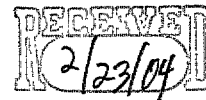


UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT
UNITED STATES COURTHOUSE, SUITE 11W
300 SOUTH FOURTH STREET
MINNEAPOLIS, MINNESOTA 55415



CHAMBERS OF
JAMES B. LOKEN
CHIEF JUDGE

February 23, 2004

03-AP-499

VIA FAX & U.S. MAIL

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, DC 20544

**Re: Comments on Proposed Federal Rules of Appellate
Procedure 32.1 and 35(a)**

Dear Mr. McCabe:

After receiving the February 11 written comments submitted by Chief Judge John M. Walker, Jr., on behalf of the judges of the Second Circuit, I belatedly polled the active and senior Eighth Circuit judges regarding proposed rules 32.1 and 35(a), something I should have done much earlier. Though the announced period for written comments expired on February 16, 2004, the Eighth Circuit judges respectfully urge the Judicial Conference Committee on Rules of Practice and Procedure to accept the following comments.

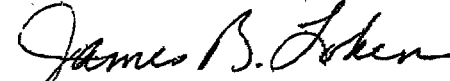
Rule 32.1. Ten of the thirteen Eighth Circuit judges who expressed views on this proposed rule (seven of nine active and three of four senior judges) oppose the adoption of proposed Rule 32.1 for the reasons stated by the judges of the Second Circuit in Chief Judge Walker's February 11 written comments, and by the judges of the Federal Circuit in Chief Judge Haldane Robert Mayer's January 6 written comments.

Rule 35(a). This proposed rule would trump the current Eighth Circuit rule that a positive vote by an absolute majority of all active circuit judges is required to grant rehearing en banc. Ten of the eleven Eighth Circuit judges who responded on this question, including all eight active judges, join the Federal Circuit in opposing the adoption of proposed Rule 35(a). In our experience, en banc rehearings require a large investment of our widely-dispersed judicial resources, a geographic factor that is doubtless not uniform among the circuits. The responding Eighth Circuit judges -- including some who do not favor our

present absolute majority rule -- agree that a uniform national rule on this subject is neither necessary nor appropriate.

Thank you for considering the views expressed in this letter.

Sincerely,


James B. Loken

/th

cc: Members of the Advisory Committee
on Appellate Rules
Members of the Standing Committee
on Rules of Practice and Procedure
Chief Judges of the United States Courts of Appeals
Judges of the Eighth Circuit Court of Appeals