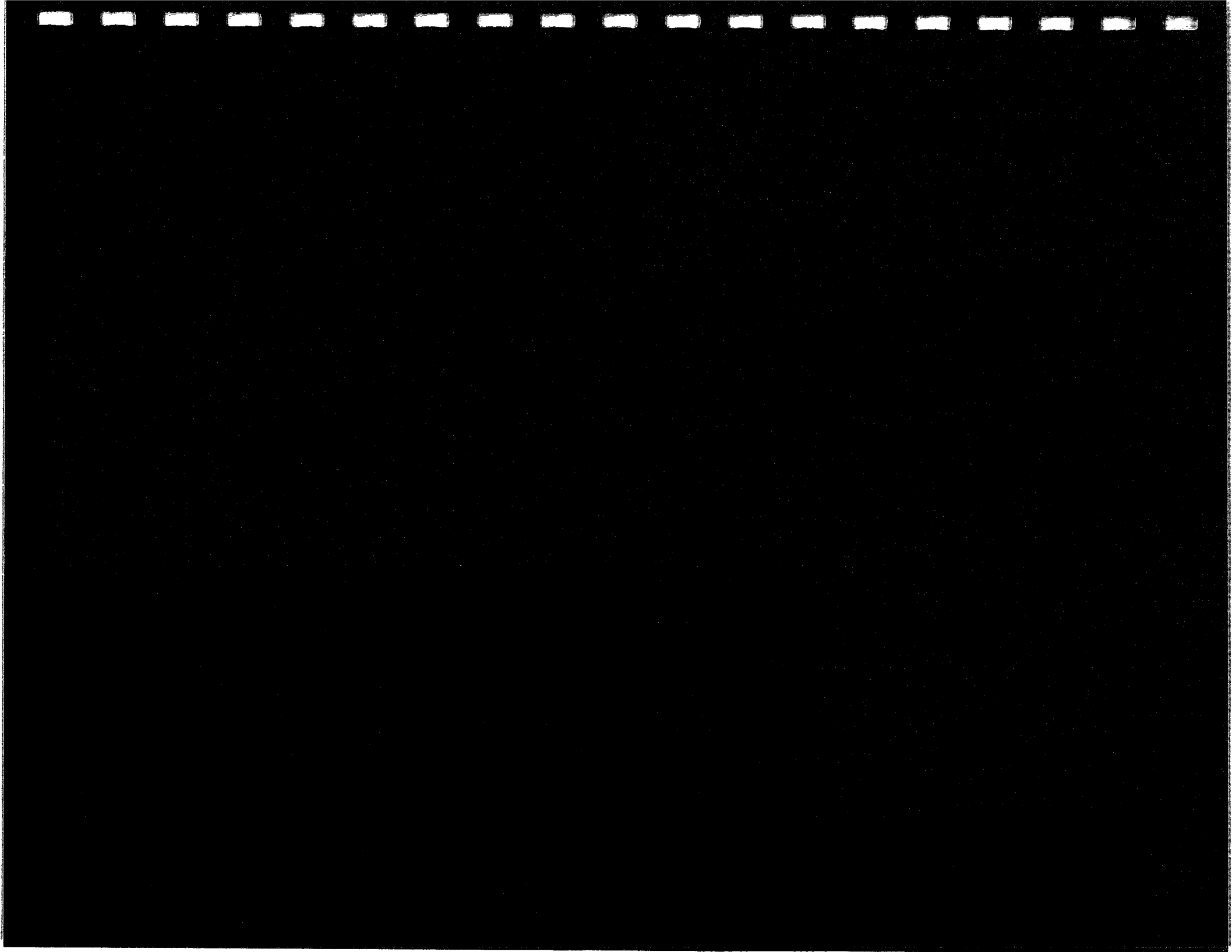
Subdivision (a). The amendment conforms this rule with an amendment being made to Rule 32. Rule 32(a)(7) requires a brief to include a certificate of compliance with type volume limitations contained in that rule. No certificate

is required, however, if a brief does not exceed 30 pages, or 15 pages for a reply brief. Rule 28(a) is amended to include that certificate in the list of items that must be included in a brief whenever it is required by Rule 32.

Subdivision (b). This is also a conforming amendment accompanying the amendment requiring a certificate of compliance with Rule 32. An appellee's brief must include such a certificate, so the cross-reference to subdivision (a) now includes paragraph (8).

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 (8) with regard to a cross-appeal. The addition of separate paragraphs requiring a summary of argument and a certificate of compliance with Rule 32 increased the relevant paragraphs of subdivision (a) from (6) to (8). The rest of the changes are stylistic; no substantive changes are intended.



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

FRANK H. EASTERBROOK
CIRCUIT JUDGE

July 24, 1995

Hon. James K. Logan
United States Court of Appeals for the Tenth Circuit
P.O. Box 790
Olathe, Kansas 66051-0790

Dear Jim:

The decision of the Standing Committee to recommit the draft of Rule 32 offers an opportunity to revisit the question what we are trying to achieve by revising the national rule. I think that there are three principal objectives:

1. Making briefs more readable. Appellate judges spend more time reading briefs than on any other task. Better typography and form would do more to facilitate our work than anything short of better substance—which no rule can ensure. Readability requires better typography, making briefs prepared in house more like briefs prepared by a commercial printer. Achieving that objective entails two steps: First, we have to free counsel from the constraints of some local rules that hamper good typography. (The Seventh Circuit, for example, forbids the use of proportional type; yet printers use *only* proportional type, and monospaced type does not appear in any professionally prepared book or magazine.) Second, we have to protect the court from typographical tyros. Freed to use good devices, such as proportionally spaced faces, lawyers may trip over their shoelaces. They went to law school, not a trade school for printers. Software has given them options they do not know how to use wisely. One therefore cannot have liberty (step one) without responsibility (step two).

2. Creating a level playing field. The rule should give every lawyer an equal opportunity to make arguments, without permitting those with the best in-house typesetting an opportunity to expand their submissions. Footnotes, the use of tight tracking, even the selection of a face with a small x-height, can squeeze more words into 50 pages. This objective is in part for the benefit of the bench, but it is even more for the benefit of the bar, a message that should be prominent in the Committee Note.

3. Facilitating a national practice. A brief prepared according to the national rule should be acceptable in every court. The Committee Note to the current draft expresses this as a hope, but as a hope it is forlorn. Comments to the many drafts show that judges and courts have different ideas about what is acceptable, so local rules are bound to break out. But a national rule can and should say that the local rules may move in one direction only: they may authorize additional devices and forms but may not remove any from the national rule. The way to achieve this is with language in the text rather than language in the Committee Note.

Having as the objective one universally acceptable brief form implies that the national rule should use the lowest common denominator. Example: Everyone thinks that serif type is acceptable, but a minority are willing to accept sans-serif type. The national rule therefore should require serif type. If a circuit wants to accept sans-serif type too, it can so provide by local rule. A lawyer who never looks at the local rule therefore is safe, and all judges receive briefs they deem readable. By contrast, a national rule that blesses both serif and sans-serif type will breed local rules banning sans-serif type, frustrating both national practice and judges who have trouble with sans-serif type but can't persuade their circuits to get rid of it.

These three objectives have several implications for the draft of a rule. I have discussed the principal consequence of the national practice objective. The level playing field objective is what leads to the limitations on words. This caused some ruckus at the Standing Committee because of concern about No-Tie Brown, who lacks word processing equipment and needs a safe harbor, leading to the question why archaic equipment carries a 20% penalty. This can and should be dealt with by a uniform safe harbor for all briefs, plus a simple method of ensuring compliance—the lawyer can certify that the brief has fewer than x words, y characters, or z lines of type. No-Tie Brown can count both lines of type and characters easier than he can count words. (A monospaced font has the same number of characters per line; rather, it has no more than a fixed number of characters per line.) As for the readability objective: the presence of tyros means that the rule must be reasonably explicit; and being explicit means using words that tyros don't already know. (If they knew them, they wouldn't be tyros.) Any effort to shield these people from words used to describe something they do every day aids neither judge nor lawyer. They can learn the words (with the aid of the Committee Note) more easily than the judges can tolerate poorly produced briefs! Lawyers will get used to the terms; the question for a rule-writer should be whether, when familiar, the terms can be readily applied.

All of this leads to a concrete proposal for a new Rule 32. I have drafted a rule from scratch, though taking account of the many turns the current draft has taken. I have tried to be as brief and non-technical as possible and have borrowed gobs of text from the draft presented to the Standing Committee. Here goes:

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

(a) *Form of a Brief.*

(1) *Reproduction.*

(A) A brief may be reproduced by any process that yields a clear dark image on light paper. The paper must be opaque and unglazed. Only one side of the paper may be used.

(B) Text must be reproduced with a clarity that equals or exceeds the output of a laser printer.

(C) Photographs, illustrations, and tables may be reproduced by any method that results in a good copy of the original; a glossy finish is acceptable if the original is glossy.

(2) *Cover.* Except for filings of pro se parties, the cover of the appellant's brief must be blue; the appellee's, red; an intervenor's or amicus curiae's, green; any reply brief, gray. The front cover of a brief must contain:

(A) the number of the case centered at the top;

(B) the name of the court;

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

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

(E) the title of the document, identifying the party or parties for whom the document is filed; and

(F) the name, office address, and telephone number of counsel representing the party for whom the document is filed. Counsel of record must be identified by an asterisk.

(3) *Binding.* The document must be bound in any manner that is secure, does not obscure the text, and permits the document to lie reasonably flat when open.

(4) *Paper Size, Line Spacing, and Margins.* The document must be on 8½ by 11 inch paper. The text must be double-spaced, but quotations more than two lines long may be indented and single-spaced. Headings and footnotes may be single-spaced. Margins must be at least one inch on all four sides. Page numbers may be placed in the margins, but no other text may appear there.

(5) *Typeface.* Either a proportionally spaced or a monospaced font may be used.

(A) A proportionally spaced face must include serifs, but sans-serif type may be used in headings and captions. A proportionally spaced face must be 14-point or larger, but 12-point text may be used in footnotes.

(B) A monospaced face may not contain more than 10½ characters per inch.

(6) *Type styles.* The brief must be set in a plain, roman style, although italics may be used for emphasis. Case names must be italicized or underlined. A brief may use boldface only for case captions, section names, and argument headings. A brief may use all-capitals text only for case captions and section names.

(7) *Length.*

(A) *Page Limitation.* A principal brief may not exceed 30 pages, or a reply brief 15 pages, unless it complies with Rule 32(a)(7)(B) and (C).

(B) *Type Volume Limitation.*

(i) A principal brief is acceptable if it contains no more than the greater of 14,000 words or 90,000 characters and does not average more than 280 words or 1,800 characters per page. A brief using a monospaced face also is acceptable if it does not contain more than 1,300 lines of text.

(ii) A reply brief is acceptable if it contains no more than half of the type volume specified in Rule 32(a)(7)(B)(i).

(iii) Headings, footnotes, and quotations count toward the word, character, and line limitations. The corporate disclosure statement, table of contents, table of citations, statement with respect to oral argument, any addendum containing statutes, rules, or regulations, and any certificates of counsel do not count toward the limitations.

(C) *Certificate of Compliance.* A brief submitted under Rule 32(a)(7)(B) must include a certificate by the attorney, or a party proceeding pro se, that the brief complies with the type volume limitation. The certificate must state the number of words, characters, or lines of type in the brief. The person preparing the certificate may rely on the word or character count of the word-processing system used to prepare the brief.

(b) *Form of an Appendix.* An appendix must comply with Rule 32(a)(1), (2), (3), and (4), with the following exceptions:

(1) The cover of a separately bound appendix must be white.

(2) An appendix may include a legible photocopy of any document found in the record or of a printed judicial or agency decision. A photocopy of a photocopy, or of a fax transmission, is not acceptable. A photocopy must be the same size as the original.

(3) When necessary to facilitate inclusion of odd-sized documents such as technical drawings, an appendix may be a size other than 8½ by 11 inches, and need not lie reasonably flat when opened.

(c) *Form of Other Papers.*

(1) *Motion.* The form of a motion is governed by Rule 27(d).

(2) *Other Papers.* Any other paper, including a petition for rehearing and a petition for rehearing en banc, and any response to such a petition,

must be reproduced in the manner prescribed by Rule 32(a), with the following exceptions:

(A) A cover is not necessary if the caption and signature page of the paper together contain the information required by Rule 32(a)(2).

(B) Rule 32(a)(7) does not apply.

(d) *Local Variation.* Every court of appeals must accept documents that comply with this rule. By local rule or order in a particular case a court of appeals may accept documents that do not meet all of the requirements of this rule.

Just a few comments, in case the reasons behind the choices in the text are obscure.

The treatment of an appendix has been put in its own subsection to promote clarity. That led me to change the order of subsection (a), so that there could be a single compact reference in subsection (b).

Reproduction: In place of the 300 dpi standard, I have used "clarity that equals or exceeds the output of a laser printer." Lawyers know what a "laser printer" is. The Committee Note can explain that this means 300 dpi (with 600 dpi preferred), and that dot-matrix and fax are out, while daisy-wheel, typewriter, standard printing, and most ink-jet printers are in. If we are going to use compliance with Rule 32 the national rule as a guarantee of acceptability everywhere, the 300 dpi minimum is essential. I have changed "white" paper to "light" (buff and cream are fine), and have added a paragraph to handle photos and illustrations.

Cover and binding come from the current Advisory Committee draft. The paper size paragraph specifies one-inch margins and defines a "margin" as space containing nothing more than page numbers. Note that under my draft Rule 32(d) a court of appeals could authorize pamphlet-sized, printed briefs.

Typeface: The draft Rule 32(a)(5) requires serif type. If the national rule allows sans-serif type, I can guarantee that several courts of appeals will forbid it anyway. The Committee Note can explain the difference between serif and sans-serif type and point out that all professionally done publications and briefs use serif type for body text. This is a real self-protection measure for judges, at no cost to attorneys. The Committee Note also can explain the difference between proportional and monospaced faces; a rule should not contain definitions of words unless the definitions depart from ordinary usage.

By the way, for my taste 14-point type is much too large. It is the size used for grade school books! (And for the preceding two sentences.) The Supreme Court allows 11-point type; I don't see why 12-point type (the size used for this letter and all of the Advisory Committee's own work) is too small. The seventh circuit will certainly adopt a local rule allowing 12-point type.

Judges who prefer or need larger type can use a computer disk to generate it (see below for a proposed new Rule 31(c)). But if the national rule is to guarantee universal acceptability, I suppose it should use the 14-point minimum for text (though not for footnotes).

Type styles: A lowest common denominator rule should ensure roman type, limit the use of italics and boldface, and all but forbid all-caps text (which lawyers are wont to use in argument headings, although I find it unreadable). Some courts may be more liberal, but I doubt it.

Length: To placate No-Tie Brown, I have drafted a safe harbor for all briefs, with a counting rule equally applicable across the board. The certificate can use word or character counts (the numbers are roughly equivalent), and the No-Tie crowd, which uses typewriters, also can use a line count that comes out to approximately 50 pages. Even No-Tie Brown can have a secretary count lines! The 1,300 lines is 50 pages at 26 lines per page. With lines 6½ inches wide, and 10½ characters per inch, there would be 68.25 characters per line, and 1,300 such lines would contain 88,725 characters. So the word, character, and line counts all come to roughly the same thing. A level playing field—and level at approximately the current 50-page limit. Rule 32(a)(7)(B)(iii) contains a more comprehensive list of excluded matter. The certificate of compliance has been simplified from the Advisory Committee's current draft.

The rest is straightforward, I hope. Rule 32(b)(2) states loudly that the appendix may not contain faxes or photo-reductions, two banes of judicial existence. Rule 32(d) sets limits on the scope of local rules that are absolutely essential if this project is to succeed.

As I said at the Standing Committee meeting, one more matter deserves attention. The single most-talked-about subject in the corridors of the appellate judges' meeting in San Diego was how to use modern technology to be able to search text in briefs and records—and, for judges with visual problems, how to enlarge that text, or have the computer read it aloud. Dealing with the record is a large problem, because only some of it is available on computer. But most briefs are now available in electronic form, and we can require them to be filed that way. I propose the following as a new Rule 31(c). The current subsection (c) in Rule 31 would be redesignated as (d).

Digital Media. One copy of each brief must be filed on digital media. The disk must contain nothing more than the text of the brief, and the label of the disk must include the case name and docket number. One copy of the disk must be served on each party separately represented. Filing and service under this subsection are not required if counsel certifies that the text of the brief is not available on digital media.

The Committee Note should include three points: (1) A 3½ inch disk is preferred but not required. (2) It is not necessary to use any particular operating

system or word processing program. Modern computers can read both IBM and Macintosh disks, and translators enable one program to read at least the text (if not all the formatting) generated by other programs. But counsel should be encouraged to include two versions of the text: one in the word processor's "native" format and the other in plain ASCII text. (3) The rule is not designed to require the use of word processing equipment.

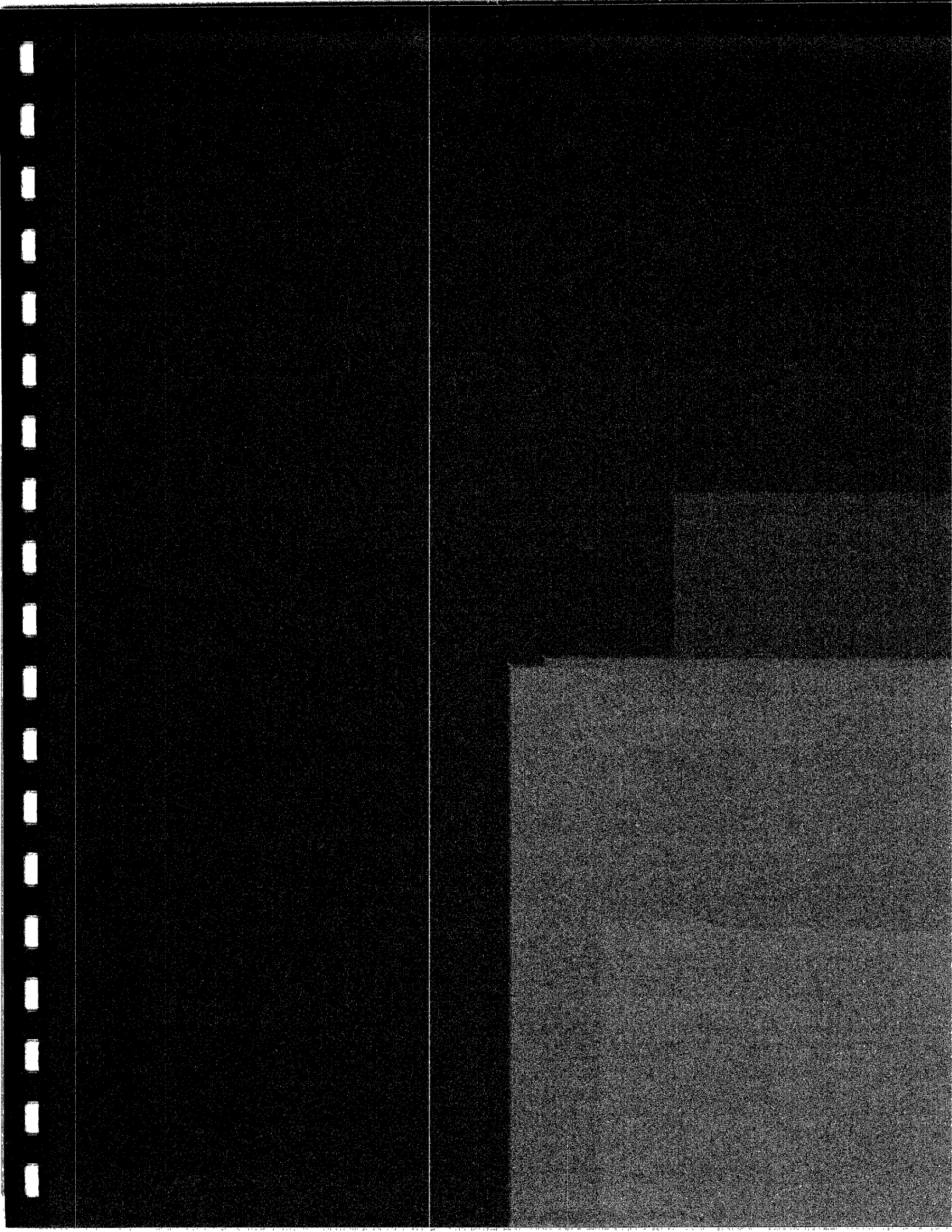
One copy should suffice; the court can create more if they are required. Judge Stotler has expressed a concern about viruses, but I do not think this troubling. Viruses infect only executable files; word processing documents are not executable. Anyway, most computers today are equipped with virus-detection and disinfection programs.

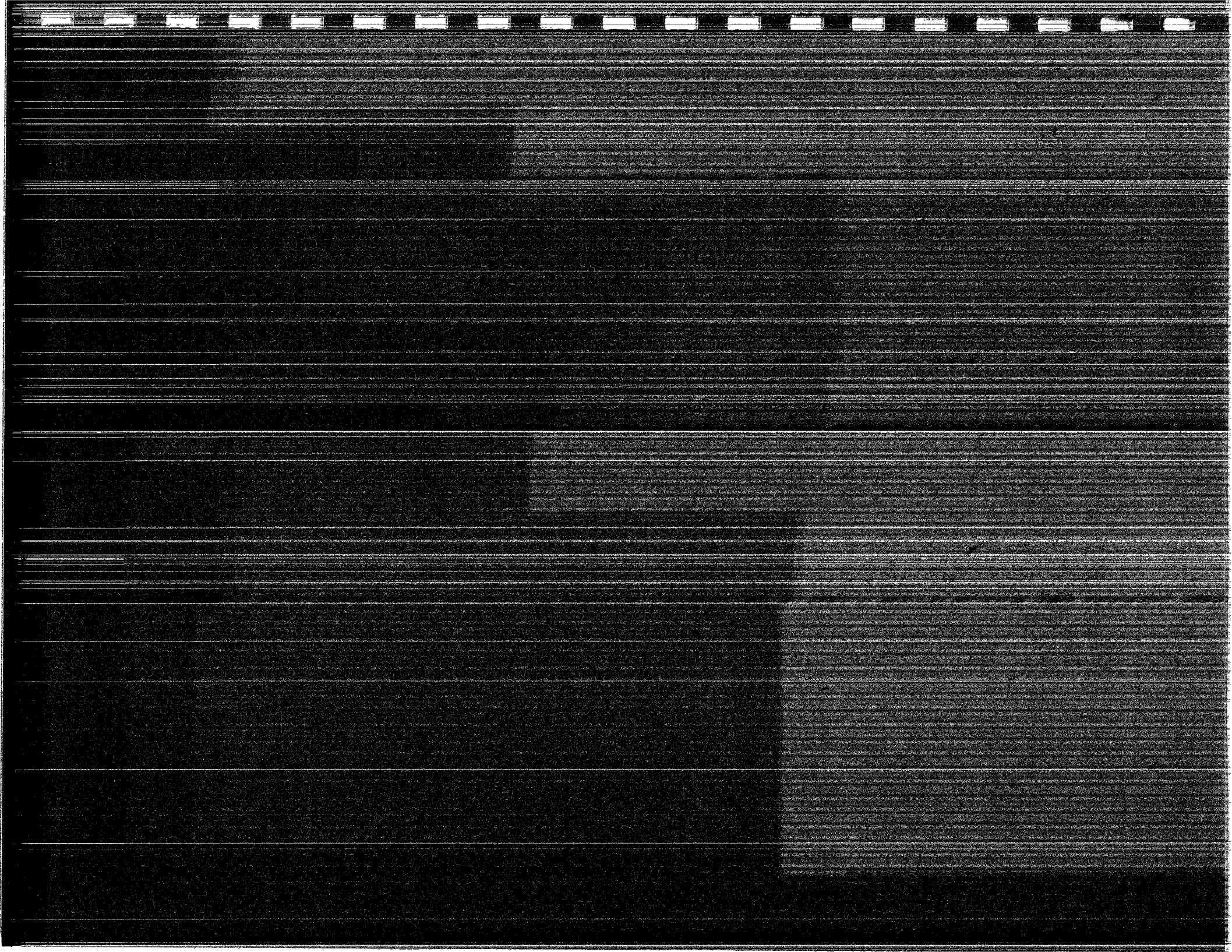
I look forward to joining you at the next Advisory Committee meeting.

Sincerely,

Frank H. Easterbrook

cc: Hon. Alicemarie H. Stotler
John K. Rabiej
Peter B. McCabe
Carol Ann Mooney
Bryan Garner





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

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

(1) *In General.* ~~Briefs and appendices~~ A brief may be produced by ~~standard typographic printing or by any duplicating or copying process which~~ produces any process that results in a clear black image on white paper, including by typing, printing or photocopying. The paper must be opaque and unglazed, and only one side may be used. ~~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 7-1/6 inches. Those produced by any other process shall be bound in volumes having pages 8-1/2 by 11 inches and type matter not exceeding 6-1/2 by 9-1/2 inches with double spacing between each line of text. In patent cases the pages of briefs and appendices may be of such size as is necessary to utilize copies of patent documents.~~

(2) *Typeface.* Either a proportionately spaced typeface of 14 points or more; or a monospaced typeface of no more than 10-1/2 characters per inch may be used in a brief. A proportionately spaced typeface has characters with different advance widths. The design must be in roman, non-script type. A monospaced typeface has characters with the same advance width.

(3) *Paper Size, Line Spacing, and Margins.* A brief must be on 8-1/2 by 11 inch paper. The text must be double-spaced, but quotations more than two lines long may be indented and single-spaced. Headings and footnotes may be single-spaced. The side margins must be at least 1 inch, and the top and bottom margins must be at least 1-1/4 inch.

(4) *Length.*

(A) Proportionately spaced briefs. A principal brief must not exceed 14,000 words and a reply brief must not exceed 7,000 words. No brief may have an average of more than 280 words per page, including headings, footnotes, and quotations.

(B) Monospaced or typewritten briefs. A brief prepared in a monospaced typeface must either:

(i) comply with the word counts, both total and average per page, for a proportionately spaced brief; or

(ii) not exceed 40 pages for a principal brief and 20 pages for a reply brief.

(C) Exclusions. Word and page counts do not include any of the following: corporate disclosure statement, table of contents, table of citations, certificate of service, certificate of compliance with Rule 32, or any addendum containing statutes, rules, regulations, etc.

(5) *Certificate of Compliance.* The attorney, or party proceeding pro se, shall include a certificate of compliance with Rule 32(a)(1)-(4). The person preparing the

certificate may rely on the word count of the word-processing system used to prepare the brief. The certificate must state the brief's line spacing, and either:

(i) that the brief is proportionately spaced, together with the typeface, point size, and word count, or

(ii) that the brief uses a monospaced typeface, together with the number of characters per inch, and word count or number of counted pages.

(6) *Appendix.* An appendix must be in the same form as a brief but may include a legible photocopy of any document in the record.

~~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.~~

~~(2)~~ *Cover.* ~~If briefs are produced by commercial printing or duplicating firms, or, if produced otherwise and the covers to be described are available,~~ Except for filings of pro se parties, the cover of the appellant's brief ~~of the appellant should~~ must be blue; ~~that of the appellee~~ the appellee's, red; ~~that of~~ an intervenor's or amicus curiae's, green; ~~that of~~ and any reply brief, gray. The cover of ~~the appendix, if separately printed, should~~ a separately printed appendix must be white. The front ~~covers of the briefs and of appendices, if separately printed, shall~~ cover of a brief and of a separately printed appendix must contain:

(A) the number of the case centered at the top;

~~(1)~~ (B) the name of the court ~~and the number of the case~~;

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

~~(3)~~ (D) 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)~~ (E) the title of the document, identifying the party or parties for whom the document is filed ~~(e.g., Brief for Appellant, Appendix)~~; and

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

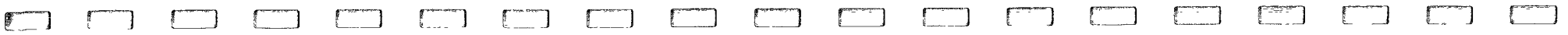
(3) *Binding.* A brief or appendix must be bound in any manner that is secure, does not obscure the text, and permits the document to lie reasonably flat when open.

(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 at 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.~~

(1) *Motion.* The form of a motion is governed by Rule 27(d).

(2) *Other Papers.* Any other paper, including a petition for rehearing and a petition for rehearing en banc, and any response to such a petition, must be produced in a



manner prescribed by Rule 32(a), with the following exceptions:

(A) Rule 32(a)(4) does not apply;

(B) a cover is not necessary if the paper has a caption that includes the case number, the name of the court, the title of the case, and a brief descriptive title indicating the purpose of the paper and identifying the party or parties for whom it is filed.

Committee Note

Subdivision (a). A number of stylistic and substantive changes have been made in subdivision (a). The rule permits printing on only one side of the paper. Although some argue that paper could be saved by allowing double-sided printing, others argue that in order to preserve legibility a heavier weight paper would be needed, resulting in little, if any, paper saving. In addition, the blank sides of a brief are commonly used by judges and their clerks for making notes about the case.

Because photocopying is inexpensive and widely available and because use of carbon paper is now very rare, all references to the use of carbon copies have been deleted.

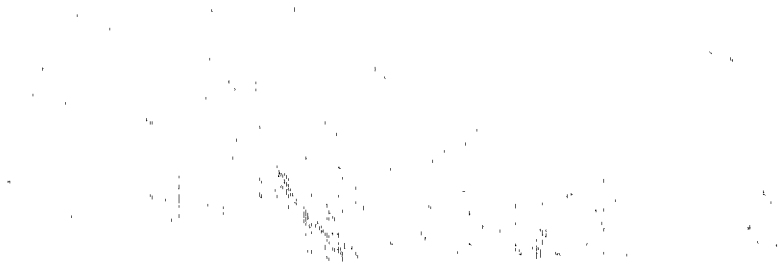
The rule requires that a brief be produced by a process "that produces a clear black image on white paper."

It is strongly preferred that the method used to produce the brief have a print resolution of 300 dots per inch or more. This will ensure the legibility of the brief. A brief produced by a typewriter, laser printer, or daisy wheel printer has a print resolution of 300 dots per inch (dpi) or more. But a brief produced by a dot-matrix printer, fax machine, or portable printer that uses heat or dye transfer methods do not. Some ink jet printers are 300 dpi or more, but some are 216 dpi and would not be sufficient.

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 computer. 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.

The rule provides two options. The text can be prepared using a proportionately spaced typeface of 14 points or more or a monospaced typeface of no more than 10-1/2 characters per inch.

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. The rule requires use of a monospaced typeface that produces no more than 10-1/2 characters per inch. A standard typewriter with pica type produces a monospaced typeface with 10 characters per inch (cpi). That is the ideal monospaced typeface. The rule permits up to 10-1/2 cpi because some computer software programs contain monospaced fonts that purport to produce 10 cpi but that in fact produce slightly



more than 10 cpi. In order to avoid the need to reprint a brief produced in good faith reliance upon such a program, the rule permits a bit of leeway. A monospaced typeface with no more than 10 cpi is preferred.

A proportionately spaced typeface gives a different amount of horizontal space to characters depending upon the width of the character. A capital "m" would be given more horizontal space than a lower case "i." Books and newspapers are ordinarily printed in proportionately spaced typefaces. The rule requires a minimum size of 14 points so that the type is easily legible. A proportional typeface must be roman, that is non-italic. That does not mean, however, that italics cannot be used for case names or for occasional emphasis. In addition, the typeface may not be a script typeface.

Because pamphlet sized briefs are rarely used in the courts of appeal, the rule makes no provision for them. The rule requires that all briefs be prepared on 8-1/2 by 11 inch paper. A brief generally must be double-spaced.

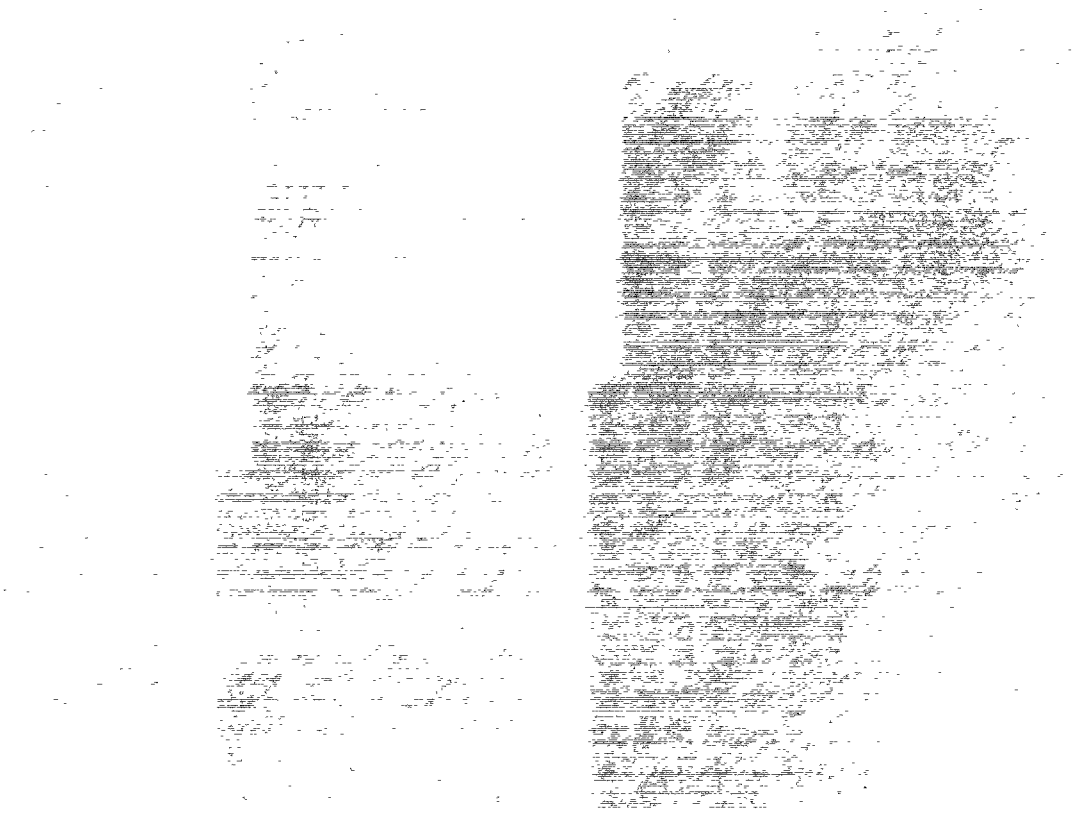
Length limitations are defined separately for proportionately spaced briefs and monospaced briefs. The length limitation for a proportionately spaced brief is based on the number of words per brief rather than the number of pages. This gives every party the same opportunity to present an argument without 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. Although the rule specifies a minimum point size of 14, the various 14 point fonts can produce wide variations in the amount of material per page.

The length of a monospaced brief may be measured by the same word limits, both overall and per page, applicable to a proportionately spaced brief, or by the total number of pages. The Committee believes that the overall word limit of 14,000 words is the equivalent of a 50 page brief written with reasonable use of footnotes and single-spaced quotations. If the person preparing the brief does not want to certify the number of words in the brief, he or she may use the safe-harbor provision allowing 40 pages for a principal brief and 20 pages for a reply brief. The safe-harbor provision limits a monospaced principal brief to 40 pages rather 50 to prevent the use of the safe-harbor provision to produce a 50 page heavily footnoted brief or one containing extensive single-spaced quotations. No safe-harbor is provided for proportionately spaced briefs because they are ordinarily prepared on a computer and an exact word count is readily available.

Until adoption of these amendments, Rule 28(g) governed the length of briefs. Rule 28(g) began with the words "[e]xcept by permission of the court," signalling that a party could file a motion to exceed the limits established in the rule. The absence of similar language in Rule 32 does not mean that the Committee intends to prohibit motions to deviate from the requirements of the rule. The Committee did not believe that any such language was needed to authorize such a motion.

The rule requires a certification of compliance with the requirements of Rule 32(a)(1) through (4). The rule permits the person preparing the certification to rely upon the word count of the word processing system used to prepare the brief.

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 faxes should be avoided. If a decision that is included in the appendix has been published, a copy of the published decision should be



provided.

The rule requires a brief or appendix to be bound in any manner that is secure, does not obscure the text, and that permits the document to lie reasonably 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 already has such a requirement, and the Fifth Circuit rules state a preference for it. While a spiral binding would comply with this requirement, it is not intended to be the exclusive method of binding. Stapling the brief at the upper left-hand corner also satisfies this requirement as long as it is sufficiently secure.

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 petition for rehearing en banc and a response to either a petition for panel rehearing or a petition for rehearing en banc be prepared in the same manner. But the length limitations of paragraph (a)(4) do not apply 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 opaque, unglazed paper 8-1/2 by 11 inches in size." That language has been deleted but that method of preparing documents is not eliminated because (a)(2) permits use of standard pica type. The only change is that the rule now specifies margins for these typewritten documents.

Agenda Item III-A

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

RECEIVED 5/26/95

May 23, 1995

The Honorable Alicemarie H. Stotler, Chair
Standing Committee on Rules of Practice
and Procedure
751 West Santa Ana Boulevard
Santa Ana, California 92701

Re: Marketing the Restylization of the Appellate Rules

Dear Judge:

When we undertook the restylization of the appellate rules I guess I did not think that we would have to do a major marketing job to have the changes accepted. I assumed that if we would simply state that the rules had been rewritten by different committees over a long period of time, that an expert on use of language in a legal context had been hired to advise the Standing Committee and all of the various rules advisory committees on language, and that this project emerged from that, it would be enough. But I suspect that you are correct that we will have to do at least some marketing. I will comment on the items in your memorandum as follows:

1. Format of Presentation. I agree with Joe Spaniol that we ought to utilize the face-to-face/side-by-side format in everything that the AO distributes for us. I doubt we can require the commercial publishers to present the changes in that form, but we can certainly suggest it if they are going to publish our proposals. I have never seen anything commercial publishers have done on appellate rules we have put out for comment; everything I have seen has been published by the AO.

2. Introduction via Circuit Judicial Conferences. Under the pressure of budget constraints, most circuits have gone to an every-other-year judicial conference instead of on an annual basis. Therefore, some circuit judicial conferences may not meet during the time that we have these rules out for comment. If there are judicial conferences which could include the revisions on their programs, the program committees may not regard these changes as "sexy" enough to make the program list. I have been

through that several times with the Tenth Circuit, and our program committees seem to want more broad-gauged subjects. I realize that the Ninth Circuit operates on a totally different format, with lots of subcommittees. We could present the rule changes to the chief judges of the various circuits as a suggested subject for conference programs, or for a subject at a court retreat. We could offer someone from our committee to make the presentation.

There is another route through the judicial conferences of the various circuits. I believe each judicial circuit council is required by law to have an advisory committee, with representatives from the bar of each of the states represented in the circuit. I was the first chair of the Tenth Circuit advisory committee. We have as its membership one lawyer from each of the six states in the circuit, selected by the circuit judges of the state from a list of three names submitted to them by the district judges in the state. These are lawyers who are required to have a substantial federal practice. In addition, there is on the advisory committee a representative of the U.S. Attorneys and the federal public defenders. We use this method--and I think other circuits also--to disseminate to the bar proposals under consideration and to develop feedback from the bar. Certainly the style revision of the appellate rules could and should be presented to those advisory committees, which will no doubt meet each time there is a circuit judicial conference--and perhaps in between. A member of our rules committee could be persuaded to make a presentation to these advisory committees and to seek their assistance in obtaining bar approval.

3. Transmittal Letter. I am in full agreement with your suggestion that the cover letter of transmittal cite the history, membership, and time invested in this project.

4. Early Hearings. I agree again that we should schedule hearings on the appellate rules changes at the earliest possible moment. In my six or so years on the committee we have never had to actually hold a public hearing. Only infrequently have we had a request by any person to appear, or an indication that anyone would appear at a public hearing. In the one instance of a request for personal appearance of which I have knowledge Ken Ripple, my predecessor, satisfied that individual by a telephone conversation. Last year there was one request from Judge Wiggins that was misconstrued as a desire to appear. When I visited with Judge Wiggins on the telephone he said he did not intend to appear but merely wanted his views known to the committee. The massive revision we have undertaken is likely to prove an exception to our past history, and certainly if there is interest we should have

hearings. We could schedule one in four different areas of the country with one circuit judge member of our committee presiding at each such hearing.

5. Lawyer's Group Support. I agree with your comments that we should make sure that all interested lawyer groups are informed and have a copy of the cover letter explaining the history, membership, and time involved in this project.

6. Litigation Magazine. Of course I would like to see an article such as you suggest. But I think the best person to do that article would be Bryan Garner. He is so busy that I do not know whether he could do it. Perhaps now that George Pratt has left the bench he, or Joe Spaniol, could do it.

7. Academic Support. If we could induce law professors to write op-ed pieces or law review articles in support of the project it would help. After all the work we have done I am not sure we want to especially invite them to nitpick. I suspect that we need not do anything special to attract comment from the country's law professors, but those who specialize in federal practice should be included on the distribution list.

8. American Law Institute Assistance. This does not seem like an ALI project. But Charlie Wright and Geof Hazard are vitally interested people who may be willing to comment approvingly of the project.

9. Stay Further Amendments. It would not be too difficult to consider the October 1995 batch of rules going out for publication and comment as the last ones until we conclude the style project. We really have only one suggestion before us that seems to deserve immediate attention--one by Judge Steve Williams to eliminate the trap of premature appeals from administrative agencies in the same way we have eliminated it for court cases. There are a few places in the style revision where ambiguities must be cleared up, and those may be regarded as substantive changes. But I see no problem in keeping new rules out of the pipeline--with the possible exception of the Steve Williams suggestion--until we get the revised rules.

10. "Marketing Style" as SRC Agenda Item. I leave that to you as to whether to put marketing on the Standing Committee's agenda for discussion.

11. Timing and the SRC Chair's Discretion. I would think that you will want to have the approval of the entire Standing Committee before you issue the appellate rules as restylized for

publication and comment. I have been pushing it pretty hard because my term as chair of the advisory committee will terminate in October 1996, and I want to have the project before the Standing Committee in time to participate in answering questions on the revisions while I am still serving on the committee. Carol Mooney has also told me she intends to end her long tenure as reporter when my tenure as chair ends. Thus, while I am not in any hurry to get this before the bar--the process has been functioning well with the appellate rules as they are currently written--if the Standing Committee wishes Carol and my input it should give its consideration before October 1996.

I have nothing additional to contribute to your marketing memo. I guess I assumed that the bar would welcome simplification and we really would not have to do a major sell job on our restylization.

Sincerely,

James K. Logan

JKL:sa

cc: Professor Carol Ann Mooney
Professor Daniel R. Coquillette
Mr. Peter G. McCabe
Mr. Joseph F. Spaniol, Jr.
Mr. John K. Rabiej

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

ALICEMARIE H. STOTLER
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

JAMES K. LOGAN
APPELLATE RULES

PAUL MANNES
BANKRUPTCY RULES

PATRICK E. HIGGINBOTHAM
CIVIL RULES

D. LOWELL JENSEN
CRIMINAL RULES

RALPH K. WINTER, JR.
EVIDENCE RULES

MEMORANDUM TO FILE
Alicemarie H. Stotler, U.S.D.J.

April 23, 1995

Re: Marketing the Restylization of the Appellate Rules

On April 18, after the Appellate Rules Advisory Committee meeting adjourned, Joe Spaniol, Peter McCabe, John Rabiej, Prof. Mooney, and I had an interesting, albeit informal, conversation about "marketing" the style project for the Appellate Rules. Among the suggestions for success are the following:

1. Format of Presentation. Joe Spaniol suggests that we insist that commercial publishers present the rule changes in a face-to-face/side-by-side format akin to that submitted by Mr. Garner when he presents revised sets of rules. We can maintain this format in the AO publication that is widely distributed, but we will have less control over the commercial publishers as well as the format adopted for online distribution. We need to look into the extent of control we have over those publications and routes of distribution.

2. Introduction via Circuit Judicial Conferences. We should use the various circuit judicial conferences throughout the United States to distribute the advance word about the Appellate Rules revisions. Perhaps April 1996 is a more logical concluding date for the style project, and we need to start working our way now onto the program committees of the various Circuit Judicial Conferences. We will need to showcase prime examples of how the Appellate Rules have been simplified and clarified.

3. Transmittal Letter. When it is time for the cover letter of transmittal to go out, perhaps by Judges Logan and Stotler (or the chairmen at the time), we need to cite the history of the style project including its illustrious members and the time invested in this project.

4. Early Hearings. We will schedule hearings on the Appellate Rules changes and set them frequently and early so as to prompt comment immediately.

5. Lawyer's Group Support. We need to make sure that many groups within the ABA are also contacted about these rules changes, plus ATLA, ACTL, etc. We should include the American Academy of Appellate Lawyers which has a newsletter and of which Mr. Munford, a member of the Appellate Advisory Rules Committee, is president-elect. (He was present during much of this April 18 discussion.)

6. Litigation Magazine. We should prepare an article for the Litigation magazine, the publication sponsored by the Litigation Section of the ABA. We need to submit an article in a timely fashion that sets forth sample rules, improved by style, with the same face-to-face format discussed in paragraph one.

7. Academic Support. We need to garner support from the academy.

8. American Law Institute Assistance? Perhaps the ALI can be approached so as to endorse, in a general way, this project. We should inquire of President Wright and/or Prof. Hazard, its Director, whether the style effort comports with the goals of the ALI.

9. Stay Further Amendments? The Appellate Rules Advisory Committee may wish to consider the October 1995 batch of rules going out for publication and comment its last batch until the style project is concluded on the Appellate Rules. If we can keep new rules out of the pipeline, it will be easier to present an entire new set of revised Appellate Rules.

10. "Marketing Style" as SRC Agenda Item. Should we include "marketing" on the Standing Rules Committee agenda so that we can determine the wishes of the Standing Committee as a whole about its endorsement of the style project and the timing of the above steps?

11. Timing and the SRC Chair's Discretion. Finally, we can consider asking the Chair of the Standing Committee to authorize publication of the Appellate Rules without having to await action by the full Standing Committee. Given the timing (of a proposed April 1996 completion date), however, it is likely the Chair of the Standing Committee will want to have the approval of the entire Standing Committee for issuance of the Appellate Rules as revised for publication and comment.

The recipients of this memo (listed below) are invited to add to, revise, or otherwise contribute thoughts on the "Marketing Memo."

Distribution List

cc: Judge Logan
Professor Mooney
Professor Coquillette
Mr. McCabe
Mr. Spaniol
Mr. Rabiej

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Agenda Item III B

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

July 1995

Introduction

At the June 1993 meeting, the Standing Committee directed the Subcommittee on Long Range Planning to undertake a thorough study of the federal judicial rulemaking procedures, including: (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 deferred in anticipation of the January 1994 Executive Session and related discussion. At that meeting, the Standing Committee decided to solicit public comments. **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 issues for preliminary discussion at that meeting and solicited further written comments from those in attendance. A draft was circulated to the Standing Committee in January 1995, and now this semi-final draft has been completed. The Chair of the Standing Committee wants to solicit comments from the Advisory Committees, so the Subcommittee's work will be back on the agenda for the winter 1995–96 meeting of the Standing Committee.

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] 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 a statute 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 system prevented the federal courts from following 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 to the corresponding state forum's rules and procedures.[6] Under the Conformity Act 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, a story "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.

Before 1938, the federal courts followed state procedural law, state substantive statutes, and federal substantive common law, even in diversity cases. Of course, the substantive common 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

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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.

9 304 U.S. 64 (1938).

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] Thus 1938 marked an inversion in diversity cases: henceforth there would be federal procedural law and state substantive law. Those 1938 rules—still recognizable today despite numerous amendments—established a 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 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 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, evincing 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 recommended to the Supreme Court what it considered 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 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 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 neither acted on the Report nor explained its inaction. 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

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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 Ibid.

14 Order Requesting Amendments from the Advisory Committee, 308 U.S. 642 (1939).

15 Continuance 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).

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, remaining until resignation or death. 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. 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 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 rules dealing with evidentiary privileges. Congress ended up mandating, by statute, that the evidence rules not take effect until approved by legislation. Then Congress reviewed the proposed rules and made substantial revisions before enacting rules of evidence 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

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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).

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).

by Congress.[23] After a 20-year hiatus the Chief Justice reestablished an Advisory Committee on the Rules of Evidence in 1993. 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 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.

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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).

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.

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. On recommendation of the Advisory Committee's chair, the Chief Justice appoints a reporter, usually from the academy, 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 "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

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29 Ibid.

30 Ibid.

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."

32 8 U.S.C. §2073(b).

33 "Meetings 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 25.

34 A Summary for Bench and Bar, supra note 25.

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.[46] Spirited debates have been generated, from time to time, over particular proposals and sets of amendments. 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 vantage includes rulemaking norms as they are currently understood as well as how they might be "reimagined." If rulemaking procedures are a meta-procedure, in the sense they are the procedures followed to promulgate new court proce-

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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).

47 Pub. L. No. 103-322, 108 Stat. 1796; H.R. Rep. No. 103-711, 103d Cong., 2nd Sess. (1994). On unanimous recommendation of the Advisory Committee on Evidence and of the Standing Committee, the Judicial Conference informed Congress that in its view this exercise was imprudent and had produced seriously flawed language. The Judicial Conference proposed an alternative text more in accord with the norms and drafting style of the other rules. See *Report of the Judicial Conference on the Admission of Character Evidence in Certain Sexual Misconduct Cases* (Feb. 1995).

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).

dures, 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 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 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 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 only 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

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49 Professor Carl Tobias assisted in the compilation of issues for consideration in this part of this Report.

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.

Federal judges ought to remain a majority of the members of the Advisory Committees. They have the knowledge and time to act in the best interest of the public those courts serve. They are of course lawyers too, with substantial experience on both sides of the bench. The ability to compare these two experiences (not to mention the diverse backgrounds that brought still others to the bench) makes judges especially appropriate rulemakers. 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 goals, 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.[51]

[1] Recommendation to the Chief Justice: Appointments to the Advisory Committees should 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 complex 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

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50 28 U.S.C. §478(b).

51 See also Proposed Long Range Plan for the Federal Courts (May 1995) Recommendation 30, Implementation Strategy 30c: "In developing rules, the Judicial Conference and the individual courts should seek significant participation by the interested public and representatives of the bar, including members of the federal and state benches."

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 should 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 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;[52] 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. In August 1994 the Chair of the Standing Committee wrote the presidents of all state bar associations, requesting them to designate persons to receive drafts and make comments; so far more than half of the state bars have done this.

To promote both the appearance and reality of openness, greater uses of technology should be explored. The extensive 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 and on commercial services, can be made available electronically on the Internet promptly. The judiciary could maintain a World Wide Web server at minimal cost.[53] If the committees operate their own server, persons 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,[54] 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

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[52] The memorandum from John K. Rabiej to the Standing Committee, dated December 6, 1994, details these procedures. The mailing list contains 2,500 names. Any given recipient who does not respond over the course of three years will be replaced with a new name.

[53] The Administrative Office has established a home page at http://www.uscourts.gov, but the page is still "under construction," meaning that comprehensive links to major data sources have not been established. Other institutions have taken the lead. Cornell has put several sets of rules online at http://www.law.cornell.edu, and Professor Theodore Eisenberg has made the AO's entire database available, with search and computation abilities added, at http://teddy.law.cornell.edu:8090/questata.htm. Undoubtedly there are other sites.

[54] 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).

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.[55] 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—or sophisticated econometric analysis of variation (the subject of the next section below).

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 studies 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 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.[56] 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.[57]

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55 Baker, supra note 1, at 335.

56 Pub. L. No. 101-650, 104 Stat. 5089 (1990).

57 Pub. L. No. 103-420, 103rd Cong., 2nd Sess. (Oct. 25, 1994).

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 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 resonates 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"[58] that present choices of different resolution procedures for different kinds of 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. But the new Fed. R. Civ. P. 83, to become effective on December 1, 1995, unless legislation intervenes, insists that local rules be consistent with, and not duplicate, national rules.

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. The Judicial Conference's own Long Range Planning Committee was unable to suggest a concrete solution.[59] 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.

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58 Baker, supra note 1, at 334.

59 Proposed Long Range Plan for the Federal Courts (Mar. 1995) Recommendation 30, Implementation Strategy 30b: "The national rules should strive for greater uniformity of practice and procedure, but individual courts should be permitted limited flexibility to account for differing local circumstances and to experiment with innovative procedures."

Redrafting proposals. The main task of drafting proposed rules belongs 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. Meetings of the Standing Committee then 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 should 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 Supreme Court has shown some unease with this process, which produces differences in style across rules; the "restyled" rules use terminology in a different way from the older rules, and when sending a package to Congress on April 27, 1995, the Supreme Court changed "must" to "shall" to preserve consistent usage. The Court may prefer an all-at-once project, of the kind now under way, but thoroughgoing restyling creates risks of accidental change in meaning (even as other unintended implications in the existing rules are caught and squelched). 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 how to proceed with the sets of restyled rules. The Long Range Planning Subcommittee has no special perspective on this frequent topic of discussion.

[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 2½ 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. (Similarly, in June 1995 the Chief Justice discharged the Judicial Conference's own Committee on Long Range Planning.) Another option is to assign 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, and vice versa.

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 seven 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.[60] 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—and, correspondingly, whether if it is best to maintain the Court's current role whether it would be appropriate to reduce the role of the Judicial Conference. Whether it is necessary for *both* of these bodies to pass on rules that have already been fully ventilated is doubtful.

There is one other 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 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."[61] On the judicial side, this distinction requires careful discernment.

Congress has the power to adopt rules and procedures for the federal courts.[62] "May" does not imply "should." The wisdom behind the Rules Enabling Act procedures is deep. The Third Branch has 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. Similarly with respect to legislation regulating the rulemaking process. In his year-end report for 1994, the Chief Justice

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60 Statement of Justice White, 113 S.Ct. at 575 (Apr. 22, 1993).

61 28 U.S.C. §2072 (a) & (b).

62 U.S. Const. art. III, §1.

wrote: "I believe that this [Rules Enabling Act] system has worked well, and that Congress should not seek to regulate the composition of the Rules Committees any more than it already has." The Judicial Conference has reached the same conclusion. See also Recommendation 1 above. And the Judicial Conference's Committee on Long Range Planning shares this understanding. See *Proposed Long Range Plan for the Federal Courts* (Mar. 1995) Recommendation 30, Implementation Strategy 30a ("Rules should be developed exclusively in accordance with the time-tested and orderly process established by the Rules Enabling Act.").

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: Three changes in the rulemaking environment have occurred at roughly the same time. The period between initial proposal and ultimate rule was extended in 1988 by increased opportunities for comment and an increased length of report-and-wait periods, so that it is now difficult to see a proposal through in fewer than three years. Simultaneously, the national rulemaking process had become more frenetic, with multiple packages pending simultaneously. Instead of five or more years between amendment cycles (the old norm), it is now common to see multiple amendments to the same rule in different phases: one pending before Congress, another pending before the Judicial Conference, a third out for public comment, and a fourth under consideration by an Advisory Committee. Meanwhile local rulemaking has burgeoned, in part at the instance of Congress (the Civil Justice Reform Act of 1990).

On one thing most people agree: *all* of these developments are unfortunate. It takes too long to amend a rule or create a new one, and delay not only perpetuates whatever problem occasioned the call for amendment but also invites Congress and local courts to step in. The former undermines the Enabling Act process (and discards the benefits of expertise); the latter undermines national uniformity. If the Supreme Court cannot respond quickly to a problem, legislation or local rules must be the answer. That amendments to the Rules Enabling Act are themselves responsible for the extended rulemaking cycle—that is, that Congress is the source of the delay it bemoans—is no answer to those who seek prompt changes. At the same time, few people can be found to support the existence of multiple changes to the same rule. Professor Wright, an observer and long-time participant in the rulemaking process, has condemned the

process of overlapping amendments in no uncertain terms.[63] His *cri de coeur* is one among many strong and fundamentally correct indictments. It also illustrates the intractable nature of the problem—for it is precisely the change in the length of the cycle that has made overlaps inevitable!

When rules could be amended after a year or two of effort, and when the Chairs of the Advisory Committees and Standing Committee had indefinite terms, it was easy to have discrete and well-separated packages of rules. The heads of the committees could plan a coherent program, confident that they could see it through, and that if new information called for prompt change, they could accomplish it by adding it to an existing package. No more. The increased length and formality of the rulemaking process makes it difficult for a bright idea or alteration required by legislation to "catch up" with an existing package. Meanwhile the members of the committees serve shorter terms, so that fresh blood brings fresh suggestions every year and the Chairs, to have any effect before their three-year terms expire, must act with dispatch. No wonder we see a drawn-out process in which amending cycles overlap while local rules sprout like weeds. And it is almost impossible to imagine a cure while the duration from proposal to effectiveness is longer than the terms of Chairs.

What is worse, a cure that entailed enforced separation of rules packages—say, a maximum of one package per three-year term of a Chair—would have large costs of its own. Would the package have to start life at the outset of the Chair's time? Too soon; the Chair needs time to settle in, do some deep thinking, review the data, collect the thoughts of the committee, and so on. Then would the package start late in the Chair's term? Too late; its architect would leave before sheparding the package through and accommodating the many demands for amendments that occur in the process. Meanwhile new things come up—new statutes, decisions that interpret a rule to create a trap for the unwary (the source of the overlapping proposals concerning Fed. R. App. P. 3 and 4 that Prof. Wright bemoaned)—and the cost of tidiness may be that litigants forfeit their rights. Put to a choice between simplifying the life of judges and authors, and preserving the rights of litigants, the rules committees always should choose the latter. That seals the fate of proposals to simplify and separate amendment packages without any escape hatch. Once we allow the escape hatch, however, messiness is inevitable.

Several recommendations above aim at relieving the stresses that have led to the current problems. We have suggested longer terms for Chairs and slower turnover of committees. We have ruminated about the possibility of abbreviating the rulemaking process by skipping one or another of the participants (either the Judicial Conference or the Supreme Court). What we now take up is the possibility of setting norms for our own work—norms rather than rules, for the reasons we have explained, but norms that if implemented will relieve the points of stress.

One important step would be to establish biennial cycles as the norm. Rules would be issued for comment every other year—not every year, or every six months, as is possible now. Advisory Committees could be encouraged to make recommendations to the Standing Committee every year (to ease the problem of congestion for both the Advisory Committees and the Standing Committee), but proposals would be consolidated for biennial publication. All Advisory Committees could be on the same schedule, so unless some emergency intervened the bar could anticipate that, say, proposals would be sent out for public comment only in even-

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[63] Charles Alan Wright, Foreword: The Malaise of Federal Rulemaking, 14 Rev. Litigation 1 (1994).

numbered years. Chairs with longer tenure could plan for these cycles, and it would be easier for late-occurring ideas to "catch up" without the need for separate publication.

A change in the publication cycle could be accompanied, to advantage, by a change in the Standing Committee's schedule. The summer meeting of the Standing Committee has been set by working backward from the May 1 deadline for promulgating rules and transmitting them to Congress (with a December 1 effective date). The Supreme Court can promulgate the rules by May 1 only if it receives a recommendation of the Judicial Conference the preceding fall (a recommendation at the Conference's spring meeting would leave the Court too little time). The Conference can make the necessary recommendation only if the Standing Committee acts by July, which leaves time to write and circulate the final recommendations. The summer meeting is therefore an enduring feature of the rulemaking landscape, so long as the Judicial Conference and the Court play their current roles and the statutory schedule is unchanged.

Not so the winter meeting—and not so the content of meetings. If all recommendations to the Judicial Conference are consolidated for action at the summer meeting, the second meeting of the year can be reserved for the discussion of drafts the Advisory Committees want to publish for comment. A meeting of the Standing Committee in the fall, rather than the winter, would create sufficient time to have a full comment period, a meeting of the Advisory Committee the next spring, and consideration of the final proposals at the ensuing summer meeting of the Standing Committee. This change could shave six months to a year off the rulemaking schedule, making a biennial cycle more attractive.[64]

As we have stressed, it will be essential to allow exceptions for true exigencies, as well as for off-year republication of proposals that deserve further comment. These should be few, however, as a longer cycle will permit more concentrated thought. We therefore make the following

[18] Recommendation to the Standing Committee: The Standing Committee should establish a biennial cycle as the norm in rulemaking, should limit its summer meeting to the consideration of proposals to the Judicial Conference, and should hold a fall meeting for the consideration of recommendations that drafts by sent out for public comment.

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

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64 The following schedule would work. In spring or summer of Year One, the Advisory Committee makes a recommendation for publication. The Standing Committee would consider the recommendation at a meeting between September 15 and 30. Publication at the beginning of November (giving the AO a month for preparation) would produce a comment period closing at the end of April in Year Two. Advisory Committees would meet toward the end of April, in conjunction with any oral hearings, to consider comments and make recommendations for a meeting of the Standing Committee to be held at the end of June of beginning of July. The Standing Committee would transmit any approved drafts to the Judicial Conference for consideration in the fall of Year Two. If the Conference and Supreme Court approved, the rule wiold take effect on December 1 of Year Three, a total time of approximately 2½ years from initial proposal to effectiveness.

procedure in the world,"[65] 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,

Thomas E. Baker
Alvin R. Allison Professor
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Frank H. Easterbrook
Circuit Judge
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65 Charles Alan Wright, Amendments to the Federal Rules: The Function of a Continuing Rules Committee, 7 Vand. L. Rev. 521, 555 (1954).

Agenda Item IIIC

TO: Advisory Committee on Appellate Rules

FROM: Carol Ann Mooney, Reporter

DATE: October 3, 1995

SUBJECT: Committee Notes

Professor Dan Coquillette, the Reporter for the Standing Committee on Rules, requested that the Advisory Committees discuss the proper role of the "Committee Notes" that accompany the federal rules of procedure. Professor Coquillette requested that the reporters to the advisory committees submit reports summarizing the discussions before the January meeting of the Standing Committee.

Professor Coquillette posed three questions.

1. Whose notes are they? Are they Advisory Committee Notes, Standing Committee Notes, or both? Whose should they be?
   - If the note is treated as an Advisory Committee Note, what happens if the Standing Committee makes amendments after the Advisory Committee has completed its work? Should there be a separate Standing Committee Note?
   - Should there be only one note reflecting both the Advisory Committee's and the Standing Committee's thoughts? If so, the note approved by the Advisory Committee ordinarily must be amended whenever the Standing Committee makes further amendments. (As a practical matter those amendments are made by the advisory committee reporter after the meeting and reviewed by the chair of the advisory committee.)

2. What should be in the text of the rule rather than in the note?

3. What happens to the note if the Judicial Conference or the Supreme Court amends a rule after the committees have completed their work? A rule could be so fundamentally altered that the note would be misleading.

1. Whose Note?

The recent practice among the members of the rules committees is to refer to the notes as "Committee Notes" rather than "Advisory Committee Notes." That is, I believe, a relatively recent change. The rules and notes are set forth in an appendix to Title 28 of the United States Code and the notes are labeled "Advisory Committee Notes." That is true even of the notes accompanying the 1993 amendments, which were sent to the

Judicial Conference as "Committee Notes."[1]

In an effort to understand the role of the notes, I consulted both the Rules Enabling Act and the "Procedures for the Conduct of Business by the Judicial Conference Committees on Rules of Practice and Procedure." Although committee notes have existed since the adoption of the Federal Rules in 1938, neither the Rules Enabling Act nor the procedures for the conduct of business provide an historical explanation of the origin or significance of the notes. The Rules Enabling Act did not mention committee notes until a 1988 amendment of the act and the procedures governing the rules committees were not adopted until the late 1980's. Since the late 1980's, when the Rules Enabling Act was amended and the procedures for the conduct of business were adopted, however, it appears that the Standing Committee must approve not only any rule amendments but also the accompanying committee note.

A. The Rules Enabling Act

The Rules Enabling Act said nothing about committee notes until 1988. As part of the 1988 Judicial Improvements and Access to Justice Act (Pub. L. 100-702) section 2073 was added to title 28. It requires an explanatory note but does not clearly assign the task of authoring that note to either the Advisory Committee or the Standing Committee. Section 2073(d) requires that "the body" recommending adoption or amendment of a rule "shall provide . . . an explanatory note on the rule. . .." Given the language in other subdivisions of the section, subdivision (d) arguably means that the explanatory note (or notes) comes from both the advisory committee and the standing committee. Under the language of subdivisions (a)(2) and (b) both the advisory committee and the standing committee make recommendations to the Judicial Conference and are, therefore, a "body" for purposes of subdivision (d). The complete text of § 2073 provides as follows:

> Rules of procedure and evidence; method of prescribing
> (a) (1) The Judicial Conference shall prescribe and publish the procedures for the consideration of proposed rules under this section.

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[1] Similarly, the government printing office rules pamphlets contain a "Historical Note" at the beginning of each pamphlet; that note recites the statutory authority for the promulgation of the rules and the date the rules were originally promulgated together with the dates of amendments. The concluding paragraph of the "Historical Note" says:

> The notes of the Advisory Committee appointed by the Supreme Court to assist it in preparing the rules and amendments are set out in the Appendix to Title 28, United States Code, following the particular rule to which they relate. In addition, the rules and amendments, together with Advisory Committee notes, are set out in the House documents listed above. (Emphasis added.)

(2) The Judicial Conference may authorize the appointment of committees to assist the Conference by recommending rules to be prescribed under section 2072 of this title. Each such committee shall consist of members of the bench and the professional bar, and trial and appellate judges.

(b) The Judicial Conference shall authorize the appointment of a standing committee on rules of practice, procedure, and evidence under subsection (a) of this section. Such standing committee shall review each recommendation of any other committees so appointed and recommend to the Judicial Conference rules of practice, procedure, and evidence and such changes in rules proposed by a committee appointed under subsection (a)(2) of this section as may be necessary to maintain consistency and to otherwise promote the interest of justice.

(c) (1) Each meeting for the transaction of business under this chapter by any committee appointed under this section shall be open to the public, except when the committee so meeting, in open session and with a majority present, determines that it is in the public interest that all or part of the remainder of the meeting on that day shall be closed to the public, and states the reason for so closing the meeting. Minutes of each meeting for the transaction of business under this chapter shall be maintained by the committee and made available to the public, except that any portion of such minutes, relating to a closed meeting and made available to the public, may contain such deletions as may be necessary to avoid frustrating the purpose of closing the meeting.

(2) Any meeting for the transaction of business under this chapter, by a committee appointed under this section, shall be preceded by sufficient notice to enable all interested persons to attend.

(d) In making a recommendation under this section or under section 2072, the body making that recommendation shall provide a proposed rule, an explanatory note on the rule, and a written report explaining the body's action, including any minority or other separate views.

(e) Failure to comply with this section does not invalidate a rule prescribed under section 2072 of this title.

B. The Procedures

The Procedures for the Conduct of Business by the Judicial Conference Committees on Rules of Practice and Procedure (hereafter "procedures") were adopted in the late 1980's during, I believe, the pendency of the 1988 legislation. Like the statutory provision, the procedures do not state directly whether the note is the Advisory Committee's, or both the Advisory Committee's and the Standing Committee's. The procedures clearly require the note to originate from the Advisory Committee and be submitted to the Standing Committee along with any proposed rule change. But that

portion of the procedures that authorizes the Standing Committee to accept, reject, or modify a proposal may be read to authorize Standing Committee modification of the note.

The procedures provide the following as to notes:

> Part I. - Advisory Committees
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> * * * * *
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> 3. Drafting Rules Changes
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> * * * * *
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> b. The reporter assigned to each Advisory Committee shall, under the direction of the Committee or its Chairman, prepare initial draft rules changes, "Committee Notes" explaining their purpose and intent, . . ."
>
> c. The Advisory Committee shall then meet to consider the draft proposed new rules and rules amendments, together with the Committee Notes, make revisions therein, and submit them to the Standing Committee, or its Chairman, with a written report explaining the Committee's action, including any minority or other separate views.
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> * * * * *
>
> 5. Subsequent Procedures [after publication]
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> * * * * *
>
> b. The Advisory Committee shall submit proposed rules changes and Committee Notes, as finally agreed upon, to the Standing Committee. . . .
>
> Part II. - Standing Committee
>
> * * * * *
>
> 8. Procedures
>
> * * * * *
>
> b. When an Advisory Committee's final recommendations for rules changes have been submitted, the Chairman and Reporter of the Advisory Committee shall attend the Standing Committee meeting to present the proposed rules changes and Committee Notes.
>
> c. The Standing Committee may accept, reject, or modify a proposal. . . .
>
> d. The Standing Committee shall transmit to the Judicial Conference the proposed rules changes and Committee Notes approved by it, together with the Advisory Committee report. The Standing Committee's report to the Judicial Conference shall include its recommendations and explain any changes it has made.

C. Conclusion

Although the explanatory notes are often referred to as "Advisory Committee Notes" and may have historically developed as such, it is arguable that the Rules Enabling Act and the procedures require the Standing Committee's approval not only of the rule amendments but also of the note. If that is so, it is hard to see how they are the exclusive province of the Advisory Committees.

I think it would generally be a bad idea to have separate "Advisory Committee Notes" and "Standing Committee Notes." Although the Standing Committee frequently makes changes in the rules proposed by an Advisory Committee most of the changes are minor and technical and most of the time the public is unaware that the final rule differs from that proposed by the Advisory Committee. Having separate notes explaining steps that are unknown to the user of the rule is more likely to cause confusion than to illuminate the drafting choices made. If important issues are uncovered in the drafting and redrafting process, they can be explained in a single committee note.

It is my understanding that the Advisory Committee on Bankruptcy has decided to recommend that the notes be treated as Advisory Committee Notes. I believe that can be consistent with the statute and the procedures if it means that the Standing Committee will exercise restraint and amend the notes only when it views amendment as necessary (which, I believe, accurately describes current practice in most instances -- the Standing Committee is far less likely to recommend amendment of a note than of the text of a proposed rule or amendment).

2. Text vs. Notes

When the original federal rules were promulgated, the Advisory Committee included a note about the notes. It said:

> Statements in the notes about the present state of the law, or the extent to which existing statutes have been superseded by or incorporated in the rules, should be taken only as suggestions and guides to source material. Such statements, and any other statements in the notes as to the purpose or effect of the rules, can have no greater force than the reasons which may be adduced to support them. The notes are not part of the rules, and the Supreme Court has not approved or otherwise assumed responsibility for them. They have no official sanction, and can have no controlling weight with the courts when applying the rules in litigated cases.
> 2 Fed. R. Serv. 632-33 (1940) citing Notes to Federal Rules of Civil Procedure (1938).

Despite that modest statement, Wright and Miller say that when "interpreting the rules, the Advisory Committee Notes are a very important source of information and

should be given considerable weight." 4 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1029 (1987).

Although a fair amount of deference may be paid to the Committee Note, the Committee Note is an interpretive aid and not an auxiliary rule. I believe that all essential information should be in the text of the rule and in particular that any direction meant to impose an obligation to act should be in the text rather than the note. Indeed, when the rules are printed by various printers, the committee notes are not always included and the Committee should be mindful that a reader may even be unaware of the existence of the notes. Reasons for the rule change and explanation of it may be in the notes.

3. Fundamental Changes by Judicial Conference or Supreme Court

During my tenure with the Advisory Committee on Appellate Rules there has been no instance in which the Judicial Conference or the Supreme Court made a fundamental change in a proposed appellate rule or amendment such that the committee note was rendered meaningless or misleading. Any such instance is likely to be very infrequent and the Court or the Judicial Conference is likely to note the problem and take remedial action. Therefore, it is not clear that any Committee policy is needed.

Agenda Item III D

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

FROM: Carol Ann Mooney, Reporter

DATE: October 3, 1995

SUBJECT: Uniform Numbering of Local Rules

Unless Congress acts otherwise, amendments to FRAP 47 will take effect on December 1, 1995. The amendments state that all local circuit rules "must conform to any uniform numbering system prescribed by the Judicial Conference." Similar amendments will also take effect in the Bankruptcy, Civil, and Criminal Rules. The Reporter for the Standing Committee has asked each Advisory Committee to submit a recommendation to the Standing Committee for consideration at its January meeting. With regard to the local rules adopted by the courts of appeals this will be a relatively easy task. All but one circuit has already followed the recommendation of the Local Rules Project and renumbered the circuit rules to correspond to the FRAP numbering system.

Attached to this memorandum are some background documents.

1. The first is a memorandum from Mr. Mecham. He indicates that the Standing Committee will recommend that the Judicial Conference prescribe uniform numbering systems "no earlier than March 1996" and that they not take effect until at least one year later so that the court have adequate time to consider and implement necessary changes to their rules.

2. The second is three pages from the Local Rules Project Report on Appellate Rules. These pages describe the project's recommended uniform numbering system. Although all but one circuit has renumbered their rules to correspond to FRAP, most circuits have not adopted all of the suggestions made by the project. Specifically, the project recommended that a local rule be preceded by the designation LAR (indicating that it is a local appellate rule); very few circuits have done so. The project also recommended that the initial number of the local rule correspond to the number of the related FRAP and that it be followed by a period and another number indicating whether it is the first, second, third, etc., local rule on that topic. For instance if a circuit has two local rules related to FRAP 3, they would be numbered LAR 3.1, and LAR 3.2. Some but not all circuits have adopted that suggestion. This level of specificity was recommended to facilitate electronic retrieval of local rules and of any case law construing them. Given the relative ease of electronic retrieval of information today compared with even a few years ago, it is not clear that this level of specificity is required. On the other hand, if the committee believes that this sort

of uniformity would be helpful it would not require great effort for the circuits to make the change.

3. The third document is a copy of Judge Ripple's letter to the Chief Judges which accompanied the Local Rules Project's Report. You will note that at two different places in the letter (noted by a check mark in the margin) he highlights the recommended uniform numbering system.

encs.

L. RALPH MECHAM
DIRECTOR

CLARENCE A. LEE, JR.
ASSOCIATE DIRECTOR

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

September 8, 1995

MEMORANDUM TO ALL: Chief Judges, United States Courts
Clerks, United States Courts

SUBJECT: Uniform Numbering of Local Rules of Court **(INFORMATION)**

Unless Congress acts otherwise, amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Rules of Procedure take effect on December 1, 1995, that will require that all local rules of court "must conform to any uniform numbering system prescribed by the Judicial Conference."

In 1988, the Judicial Conference "approved and urged each district court to adopt a uniform numbering system for its local rules, patterned upon the Federal Rules of Civil Procedure." In 1991, a suggested uniform numbering system governing local rules of courts of appeals based on the Federal Rules of Appellate Procedure was circulated to circuit chief judges. As a result, many courts have already revised their local rules governing appellate and civil proceedings using the federal models.

The Committee on Rules of Practice and Procedure is completing work on uniform numbering systems governing bankruptcy and criminal proceedings. At its upcoming winter meeting, it will consider recommending formally that the Judicial Conference prescribe - no earlier than March 1996 - uniform numbering systems for all local rules of court based on the respective Federal Rules of Practice and Procedure. The committee intends to recommend that the numbering systems not take effect for at least one year thereafter, so that the courts will have adequate time to consider and implement necessary changes to their rules. The uniform numbering systems will not apply to local Civil Justice Reform Act plans, unless the plans' provisions are incorporated into the local rules.

For planning purposes, if the committee's recommendations are accepted, a court will be required to make appropriate changes to its local rules to comply with required uniform numbering systems prescribed by the Judicial Conference no earlier than March 1997.

L. Ralph Mecham

Uniform Numbering System for Local Appellate Rules

All of the courts of appeals have local appellate rules. Eleven of these courts have other directives which also regulate practice. The Local Rules Project has termed these directives "Internal Operating Procedures" (IOPs). Currently, there is no uniform numbering system for these local rules and IOPs. Five of the courts have appellate rules and IOPs which correspond with the numbering of the existing Federal Rules of Appellate Procedure. Court of Appeals for the Fourth Circuit, Court of Appeals for the Fifth Circuit, Court of Appeals for the Ninth Circuit (no IOPs exist), Court of Appeals for the Eleventh Circuit, Court of Appeals for the Federal Circuit (no IOPs exist). Four other courts have rules and IOPs that appear to correlate in some instances to the Federal Rules of Appellate Procedure and at other times to be numbered quite differently. Court of Appeals for the First Circuit (rules generally correlate but not IOPs), Court of Appeals for the Second Circuit (rules generally correlate but not IOPs), Court of Appeals for the Seventh Circuit (rules generally correlate but not IOPs), Court of Appeals for the Tenth Circuit (rules generally correlate but not IOPs). The remaining four courts have rules and IOPs that are arranged according to a numbering system which does not resemble that of the Federal Rules of Appellate Procedure. Court of Appeals for the Third Circuit, Court of Appeals for the Sixth Circuit, Court of Appeals for the Eighth Circuit, Court of Appeals for the District of Columbia Circuit.

The Judicial Conference has recommended that a uniform numbering system be adopted which would standardize the numbering of the local rules on civil practice in the district courts. *See* Report of the Judicial Conference (September, 1988) 103. A uniform system has many advantages. It will be helpful to the bar in locating rules applicable to a particular subject.

This is especially important for those attorneys with multi-district or multi-circuit practices. It is also significant for any attorney needing to locate a particular rule or to learn whether a local rule on a specific topic exists in the first instance. In the past, it has been difficult to find any case law relating to a particular local rule, in part because there is no uniform numbering. The uniform system will also ease the incorporation of local rules into the various indexing services such as West Publishing Company and the Lexis computer services.

The Report of the Local Rules Project examining the local rules on civil practice which was sent to the chief judges of the district courts in the spring of 1989 suggested a uniform numbering system based on the numbering system used for the Federal Rules of Civil Procedure. This system is already familiar to the bar. The Local Rules Project also suggested that the numbering system for the admiralty rules correlate with the Supplemental Rules. Consistent with these proposals, the Local Rules Project now suggests that the courts of appeals adopt a numbering system for their respective local rules which tracks the Federal Rules of Appellate Procedure.

Under this system, each local rule corresponds to the number of the related Appellate Rule. For example, the designation "LAR3.1" refers to the local rule entitled: "Appeal as of Right—How Taken." The designation "LAR" indicates it is a local rule of appellate practice; the number "3" indicates that the local rule is related to Appellate Rule 3; and, the number "1" after the period indicates that it is the first local rule concerning Appellate Rule 3.1. The same system also applies with respect to those Federal Rules of Appellate Procedure with a "1" or a "2" after the initial rule number, such as Rule 3.1 entitled "Appeals from Judgments Entered by Magistrates in Civil Cases." Thus, for example, the first local rule concerning Appellate Rule 5 "Appeals by

Permission under 28 U.S.C. §1292(b)" is designated "LAR5.1," while the first local rule concerning Appellate Rule 5.1 "Appeals by Permission under 28 U.S.C. §636(c)(5)"" is designated "LAR5.1.1."

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

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TO: Chief Judges of the Circuits

FROM: Kenneth F. Ripple
Chair, Advisory Committee on Appellate Rules

RE: Local Rules Project
Report on the Local Rules of Appellate Practice

DATE: April 19, 1991

I write to send you a copy of the Local Rules project covering the courts of appeals and to request your help--and advice--in our committee's effort to fulfill the mandates of Congress and of the Judicial Conference.

In the following paragraphs, I shall set forth the background of this project, explain the attached material and outline the procedure that our committee will follow in evaluating the report.

Background

The Committee on Rules of Practice and Procedure formed the Local Rules Project several years ago to examine the local rules of the ninety-four federal district courts and of the thirteen appellate courts. The Project was intended to provide a complete review of local rules for errors or internal inconsistencies; to study how rulemaking and the actual rules work in practice; and, to provide a systematic review of the underlying policies of local rules. In April, 1989, the Report on Local Rules of Civil Practice in the district courts was distributed to the chief judges of the district courts. The attached report consists of the materials from the Local Rules Project covering the courts of appeals. This Report was approved for distribution to you by the Committee on Rules of Practice and Procedure at its February 4, 1991 meeting in Washington, D.C. The Advisory Committee on the Federal Appellate Rules was given the task of assisting the circuits in evaluating the report and of recommending those areas where rules of national uniformity are needed.

The Attached Report

Attached is a copy of the Report of the Local Rules Project. It consists of several parts, each of which is described briefly below. The committee hopes that this material will be helpful as you review your local rules.

1. **History and Methodology.** The first part of the report consists of a brief history and methodology of the Local Rules Project. It stresses that Congress has been concerned about the proliferation of local rules at every court level. Congressional hearings since at least 1983 have raised this issue. The document also discusses the methodology employed by the Project. It explains how the Project collected, sorted, and analyzed the available local rules of the district and circuit courts. It is useful to keep in mind that, throughout all of this material, the local rules are discussed by topic and not by court. Because the local rules supplement many of the Federal Rules of Appellate Procedure, the topic headings the Project employed are generally those set forth in the Federal Rules of Appellate Procedure.

2. **Uniform Numbering System.** The Local Rules Project has suggested a uniform numbering system for all circuit courts based on the Federal Rules of Appellate Procedure.

3. **Treatise.** The topics covered in the treatise are arranged according to the Federal Rules of Appellate Procedure. Each topic consists of a discussion of all of the rules relating to that topic. This discussion is arranged in four subsections:

   1) "Rules Subject to Local Variation." This subsection consists of a discussion of those rules that the Project identified as matters that ought to remain local;

   2) "Rules that Repeat." This subsection identifies those rules that the Project determined repeat existing law;

   3) "Inconsistent Rules." This subsection discusses those rules that the Project determined to be inconsistent with existing law;

   4) "Topics for Advisory Committee Review." This subsection consists of a discussion of those rule topics that are being referred, at this point, to

the Advisory Committee on Appellate Rules for possible incorporation into the Federal Rules of Appellate Procedure.

4. **List of Local Rules for Each Appellate Court.** This is a list for your court of your local rules, arranged according to your present numbering system, that were discussed in the treatise. Each rule is numbered and then identified as a repetitive local rule, an inconsistent local rule, a rule that should remain subject to local variation, or a rule that should be incorporated into the Federal Rules of Appellate Procedure. There is also a designation next to each of these local rules indicating where in the treatise the discussion on the particular rule can be found.

A particular local rule may be discussed in one or more of the four subsections of the treatise. For example, a portion of a local rule may repeat an existing Appellate Rule while another portion of the same rule may be an appropriate subject for possible incorporation into the Federal Rules of Appellate Procedure. In such a case, it would be counted twice. These lists identified 1,340 different rules or portions of rules that were counted and discussed by the Project. Of those entries, 484 (36 per cent) related to rules or rule topics that should remain subject to local variation; 444 (33 per cent) related to rules or rule topics that repeated existing law; 196 (15 per cent) related to rules or rule topics that are inconsistent with existing law; and, 216 (16 per cent) address topics that should be examined by the Advisory Committee.

Evaluation of the Report

At present, this report ought to be considered the empirical research of scholars. Its contents and conclusions have not be evaluated or approved by the Standing Committee or the Advisory Committee. It is now time to evaluate the report and, in the process, rectify inconsistencies in local rules that unnecessarily detract from the ideal of uniformity in federal appellate practice.

Upon studying the report, your circuit undoubtedly will identify some local rules that have been superseded by legislation or that clearly are inconsistent with the Federal Rules of Appellate Procedure. These matters can be remedied by your circuit. There will be another group of local rules with respect to which the Local Rules Project's conclusion may not be

clear or where the circuit may disagree with the Project's conclusion. Here, we would appreciate your discussing the matter with the Project director and, in light of that conversation, reevaluating your earlier conclusion. In many cases, the Project, limited to the cold print of the rule, may have misapprehended the purpose of the local rule.

The Mechanics of Implementation

In order to expedite this process of evaluation, may I ask that you implement the following timetable:

1) Please designate a person from your circuit as a liaison with our committee during this evaluation project. I would appreciate your informing Professor Squiers, the Project Director, of that designation.

2) Please begin your process of evaluation of the report. At its winter 1991 meeting, the Advisory Committee will review the preliminary reactions to the Report from each circuit and submit a report to the Standing Committee on Practice and Procedure at its January 1992 meeting. That committee can report, in turn, to the Judicial Conference in March 1992. In its preliminary report, each circuit ought to indicate those local rules that need revision or repeal because they are inconsistent with the Federal Appellate Rules and to estimate when such repeal can be expected. We would also appreciate your identifying any areas in which there is clear disagreement between the conclusion of the Project and the circuit. Finally, a brief outline of those areas that need more study would be appreciated. Of course, we also welcome your views on those areas that the Project has designated as necessary for this committee's immediate attention. We would appreciate your preliminary report by November 1, 1991.

A Few Suggestions

1) You will note that the Local Rules Project includes a suggested numbering system for local rules.[1] Five of the thirteen circuits already have appellate rules and internal operating procedures which correspond with the numbering system

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[1] The Judicial Conference had already recommended that a uniform numbering system be adopted which would standardize the numbering of the local rules on civil practice in the district courts. See Report of the Judicial Conference (September, 1988) 103. This numbering system was provided to the district courts in the April, 1989 Report of the Local Rules Project.

of the Federal Rules of Appellate Procedure. Use of this system will help the circuit identify local rules that re in conflict with the national rules and facilitate compliance with local rules by the bar.

2) While this material because of its bulk appears overwhelming, it is quite easy to use. For example, if you are interested in examining your local rule on writs of mandamus, you can begin the study in one of two ways. First, you can start by looking at the treatise under "Rule 21. Writs of Mandamus and Prohibition," to read about the Project's conclusions on local rules relating to this topic. After reading this information, you would be alerted not only to local rules that may be problematic, but also to rules that should remain as local rules. You can then look at your list of local rules (4, supra) and make determinations on what revisions you may want to undertake.

You can also begin your examination by looking, first, at the list of your local rules that were studied by the Project (4, supra). This list is arranged in numeric sequence. You can locate your local rule on writs of mandamus on the list and see, at a glance, what the Project concluded about that rule (i.e., possible inconsistency, possible repetition, should remain subject to local variation, should go to the Advisory Committee), and where a discussion of that rule is located. It should be noted that the text provides only examples of local rules on each of the subjects discussed. In those situations, for instance, where ten circuit courts have a local rule on a particular subject, the Project cited only some local rules in the discussion. All of the ten local rules, however, have been incorporated into the lists for the individual courts. Thus, although the local rule of a particular court may not be specifically cited in the text, it is still on the list and the discussion in the text is still applicable. You can then proceed through the list of local rules studied by the Project in making determinations about individual rules.

3) As your circuit evaluates this Local Rules Report, there will be questions. The Project Director, Professor Mary Squiers, is available to assist you in that regard. She may be reached at Boston College Law School, 885 Centre Street, Newton, MA 02159, (617) 552-8851.

On behalf of the committee, may I express our sincere thanks to you and your colleagues for your help.

Cordially,

Kenneth F. Ripple