AGENDA
MEETING OF THE ADVISORY COMMITTEE ON APPELLATE RULES
OCTOBER 20 & 21, 1992

I. **Action Items**

A. Item 91-4, amendment of Rule 32 regarding typeface.

B. Item 91-5, new rule to authorize use of special masters in the courts of appeals.

C. Item 91-7, regarding appeal of remand orders in removal cases.

D. Item 91-11, amendment of Rule 42 regarding the authority of clerks to return or refuse documents that do not comply with national or local rules.

E. Item 91-12, amendment of Rule 33. (A subcommittee consisting of Judge Hall, Judge Logan, and Mr. Kopp was appointed in December 1991.)

F. Item 91-13, amendment of Rule 41 to provide a uniform standard for granting a stay of mandate.

G. Item 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.

H. Item 91-22, amendment of Rule 9 regarding the type of information that should be presented to a court of appeal in bail matters.

I. Item 91-26, amendment of Rule 28 to require a summary of argument and inclusion of any claim for attorney's fees and the statutory basis therefore, and amendment of Rules 28 and 32 to preempt local rules on minor matters such as stapling. (A subcommittee consisting of Mr. Kopp and Mr. Strubbe was appointed in December 1991 to consider the preemption question.)

J. Item 91-27, amendment of all the appellate rules that require the filing of copies of a document to authorize local rules that require a different number of copies. (A subcommittee consisting of Mr. Kopp, Mr. Strubbe, and Mr. Spaniol was formed in December 1991 to examine the feasibility of having a chart that would appear at the beginning of each court's local rules. The chart would list the required number of copies of each document.)

II. Discussion Items

A. Item 86-23, regarding the ten day period within which an objection to a magistrate's report must be filed and the difficulty that prisoners have in meeting that time schedule.

B. Item 91-6, regarding allocation of word processing equipment costs between producing originals and producing "copies."

C. Item 91-16, should there be national procedures for death penalty cases? (A subcommittee consisting of Judges Boggs, Hall, and Jolly was formed in March 1992.)

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

E. Item 91-28, updating Rule 27 - motions practice. (Mr. Kopp - the originator of the suggestion - was asked for his suggestions.)

F. Item 92-3, possible conflict between Rule 4(b) and 18 U.S.C. § 3731.

G. The eleventh circuit's response to the local rule project.

H. General reassessment of the local rules project and the Advisory Committee's conclusions.

III. Reports

A. Items 89-5 and 90-1, amendment of Rule 35 to treat suggestions for rehearing in banc like petitions for panel rehearing so that a request for a rehearing in banc will also suspend the finality of the court's judgment and thus toll the period in which a petition for certiorari may be filed. A proposed amendment was submitted to the Standing Committee at its July 1992 meeting with a request for publication. The request was denied and the matter was referred back to the Advisory Committee.

B. Item 91-3, defining final decision by rule.

C. Item 92-1, amendment of Rule 47 to require that local rules follow uniform numbering system and delete repetitious language, and 92-2, amendment to permit technical amendment of the rules without full procedures.

D. Item 92-4, amendment of Rule 35 to include intercircuit conflict as a ground for seeking rehearing in banc.

E. Item 92-8, amendment of Rule 38.

ACTION ITEMS

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

ROBERT E. KEETON
CHAIRMAN

JOSEPH F. SPANIOL, JR.
SECRETARY

CHAIRMEN OF ADVISORY COMMITTEES
KENNETH F. RIPPLE
APPELLATE RULES
SAM C. POINTER, JR.
CIVIL RULES
WILLIAM TERRELL HODGES
CRIMINAL RULES
EDWARD LEAVY
BANKRUPTCY RULES

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

FROM: Carol Ann Mooney, Reporter

DATE: October 1, 1992

SUBJECT: Materials for the October 20-21 Meeting

Enclosed is an agenda for the upcoming meeting. Except for the addition of a new item in the Report section of the agenda, the agenda is unchanged from the tentative agenda circulated last summer. Also enclosed are materials for all of the Action Items on the agenda. This packet should include memoranda on the following items:

1. a combined discussion of Item 91-4 regarding typeface and that portion of Item 91-26 regarding amendment of Rule 32 to preempt local rules on matters such as binding,
2. Item 91-5 regarding special masters,
3. Item 91-7 regarding appeal of remand orders in removal cases,
4. Item 91-11 regarding authority of clerks to return or refuse documents,
5. Item 91-12 regarding prehearing conferences,
6. Item 91-13 regarding uniform standards for granting a stay of mandate,
7. Item 91-14 regarding petitions for mandamus (the memorandum is dated April 22, 1992 and is being recirculated for your convenience),
8. Item 91-22 regarding review of bail decisions,
9. Item 91-26 requiring a principal brief to include a summary of argument and any claim for attorney fees,
10. Item 91-27 regarding the number of copies problems (this memorandum is dated April 13, 1992 and is being recirculated for your convenience; note, however, that attached to the memorandum new tables).

Materials for the discussions items will be circulated in the near future. I look forward to seeing all of you. If you have any questions or comments, please do not hesitate to contact me. My phone number is (219) 239-5866.

PUBLIC CITIZEN LITIGATION GROUP
SUITE 700
2000 P STREET N W
WASHINGTON, D C 20036
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March 10, 1994

Hand Delivery

Peter G. McCabe, Secretary
Committee on Rules of Practice
and Procedure
Judicial Conference of the United States
Room 4-170
One Columbus Circle N.E.
Washington D.C. 20544

Re: Comments on Proposed Amendments to
Federal Rules of Appellate Procedure

Dear Mr. McCabe:

Pursuant to the notice dated October 15, 1993, I am hereby submitting the comments of the Public Citizen Litigation Group concerning the proposed amendments to the Federal Rules of Appellate Procedure. I regret that we were unable to complete them sooner, and I hope that you will be able to make them available for the committee for its hearing scheduled for March 15th. As in the past, we stand ready to assist the committee in any way possible.

Sincerely yours,

Alan B. Morrison

March 9, 1994

COMMENTS OF PUBLIC CITIZEN LITIGATION GROUP REGARDING PROPOSED AMENDMENTS TO FEDERAL RULES OF APPELLATE PROCEDURE OF JUNE 1993

The Public Citizen Litigation Group is a nonprofit public interest law firm that litigates regularly in federal courts around the country. In most appellate cases it represents the petitioner (appellant), but in a significant number of cases it represents the appellee. These comments regarding the June 1993 proposed amendments to the Federal Rules of Appellate Procedure are based on its experiences in a variety of appellate courts, federal and state, and are submitted principally to improve the quality of the rules and their overall efficiency and fairness, not to benefit any particular class of litigants or counsel.

We have one overall comment. In recent years we have noticed an increasing number of instances in which the circuit courts of appeals issue local rules, principally, but not exclusively relating to the format, contents, and lengths of briefs that are not only at variance with each other, but are different from, and in some cases inconsistent with, judgments made under the Federal Rules of Appellate Procedure that are supposed to govern all of the circuits. Some of the differences are quite significant -- they cut down on time for briefing or limit the number of pages to fewer than that allowed under FRAP. While others are rather minor, they still must be satisfied for each circuit. Particularly for firms like ours whose work extends beyond more than one or two courts of appeals, these differences, which are arising with increasing frequency, create real compliance burdens, including, in some

cases, resubmission for technical non-compliances.

On a number of such issues, there is no right or wrong answer in any objective sense; rather, there are preferences among the local rule-writers, often based on no more than the need to decide a matter one way or another. Our principal plea to the Committee is to continue the process of "de-Balkanization," which began with requiring circuit courts to number their local rules in accordance with FRAP. The next step is to reduce the number of areas in which local variance should be allowed, for which there are two good examples in the Rules on which comments are sought: methods of service and filing (and the timing implications thereof), and the various methods used to assure that attorneys do not exceed the applicable page limits for briefs. Our suggestion is that, at least in the areas of service/filing methods and the format and length of briefs, FRAP should "preempt" local rules on those subjects. At the very least, the circuits should not be able to add new or different rules without obtaining the prior permission of the Judicial Conference, after notice and an opportunity to comment not limited to those who regularly practice in that circuit. The presumption should be that, if there is a problem with FRAP, then FRAP should be amended, and a proliferation of local rules is not the cure for the problem. This procedure should be even more justified if, as the Committee proposes, the Judicial Conference is given the authority to adopt purely technical changes to FRAP on its own, thereby speeding up the process considerably.

Rule 25 - Filing and Service

We support the clarification regarding the timing of filings and the specific authorization for facsimile transmission, if approved by local rule or court order. (This is one area where local conditions do matter, and hence there is a basis for local variations.) In expressing our support, we do so on the basis of our understanding that putting the necessary number of copies of a brief in a mailbox on the due date would still be timely. If it is not, then we would oppose the shortening of time from the present system which works quite well. Our suggestion here relates to the absence of any mention of service and filing by overnight mail services, such as Federal Express, Express Mail, or UPS. These methods of delivery are commonly used and should be covered in a clear and uniform fashion by the basic appellate rules, not left to the various circuit courts, which have treated them in a variety of different ways. We take no particular position as to how overnight delivery ought to be treated, both for purposes of authorizing the method of filing and computing the time for responding, i.e., should the three day extension of time when service is made by regular mail be modified? We do note, however, that they almost always result in faster delivery to opposing counsel and the court, and hence should not be treated less favorably that first class mail. But whatever the result, we urge the Committee to address this matter at this time and then forbid local courts from adopting variations to whatever rule is adopted.

Rule 32 - Format of Briefs & Appendices

These proposals relate to the forms of the brief, appendix, and other papers, and we support the changes with one exception discussed below. In addition, there are a number of items that ought to be included but are not, and these rules should be made exclusive and not subject to variation by the courts of appeals.

Controlling the Length of Briefs

Our one disagreement relates to the Committee's efforts in trying to assure that no lawyer ever submits a brief of more than 50 pages and does not get around the rule by either using smaller type, proportionate spacing, or excessively long footnotes. Over the years the D.C. Circuit and other courts of appeals have made various attempts to control what they consider to be "cheating" by some lawyers. Our basic position is that the effort is not worth the cost. At the outset we note that our office rarely reaches the 50 page limit and uses very few footnotes, and so our views are principally aimed at reducing general burdens and not at assuring that we can continue to submit over-long briefs.

We begin by expressing our doubts as to how serious a problem this really is. Suppose that a law firm was intent on writing as long a brief as possible, using the type size authorized, and maximizing the number of footnotes. How much "cheating" could actually occur? Proportionate spacing could add perhaps a couple of pages, but maximizing the use of footnotes would not help much, in part because of the space lost between the separate footnotes. To save a significant number of pages, it would be necessary to put

very large amounts of seemingly important material in the footnotes, with a concomitant risk that they would simply not be read at all. In our view, even assuming the worst case possible, there is no way that anyone could add more than 10 pages to a brief, which would add no more than 10 minutes to the time taken to read it, and probably less than that. And all of this assumes that lawyers will not get the message that efforts to evade the spirit of the rule are frowned upon, and that, even though the brief is not rejected, the judges may well not read all of it carefully and will be annoyed at counsel (client) for using such tactics. Moreover, the number of cases in which there are actually briefs approaching the page limit are relatively few, such that, even cumulatively, they do not substantially add to the existing burdens of federal appellate judges.

On the other hand, these requirements do burden lawyers by requiring them to be sure that their equipment is properly programmed to count the words in the same way that the rule requires they be counted and in general worrying about details that have nothing to do with the merits. Our experience also tells us that these kind of mechanical requirements tend to be rigorously enforced, at least in some courts, thereby generating substantial amounts of paperwork for the clerk's offices, as well as the lawyers whose briefs are being scrutinized, if not rejected or required to be done over. Finally, the proposal not only assumes that a substantial number of lawyers will act in ways to avoid the spirit of the law, but that those same lawyers will also not devise

new ways around the rule, as either new equipment arrives or new strategies are developed.

For all of these reasons, we urge the Committee not to include any of these anti-cheating provisions and instead to simply authorize the courts of appeals to require the re-filing of briefs where there is a flagrant disregard for the intent of the rule. That ought to be enough, and nothing further seems warranted. In the alternative, we propose two suggestions. First, if these detailed requirements are imposed, there ought to be a safe harbor, so that if a lawyer files a brief that has 10% fewer pages than the limit, no certification is required, on the theory that, if a brief is not within five pages of the 50 page limit, the lawyer is not truly worried about the brief being too long. Second, we would support a requirement that the average page contain no more than 300 words as the easiest means for assuring compliance with the spirit of a fixed page limit. Assuming that a no-footnote page would have about 250 words, this would allow about one-sixth of each page to be footnotes, which, while on the high side, is a modest compromise. Moreover, with 300 rather than 250 words per page, issues relating to word counting -- one program that we use counts "U.S.C." as three words, but USC as one --take on much less significance, especially when there will still be page limits and minimum size type requirements. Double-spacing footnotes would also be an easily administrable, but aesthetically unpleasing, solution.

Finally, some circuits have issued general rules that reduce the number of pages allowed for briefs below those authorized in FRAP. This practice should be forbidden; FRAP sets the standard, and if it is too high (or too low), it should be changed in FRAP. All federal circuit judges have very heavy case loads, but shortening briefs in some circuits is not an appropriate way to deal with the problem, especially if the page limits are strictly enforced through objective standards, as the Committee proposes. In our view, efforts to shorten briefs substantially are often counterproductive because they result in briefs that are more difficult to understand, and hence have to be reread, even if they have fewer pages.

Formats of Briefs, etc.

There are a number of other aspects of the rule that ought to be clarified on a nationwide basis. This would include whether briefs (other than those produced by standard typographical printing) should be single or double-sided; what color supplemental briefs should be; whether the summary of argument counts toward the page limits; and whether the cover stock on a petition for rehearing should be the same as that of the briefs and appendices. These are matters that arise frequently and should be dealt with in the basic appellate rules.*

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*On a technical matter, we note proposed Rule 32(a)(3), line 29, states that "text must be double-spaced," but that sentence refers to both briefs and appendices. Since most appendices are simply photocopied, we suggest that the rule state that the text of briefs must be double-spaced, and nothing need be said about appendices.

We also suggest that, given the level of detail proposed by these rule changes, as well as others that have been made in recent years, the suggestion in the final paragraph of the discussion of subdivision (a) -- urging circuit courts to "carefully weigh" additional rules -- is not enough. There is simply no need for the kind of local variation that exists including, for example, Rule 32 of the Second Circuit, which is cited by the Committee in the preceding paragraph to support the requirement that the number of the case be centered at the top of the brief. That local rule also requires, unlike every other circuit, that the numbering be in extra large letters, and it actually requires the number to be in the top right corner, not at the center. If that requirement is a good one, a matter on which we take no position, then it ought to be a good one for every circuit, and if not, the Second Circuit ought to be forbidden from putting in such special requirements, unless there is some unusual circumstance of which we are unaware that justifies it in the Second Circuit but not elsewhere.

Similarly, the new provision in subsection (a)(7) that requires that a brief or an appendix be bound in a manner that "permits the document to lie flat when opened" is inconsistent with the requirements of several circuits that permit only certain types of bindings. Again, there seems no reason for local variance, and spiral binding, as the comments suggest, ought to be sufficient everywhere.

For all of these reasons, the rules ought to be clear that the circuits do not have the authority to propose additional

requirements for the formats and lengths of briefs different from those specified in these rules. At the very least, there ought to be a requirement that, before any such rule could be adopted, permission must be obtained from the Judicial Conference upon a showing of good cause. That would slow down the trend toward Balkanization and would be a valuable check on the process if total preemption is not mandated. The most important aspect of this is not that the individual variations are wise or unwise, but that they detract from uniformity and increase the burdens to litigants, and in many respects the court personnel as well.

Rule 49 - Technical Changes

This proposal would permit the Judicial Conference to amend the Federal Rules of Appellate Procedure Rules in very narrow circumstances. In the past we have opposed other proposed authorizations on the ground that they gave too much discretion to the Judicial Conference. However, we believe that the delegation here is not overly broad and that the kind of changes that can be made do not, as a matter of policy, need to go through the Supreme Court and Congress. The question nonetheless remains as to whether this type of delegation is authorized by 28 U.S.C. § 2072. In our view, the Supreme Court should not start an unnecessary controversy, and instead it should ask Congress to amend the statute to authorize this limited type of amendment as applied to all of the rules subject to that provision.

In any event, even though the authorization is narrow, we would urge that Congress require the Judicial Conference to provide

notice and an opportunity for comment before making even technical changes. Such a requirement would help assure that even technical changes are appropriate and clear and that changes which are not technical are not inappropriately brought in under such a delegation. Because the comment period need not be lengthy, it should not pose any significant problems, but it is a useful check under the circumstances which Congress should add to the authorization.

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

March 21, 1994

Alan B. Morrison, Esquire
Citizen Litigation Group
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036

Re: Proposed Amendments to Rules 25, 32, and 49 of the Federal Rules of Appellate Procedure

Dear Mr. Morrison:

Thank you for your letter of March 10, 1994, commenting on the proposed changes to Rules 25, 32, and 49 of the Federal Rules of Appellate Procedure. A copy of your letter will be sent to the members of the Judicial Conference Advisory Committee on Appellate Rules for their consideration. The next meeting of the committee will be in Denver, Colorado on April 25-26, 1994.

We welcome your comments and appreciate your interest in the rulemaking process.

Sincerely,

Peter G. McCabe
Secretary

cc: Honorable Alicemarie H. Stotler
Honorable James K. Logan
Advisory Committee Members
Professor Carol Ann Mooney
Professor Daniel R. Coquillette

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

FROM: Carol Ann Mooney, Reporter

DATE: September 30, 1992

SUBJECT: 91-4, amendment of Rule 32 regarding typeface and
91-26, amendment of Rule 32 to preempt local rules on minor matters such as stapling

I. 91-4, Amendment of Rule 32 Regarding Typeface

The Problem

Fed. R. App. P. 32 currently provides that at least 11 point type must be used in the printed matter in briefs and appendices. In this era of documents created on and printed by personal computers such a direction is outmoded.

The Fifth Circuit recently added a local rule further restricting the print options. The rule states that for non-proportional typeface 11 point type or larger must be used but for proportional fonts at least 12 point type must be used. The Fifth Circuit also provides a shorter page limit for briefs produced using proportional fonts.[1] The Fifth Circuit's local rules were prompted by a finding by Mr. Ganucheau, the Clerk of the Fifth Circuit, that the text of a brief can be increased by as much as 46% by varying the style of type within the 11 point height requirement.

Several other circuits have local rules restricting the type of typeface that may be used. The texts of local rules governing the form of a brief, including rules on typeface, are attached to this memorandum.

The Delegation Question

The Advisory Committee has briefly discussed the possibility of delegating to the Judicial Conference authority to specify from time to time acceptable typefaces. Because most documents are now printed on computers and computer capabilities are constantly changing, delegating authority to the judicial conference would be more efficient and flexible than relying on the Rules Enabling Act procedures. The Judicial Conference, in turn, might

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[1] Principal briefs produced in the non-proportional (Courier) typeface may be 50 pages; those produced in the standard typographic printing or with proportional fonts cannot exceed 40 pages. See 5th Cir. Loc. R. 28.1.

delegate the responsibility to its committee on automation.

A preliminary question is whether such a delegation is appropriate under the Rules Enabling Act, 28 U.S.C. §§ 2071 - 2077. The Rules Enabling Act authorizes the federal courts to prescribe rules of practice and procedure but requires that a period of public notice and opportunity for comment precede any such prescription. 28 U.S.C. § 2071(b). Also, before any rule may take effect it must be submitted to Congress for an seven month period of review. 28 U.S.C. § 2074(a).

A year ago Judge Ripple asked Mr. William Burchill, the General Counsel for the Administrative Office, if he saw any legal impediment to such a delegation. Mr. Burchill responded that he did not and a copy of his letter is attached.

Mr. Burchill analogized the proposed delegation to the delegations in Civil Rule 79. Rule 79(a) requires clerks to keep a civil docket "of such form and style as may be prescribed by the Director of the Administrative Office . . . with the approval of the Judicial Conference . . ." Subdivisions 79(b) and (d) contain similar language. A similar delegation is contained in FRAP Rule 25 concerning electronic filing. FRAP 25 authorizes the courts of appeals to adopt local rules permitting electronic filing "provided such means are authorized by and consistent with standards established by the Judicial Conference of the United States.

The type of delegation in both Civil Rule 79 and in Appellate Rule 25 is, however, different than what is contemplated here. In both instances, the Judicial Conference has authority to tell a court how it may conduct its internal business (authority that the Judicial Conference arguably has without regard to the Rules Enabling Act--the authority is analogous to the authority to adopt internal operating procedures). The delegation regarding typeface would authorize the Judicial Conference to tell parties how they must prepare their pleadings (authority that the Conference is given by the Rules Enabling Act, which act requires adherence to certain procedures before such a rule can become effective). The current proposal is to use the rulemaking authority delegated to the courts by Congress, authority that can be exercised only by following certain Congressionally mandated procedures, to permit the Judicial Conference to amend a rule (not the language of it, but its actual content) from time to time without following all of the ordinary procedures.

Mr. Burchill also cited various statutes that give the Judicial Conference authority to modify administrative requirements in light of changing conditions. For example, the Judicial Conference determines the schedule of clerk's fees and prescribes the qualification of certified court interpreters and the languages for which certification will be offered. Because Congress directly delegated such authority to the Director or the Judicial Conference, such statutory delegations do not raise the same questions as the proposal under consideration.

Giving the Judicial Conference authority to designate acceptable typefaces from time to time would allow the Judicial Conference to change the "rule" concerning acceptable

typefaces without the ordinary period for publication and comment and without review by the Supreme Court and the Congress. Of course, the adoption of a rule amendment allowing such delegation would follow the normal processes including the periods for public comment and Supreme Court and congressional review.

Draft One

An alternative approach that would avoid the delegation question would be to allow each circuit to prescribe, by local rule, acceptable typefaces chosen from a list of typefaces approved by the Judicial Conference or the Director of the Administrative Office. The list prepared by the Administrative Office would provide a level of national coordination while avoiding the delegation question. When refining or revising the list, the Administrative Office would also be able to draw upon the experience of the various circuits.

The following draft requires the Judicial Conference or the Administrative Office to prepare a list of acceptable typefaces and fonts that are functional equivalents but then permits each court of appeals to promulgate a local rule drawing from that list. The draft also makes style changes consistent with suggestions we received from the style committee last spring. The changes requiring an attorney's office address and telephone number on the cover of a brief were approved by the Advisory Committee last December and by the Standing Committee last January but have not yet been published for comment.

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

(a) *Form of a Briefs and ~~the~~ an Appendix.*-- ~~Briefs and appendices~~ A brief or appendix may be produced by standard typographic printing or by any duplicating or copying process ~~which~~ that produces a clear black image on white paper. Carbon copies of ~~briefs and appendices~~ a brief or appendix may not be submitted without the court's permission ~~of the court~~, except in behalf of parties ~~allowed to proceed~~ proceeding in forma pauperis. All printed matter must ~~appear in at least 11 point type~~ be on opaque, unglazed paper. A court of appeals may, by local rule, prescribe the size and style of print or typeface to be used in a brief or appendix and establish other similar requirements, such as spacing between lines. The local rules may require only one or more of the prints or typefaces, including size and style, on the list of acceptable and generally available typefaces prepared by the Judicial

Conference of the United States or the Director of the Administrative Conference. ~~Briefs and appendices~~ A brief or appendix produced by the standard typographic process ~~shall~~ must 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~~ must be bound in volumes having pages not exceeding 8-1/2 by 11 inches and type matter not exceeding 6-1/2 by 9-1/2 inches~~, with double spacing between each line of text~~. In a patent cases the pages of ~~briefs and appendices~~ a brief or appendix may be ~~of such~~ any size ~~as is~~ necessary to utilize copies of patent documents. Copies of the reporter's transcript and other papers reproduced in a manner authorized by this rule may be inserted in the appendix; such pages may be informally renumbered if necessary.

If ~~briefs are~~ a brief is produced by a commercial printing or duplicating firms, or if produced otherwise and the covers to be described are available, 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~~ 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:

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

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

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

(4) the title of the document (*e.g.*, Brief for Appellant, Appendix); and

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

(b) *Form of Other Papers.*--~~Petitions~~ A petition for rehearing ~~shall~~ must be produced in a manner prescribed by subdivision (a). ~~Motions and other papers~~ A motion or other paper may be produced in like manner, or ~~they~~ it may be typewritten ~~upon~~ on opaque, unglazed paper 8-1/2 by 11 inches in size. Lines of typewritten text ~~shall~~ must be double spaced. Consecutive sheets ~~shall~~ must be attached at the left margin. Carbon copies may be ~~used for filing and service~~ filed and served if they are legible.

A motion or other paper addressed to the court ~~shall~~ must contain a caption ~~setting forth~~ that includes the name of the court, the title of the case, the file number, and a brief descriptive title indicating the purpose of the paper.

Committee Note

The amendment deletes the requirement that all printed matter be in 11 point type. The purpose of requiring all parties to use 11 point type was to allow each party to present an equal amount of material to the court within the page limitations established for briefs. The 11 point provision no longer achieves the uniformity of treatment that was its objective. Even with the 11 point requirement, the amount of text can vary greatly with the style of type used.

Because most documents are now printed on computers and computer capabilities are constantly changing and because the process for amending these rules ordinarily takes two and one-half years or longer, any standard established in this rule might well be outdated shortly after its effectiveness. Therefore, the Committee decided that the fairness objective could be achieved with more flexibility if the Judicial Conference or the Administrative Office prepared a list of generally available typefaces and fonts that are functional equivalents and if the rule authorized the courts of appeals to adopt local rules based upon the list prepared by the Administrative Office. The list would provide national coordination. The ability to respond to technical changes would be improved because the time needed to promulgate a local rule is much shorter than that needed for these rules.

The Committee may prefer to proceed with the approach that delegates to the Judicial Conference the authority to designated acceptable typefaces. The fact that a rule delegating such authority to the Judicial Conference would need to follow the ordinary procedures, notably the period of congressional review, may cure any delegation problems. If Congress leaves the rule intact after its review, that may itself serve as delegation of authority to the Judicial Conference.

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

(a) *Form of a Briefs and ~~the~~ an Appendix.*-- ~~Briefs and appendices~~ A brief or appendix may be produced by standard typographic printing or by any duplicating or copying process ~~which~~ that produces a clear black image on white paper. Carbon copies of ~~briefs and appendices~~ a brief or appendix may not be submitted without the court's permission ~~of the court~~, except in behalf of parties ~~allowed to proceed~~ proceeding in forma pauperis. All printed matter must ~~appear in at least 11 point type~~ be on opaque, unglazed paper in a size and style of print or typeface designated as acceptable by the Judicial Conference of the United States and it must comply with any other similar requirements, such as spacing between lines, established by the Judicial Conference. ~~Briefs and appendices~~ A brief or appendix produced by the standard typographic process ~~shall~~ must 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~~ must be bound in volumes having pages not exceeding 8-1/2 by 11 inches and type matter not exceeding 6-1/2 by 9-1/2 inches~~, with double spacing between each line of text~~. In a patent cases the pages of ~~briefs and appendices~~ a brief or appendix may be ~~of such~~ any size ~~as is~~ necessary to utilize copies of patent documents. Copies of the reporter's transcript and other papers reproduced in a manner authorized by this rule may be

inserted in the appendix; such pages may be informally renumbered if necessary.

If ~~briefs are~~ a brief is produced by a commercial printing or duplicating firms, or if produced otherwise and the covers to be described are available, 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~~ 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:

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

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

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

(4) the title of the document (*e.g.*, Brief for Appellant, Appendix); and

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

(b) *Form of Other Papers.*--~~Petitions~~ A petition for rehearing ~~shall~~ must be produced in a manner prescribed by subdivision (a). ~~Motions and other papers~~ A motion or other paper may be produced in like manner, or ~~they~~ it may be typewritten ~~upon~~ on opaque, unglazed paper 8-1/2 by 11 inches in size. Lines of typewritten text ~~shall~~ must be double spaced. Consecutive sheets ~~shall~~ must be attached at the left margin. Carbon copies may be ~~used for filing and service~~ filed and served if they are legible.

A motion or other paper addressed to the court ~~shall~~ must contain a caption ~~setting~~

~~forth~~ that includes the name of the court, the title of the case, the file number, and a brief descriptive title indicating the purpose of the paper.

If rule 32 is amended to give the Judicial Conference authority to determine the types of print and page format that are acceptable, there should be a concurrent amendment requiring the clerks of the courts of appeals to provide parties with a list of the Judicial Conference guidelines.

Rule 45. Duties of a Clerk

* * *

(b) *The Docket; Calendar; Other Records Required.*-- The clerk shall maintain a docket in ~~such~~ the form ~~as may be~~ prescribed by the Director of the Administrative Office of the United States Courts.

The clerk shall prepare, under the direction of the court, a calendar of cases awaiting argument. In placing cases on the calendar for argument, the clerk shall give preference to appeals in criminal cases and to appeals and other proceedings entitled to preference by law.

The clerk shall keep such other books and records as may be required from time to time by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States, or as may be required by the court.

The clerk shall keep a list of the size and style of print and typefaces approved by the Judicial Conference for use in a brief or appendix, together with any other printing or typing restrictions established by the Judicial Conference. The clerk shall furnish a copy of the list to a party or a party's counsel upon request.

II. 91-26, Amendment of Rule 32 to Preempt Local Rules on Minor Matters

At the Advisory Committee's December 1992 meeting when discussing whether a summary of the argument should be required in a brief, the Committee also discussed the fact that several circuits have local rules governing such issues as the stapling and binding of briefs. Mr. Kopp suggested that the national rule should preempt local rules on such minor matters or at least alert parties to the possibility that local rules may have such additional requirements. Mr. Kopp and Mr. Strubbe were asked to consult with the reporter about developing amendments to Rules 32 and 28.

Mr. Kopp, acting on behalf of the Solicitor General, and Mr. Strubbe have made a number of suggestions.

1. Mr. Kopp's primary suggestion is to add a new subdivision to Rule 32 stating that the requirements of Rule 32 preempt local rules. Specifically, he suggests a paragraph stating:

> *Preemption of Local Rules.*--The requirements of this rule concerning the form of briefs, appendices, and other papers may not be supplemented, subtracted from, or altered by any local rule, practice, or internal operating procedure.

Because such a provision would prohibit local rules on a variety of topics that are now covered by local rules, Mr. Kopp makes a number of other subsidiary suggestions.

(a) Mr. Kopp suggests adding a sentence to subdivision 32(a) governing the binding of briefs. He suggests language stating:

> Briefs and appendices shall be stapled or bound on the left side in any manner that is secure and does not obscure the text.

(b) The FRAP rules do not indicate the cover colors for petitions for rehearing or suggestion for rehearing in banc, or of responses to either. Mr. Kopp suggests adding another sentence to subdivision 32(a) stating:

> The cover of any petition for rehearing or suggestion for rehearing in banc, or of any response to such petition or suggestion, should be yellow.

Mr. Strubbe noted that the Seventh Circuit requires that the cover of a petition for rehearing or suggestion for rehearing in banc be the same color as the party's main brief. Mr. Strubbe further noted that the Seventh Circuit requires that the cover of a cross-appellee's brief (another matter not covered by FRAP

32) be yellow.

(c) Mr. Kopp suggests that the number of the case should be centered at the top of the front cover.

(d) Mr. Kopp further suggests amending the first sentence of subdivision b. That sentence requires a petition for rehearing to be produced in the same manner as briefs. Mr. Kopp suggests that a suggestion for rehearing in banc and any response to such a petition or suggestion should also be bound by the same rules.

2. Mr. Kopp additionally suggests a special rule that would apply when a party submits a brief or appendix that, in the opinion of the clerk, does not comply with the requirements of Rule 32. Specifically, the Solicitor's office suggests adding the following subdivision to the rule:

> *Compliance.*--The clerk of the court of appeals may notify a party when, in the clerk's judgment, the party has filed a brief or appendix that does not comply with these rules. In such even, the clerk shall inform the party of the nature of the noncompliance and specify a date by which the party may correct the noncompliance. If the party corrects the noncompliance by the date specified, the brief or appendix shall be considered filed as of the original filing date, unless the court orders otherwise. The time for filing any document that responds to a brief or appendix that has been so corrected shall run from the original filing date unless the court, sua sponte or upon motion, enters an order specifying a different date. If in the clerk's judgment the party fails to correct the noncompliance, the clerk shall refer the matter to the court for a ruling.

Note that this suggestion is interrelated with item 91-11, the proposal to prohibit clerks from refusing to file any document because the document is not in the proper form. The Solicitor's office attempted to shape this provision in a manner that is consistent with that principle. The draft authorizes the clerk to notify a party of the nature of any defect and give the party an opportunity to correct it, all without the necessity of judicial intervention. If a party refuses to take the suggested action or fails to do so, the clerk must then refer the matter to the court for a ruling. This appears to work a helpful compromise. The clerk has no authority to refuse a brief or appendix but may work with a cooperative party to correct any defects without the need for court intervention.

Note that the draft only gives such authority to clerks with respect to briefs and appendices; it does not extend to any other papers such as motions, petitions for rehearing, or petitions for interlocutory review. A brief or an appendix is not a jurisdictional document; allowing a clerk to extend the filing time for either cannot expand substantive rights.

3. Mr. Strubbe suggested that the rule allowing a party proceeding *in forma pauperis* to file carbon copies should be limited to *pro se* parties. The Seventh Circuit does not allow parties represented by assigned counsel to file carbon copies. Because photocopying is so widely available and low cost, such a restriction seems entirely appropriate.

4. Mr. Strubbe also suggested deleting the special provision regarding patent cases. The only circuit that now has patent jurisdiction is the Federal Circuit. Mr. Strubbe contacted the Clerk of the Federal Circuit, Mr. Gindhart, who suggested striking the sentence. Mr. Gindhart pointed out that the Federal Circuit's practice note accompanying local rule 32 requires parties to reduce oversized documents to 8-1/2 x 11 inches, or otherwise fold and bind them so that they do not protrude beyond the covers of the brief.

Draft Three

The following draft incorporates the changes suggested by the Solicitor's office and Mr. Strubbe with those made in draft one contained in this memorandum. I have made some stylistic changes to their suggestions.

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

(a) *Form of a Briefs ~~and the~~ an Appendix.*-- ~~Briefs and appendices~~ A brief or appendix may be produced by standard typographic printing or by any duplicating or copying process ~~which~~ that produces a clear black image on white paper. Carbon copies of ~~briefs and appendices~~ a brief or appendix may not be submitted without the court's permission ~~of the court~~, except in behalf of ~~pro se~~ parties ~~allowed to proceed~~ proceeding in forma pauperis. All printed matter must ~~appear in at least 11 point type~~ be on opaque, unglazed paper. A court of appeals may, by local rule, prescribe the size and style of print or typeface to be used in a brief or appendix and establish other similar requirements, such as spacing between lines. The local rules may require only one or more of the prints or typefaces, including size and style, on the list of acceptable and generally available typefaces prepared by the Judicial Conference of the United States or the Director of the Administrative Conference. ~~Briefs~~

~~and appendices~~ A brief or appendix produced by the standard typographic process ~~shall~~ must 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~~ must be bound in volumes having pages not exceeding 8-1/2 by 11 inches and type matter not exceeding 6-1/2 by 9-1/2 inches~~, with double spacing between each line of text~~. A brief or appendix must be stapled or bound on the left side in any manner that is secure and does not obscure the text. ~~In patent cases the pages of briefs and appendices may be of such size as is necessary to utilize copies of patent documents.~~ Copies of the reporter's transcript and other papers reproduced in a manner authorized by this rule may be inserted in the appendix; such pages may be informally renumbered if necessary.

If ~~briefs are~~ a brief is produced by a commercial printing or duplicating firms, or if produced otherwise and the covers to be described are available, 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~~ 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:

(1) the name of the court and the number of the case; the number of the case must be centered at the top of the front cover;

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

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

(4) the title of the document (*e.g.*, Brief for Appellant, Appendix); and

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

(b) *Form of Other Papers.*--~~Petitions~~ A petition for rehearing, a suggestion for rehearing in banc, and any response to such petition or suggestion ~~shall~~ must be produced in a manner prescribed by subdivision (a). The cover of any petition for rehearing or suggestion for rehearing in banc, or of any response to such petition or suggestion, must be yellow. ~~Motions and other papers~~ A motion or other paper may be produced in like manner, or ~~they~~ it may be typewritten ~~upon~~ on opaque, unglazed paper 8-1/2 by 11 inches in size. Lines of typewritten text ~~shall~~ must be double spaced. Consecutive sheets ~~shall~~ must be attached at the left margin. Carbon copies may be ~~used for filing and service~~ filed and served if they are legible.

A motion or other paper addressed to the court ~~shall~~ must contain a caption ~~setting forth~~ that includes the name of the court, the title of the case, the file number, and a brief descriptive title indicating the purpose of the paper.

(c) *Nonconforming Brief or Appendix.*--The clerk of a court of appeals may notify a party when, in the clerk's judgment, the party has filed a brief or appendix that does not comply with these rules. In such event, the clerk must inform the party of the nature of the noncompliance and specify a date by which the party may correct the noncompliance. If the party corrects the noncompliance by the date specified, the corrected brief or appendix will be treated as filed on the original filing date, unless the court orders otherwise. The time for filing any responsive document to a corrected brief or appendix runs from the original filing

date unless the court orders a different time. If in the clerk's judgment the party fails to correct the noncompliance, the clerk must refer the matter to the court for a ruling.

(d) Preemption of Local Rules. The requirements of this rule concerning the form of a brief or appendix, and other papers may not be added to, subtracted from, or altered by any local rule, practice, or internal operating procedure.

Miscellaneous Reflections on the Draft Three

With regard to the clerk's authority to notify a party about noncompliance with the rules there are several matters to note.

1. The draft states that the clerk may notify the party about noncompliance with "these rules." "These rules" presumably includes all of the FRAP rules, not just Rule 32. Therefore, it includes authority to suggest that a brief is missing an essential element such as a jurisdictional statement. However, the term "these rules" would not include authority for the clerk to take action if a brief fails to comply with a local rule, such as one requiring a summary of argument.

2. The last sentence states that the clerk must refer the matter to the court for a ruling if a party fails to correct the noncompliance. That sentence may suggest that the clerk may not refer the matter to the court before expiration of the time the clerk has granted the party to make corrections. Would it be better to state that the clerk must refer the matter to the court if either the party refuses to make the corrections or the party's efforts to make the correction fall short?

If the preemption provision is adopted, a number of items currently covered by some of the local rules would no longer be effective. Is it desirable to include any of those provisions in the FRAP rule?

1. Several of the local rules contain more elaborate provisions about binding.
   - 3d Cir. R. 21(2).A(b) (metal fasteners or staples must be covered)
   - 5th Cir. R. 32.3 (must be bound to insure that it will not lose cover or fall apart, preferred that the brief lie flat when open, front and back durable covers)
   - 11th Cir. R. 32-3 (cover at least 90# on front and back, securely bound, exposed metal prong paper fasteners of ACCO type are prohibited)
   - Fed. Cir. R. 32(b) (durable cover front and back; securely bound; lie flat when open; ring-type bindings, plastic or metal, or bindings that protrude from front and back covers not acceptable; staple ends must be covered with tape)

   Are any of the more elaborate rules desirable?

2. FRAP 32 contains no directions about whether a cross-appellee's brief must be combined with any reply to the first appeal, and if so, whether the brief should be a special color.
See 6th Cir. R. 30 and 7th Cir R. 28.

3. Are special provisions about quotations or footnotes necessary?
See 2d Cir. R. 32(a); 5th Cir. R. 32.2; 8th Cir. R. 28A(a); 11th Cir. R. 32-1, 32-3; Fed. Cir. R. 32(a).

CIRCUIT RULES GOVERNING THE FORM OF A BRIEF OR APPENDIX

D.C. Cir. R. 11. Briefs.

(a) *Contents of Briefs: Additional Requirements.* All briefs, except those produced by standard typographical printing, shall be printed on one side of the page only in pica non-proportional type.

2d Cir. R. 32. Form of briefs; the appendix; and other papers.

(a) In all documents produced by standard typographic printing, text shall appear in 11-point or larger type with a 2-point or more leading between lines, and footnotes shall appear in 9-point or larger type with 2-point or more leading between lines.

(b) The number of the case shall be printed in type at least one inch high in the upper right-hand corner of the covers of all briefs and appendices filed in this court.

3d Cir. R. 21(2). Form of briefs, the appendix and other papers.

A. Briefs and the appendix.

(a) Briefs and appendices may be produced by standard typographic printing or by any duplicating or copying process which produces a clear black image on white paper. Carbon copies of briefs and appendices may not be submitted without permission of the court, except in behalf of parties allowed to proceed in forma pauperis and only where Xerox or equivalent duplicating processes are not available. All printed matter must appear in at least 11 point type on opaque, unglazed paper. See Rule 10(3) for contents of appendix.

(b) All briefs, appendices, motions and other papers shall be firmly bound at the left margin. Any metal fasteners or staples must be covered.

(c) (i) Briefs and appendices produced by the standard typographic process shall have pages 6-1/8 by 9-1/4 inches and type matter 4-1/6 by 7-1/6 inches.

(ii) Briefs and appendices produced by any other process shall have pages not exceeding 8-1/2 by 11 inches and type matter not exceeding 6-1/2 by 9-1/2 inches, with double spacing between each line of text.

(iii) Lines of typewritten text shall be double spaced. Carbon copies may be used for filing and service if they are legible.

(d) In patent cases the pages of briefs and appendices may be of such size as is necessary to utilize copies of patent documents.

(e) 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.

(f) Except where the litigant is in forma pauperis, the cover of the brief of the appellant will be blue; that of the appellee, red; that of an intervenor or amicus curiae, green; that of any reply brief gray. The cover of the appendix, if separately printed, will be white. Where a transparent cover is utilized, the underlying sheet must nevertheless conform to these color requirements.

(g) The front covers, or the underlying sheet if a transparent cover is utilized, of the briefs and of appendices, if separately printed, shall contain: (1) the name of this court and the number of the case; (2) the title of the case (see FRAP 12(a)); (3) the nature of the proceeding in the court (*e.g.*, Appeal; Petition for Review) and the name of the court, agency, or board below; (4) the title of the document (*e.g.*, Brief for Appellant, Appendix); and (5) the names and addresses of counsel representing the party on whose behalf the document is filed.

* * *

5th Cir. R. 32 Form of Briefs.

32.1 Typeface. In addition to the provisions of FRAP 32, briefs produced by any duplicating or copying process shall be in either:

a. Option A. 11-point non-proportional (Courier) typeface produced by a typewriting element or print font. Each page shall contain no more than 27 lines of double-spaced text and each line shall not exceed 6-1/2 linear inches of text; or

b. Option B. Proportional fonts printed in no smaller than 12 point, produced using office automation devices. The use of sans serif type is prohibited. Each page shall contain no more than 27 lines of double-spaced text and each line of text shall not exceed 6-1/2 linear inches. Smaller fonts and the use of compacted or otherwise compressed printing features will be grounds for rejection of a brief. For length of briefs under Option B, see Local Rule 28.1.

32.2. Quotations and Footnotes. These must appear in the same size type as the option selected. Reasonable allowances are made for single-spaced quotations and footnotes within the 6-1/2 x 9-1/2 inch textual space allowed. Counsel are cautioned not to attempt to circumvent the limitations on lengths of briefs by excessively quoting sources, or presenting argument in footnotes. The Court will reject briefs deemed to violate these cautions.

32.3. Binding-Copying. Briefs shall be bound so as to insure that the bound copy will not lose its cover or fall apart in regular use. It is preferred that briefs be bound to

permit them to lie flat when open, and they must do so if the cover is plastic or any material not easily folded.

Every brief must have front and back covers of durable quality. The front cover must clearly indicate the name of the party on whose behalf the brief is being filed.

Briefs produced by any duplicating process in 8-1/2 x 11 inch size, shall use only one side of each sheet.

32.4. Rejection of Briefs. Unless every copy of a brief conforms to this rule and to all provisions of FRAP 32, the Clerk is authorized to return unfiled all nonconforming copies. An extension of ten days is allowed for the re-submission in a conforming format of a rejected brief.

6th Cir. R. 30. Cross-Appeals

(**Paraphrased:** Brief one, filed by plaintiff, shall have a blue cover. Brief two, filed by defendant, shall contain both the response to the appellant's brief and the issues and arguments in the cross-appeal and shall have a red cover. Brief three, filed by the plaintiff, shall contain any reply to the first appeal and the response to the issues and arguments in the cross-appeal and shall have a yellow cover. Brief four, filed by the defendant if the defendant chooses to file a reply in the cross-appeal, shall have a gray cover.)

7th Cir. R. 28. Briefs.

* * *

(g) Briefs in Multiple Appeals.

(1) Appellant's Reply and Cross-Appellee's Brief. The appellant's reply brief and cross-appellee's brief shall be combined, shall not exceed the page limitation of a main brief, shall have a yellow cover, and shall be filed within 30 days after the filing of the cross-appellant's brief unless otherwise ordered by this court.

7th Cir. 32. Briefs, Printing.

All briefs except those produced by standard typographical printing shall be printed only in pica non-proportional type.

8th Cir. R. 28A. Briefs.

(a) Preparation of Briefs. Unless otherwise provided by this rule, briefs shall comply with FRAP 28, 29, 31, and 32. Briefs shall be printed or typewritten. Typewritten briefs shall be double-spaced. Footnotes must be printed or typed in the same size type as the text of the brief. The clerk may refuse to file, or refer to a panel of the court for review, briefs

that do not comply with this rule.

10th Cir. R. 32. Form of Briefs.

32.1. Form of Briefs. Except in cases designated for summary disposition under 19th Cir. R. 27.2, briefs must comply with the following provisions of this rule:

(a) The court *prefers* typewritten briefs on 8-1/2" x 11" opaque, unglazed paper rather than briefs printed by standard typographic processes. Lines of text must be double-spaced; space-and-a-half will not be accepted. Typewritten text must be no smaller than pica with no less than 10 pitch spacing.

(b) Briefs shall be prepared and filed in accordance with Fed.R. App. P. 28, 29, 31 and 32, except as otherwise provided by these rules.

32.2. Sanction for Non-Compliance. The clerk may refuse to accept for filing briefs or other pleadings which do not comply with the Federal Rules of Appellate Procedure and the 10th Circuit Rules.

11th Cir. R. 32-1. Form of Papers.

Unless otherwise provided, all papers required or permitted by FRAP shall be prepared, preferably typed, on opaque, 8-1/2" x 11", unglazed paper, and shall be stapled or bound on the left. Typed matter must be on one side of the page only and double spaced, except quotations which shall be single spaced. All copies presented to the court must be legible.

11th Cir. R. 32-1. Pro Se Papers.

All papers and documents submitted to the court by parties proceeding pro se or in forma pauperis should likewise comply with R. 32-1 above. While making due allowance for any case presented by a person appearing pro se, the clerk will refuse to receive any document sought to be filed that does not comply with the substance of these rules.

11th Cir. R. 32-3. Briefs-Form.

The cover of the brief must clearly indicate the name of the party on whose behalf the brief is filed. Each copy must, in addition to compliance with FRAP, have a cover of durable quality (at least 90#) on both front and back sides, and be securely bound along the left-hand margin so as to insure that the bound copy will not loosen or fall apart or the cover be detached by shipping and use. Exposed metal prong paper fasteners of ACCO type are prohibited.

Within the requirements of FRAP 32(a), a typed brief must conform to the following standards:

(a) 8-1/2" x 11" paper with typed matter on one side of the page only and not exceeding 6-1/2" x 9-1/2";

(b) 10 pitch or more spacing between letters;

(c) 11 point type (pica or equivalent) or larger;

(d) double-spaced (1-1/2 spacing is not acceptable--the minimum distance between lines of type must be 3/16").

Within the requirements of FRAP 32(a), printed briefs produced by the standard typographic process must conform to the following standards:

(a) 6-1/8" x 9-1/4" paper with printed matter 4-1/6" x 7-1/6";

(b) 11 point type of larger with spacing between letters which is normal and customary in the printing industry;

(c) not less than one point leading (or equivalent) between lines.

Quoted material in the text and footnotes consisting primarily of quoted material and citations may be single-spaced.

Briefs produced by any duplicating process on 8-1/2" x 11" paper shall use only one side of each sheet.

Unless each copy of the brief, in the judgment of the clerk, conforms to this rule and to provisions of FRAP 32(a), the clerk may either:

(a) return nonconforming copies unfiled, giving notice of the reason(s) why the brief was not accepted for filing; or

(b) conditionally file the brief, subject to the requirement that the party file in the office of the clerk a complete set of replacement briefs which comply with FRAP and circuit rules within 14 days of issuance of notice by the clerk that the briefs have been conditionally filed. The clerk's notice shall specify the matters requiring correction. The time for filing of the opposing party's brief runs from the date of service of the conditionally filed brief and is unaffected by the later substitution of corrected copies pursuant to this rule.

Fed. Cir. R. 32. Form of briefs, the appendix and other papers.

(a) Dimensions; single-sided copying; type; spacing; page numbers. Briefs shall be bound in volumes having pages 8-1/2 by 11 inches. If a brief is produced by other than the standard typographical process used by commercial printers, type matter shall appear on only one side of the page, shall not exceed 6-1/2 by 9-1/2 inches using 10-pitch (pica) or larger pitch type or 5-1/2 by 8-1/2 inches using 11-point or larger proportional spacing type, and shall be double spaced between each line of text using the standard of 6 lines of type per inch. Quotations more than two lines long in the text or footnotes may be indented and single spaced. Headings and footnotes may be single spaced, except footnotes that are not limited to citations shall be double spaced. Citations that include parenthetical information of more than 25 words shall also be double spaced. The pages of a brief shall be numbered in the center of the bottom margin, using arabic numerals for the pages subject to the page limitation and lower case roman numerals for all other pages.

(b) Cover of brief; binding. Briefs shall have a cover of durable quality on both front and back sides and be securely bound along the left-hand margin to ensure that the bound copy will not loosen or fall apart. Briefs should lie flat when open. Ring-type bindings, plastic or metal, or bindings that protrude from the front and back covers of the brief (*e.g.*, Velobind) are not acceptable. Externally positioned staple ends must be covered with tape.

(c) Nonconforming briefs. The clerk may refuse to file any brief that has not been printed or bound in conformity with Rule 32 of the Federal Rules of Appellate Procedure and this Federal Circuit Rule 32.

* * *

Federal Circuit Practice Note. Content of cover. When a brief and appendix are bound together, the cover shall so indicate.

Print size in briefs. Counsel should avoid photoreproduction that reduces the print size of the original smaller than the size required by these rules.

Reply brief in cross appeals. The covers of reply briefs of both the appellant and the cross appellant should be gray.

Copies of patent documents. Oversize patent documents reproduced in a brief or appendix should be photoreduced to 8-1/2 by 11 inches if readability can be maintained; otherwise, they should be folded and bound so as not to protrude beyond the covers of the brief or appendix.

Temporary Emergency Court of Appeals R. 22. Reproduction of record, briefs and other written materials filed.

Printing of the record, briefs or any other papers filed in the court is not required. Papers and briefs may be typewritten on standard or legal size paper, with copies reproduced by any method resulting in clearly readable copy. All written material shall be double spaced. Briefs shall be bound in soft covers: blue for appellant; red for appellee; green for intervenor or amicus curiae; gray for reply briefs and fastened at the left side at three places.

L. RALPH MECHAM
DIRECTOR

JAMES E. MACKLIN JR.
DEPUTY DIRECTOR

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

WILLIAM R. BURCHILL, JR.
GENERAL COUNSEL

October 10, 1991

Honorable Kenneth F. Ripple
United States Court of Appeals
208 United States Courthouse
204 South Main Street
South Bend, Indiana 46601

Dear Judge Ripple:

I am in receipt of your letter of September 17, seeking my advice as to possible amendments to Federal Rule of Appellate Procedure 32 and its requirement that the minimal type point permitted in appellate briefs be "11 point type."

Although I am by no means a computer maven, I certainly understand the Committee's desire to have the rules keep up with the changing technology of word processing, and retention of a national standard on print size would appear quite useful. As to the mechanics of an amended provision, I see no legal impediment to a redrafted rule that would permit the Judicial Conference or the Administrative Office to specify from time to time the acceptable typefaces. Delegating authority in this way obviously would be more efficient and flexible than relying on the Rules Enabling Act procedures, and, indeed, a good bit of precedent exists for just this type of approach.

Perhaps the best prototype is to be found in Federal Rule of Civil Procedure 79. Rule 79(a) provides that clerks shall keep a book known as the civil docket "of such form and style as may be prescribed by the Director of the Administrative Office . . . with the approval of the Judicial Conference . . . ." Rule 79(b) calls on clerks to keep final judgments and appealable orders "in such form and manner as the Director of the Administrative Office . . . with the approval of the Judicial Conference . . . may prescribe." And Rule 79(d) provides that clerks shall keep "such other books and records as may be required from time to time by the Director of the Administrative Office . . . with the approval of the Judicial Conference . . . ." [I should point out that Federal Rule of Criminal Procedure 55 also calls upon clerks to keep criminal records in such form as the Director may prescribe, but in fact this agency has not established separate record-keeping requirements for criminal cases. Generally, clerks simply adopt civil record-keeping forms as appropriate.]

Several statutory provisions also authorize the Judicial Conference or the Director to promulgate and modify administrative requirements in light of changing times and economic conditions. For example, sections 1913, 1914 and 1920 of title 28 authorize the Judicial Conference to promulgate a schedule of clerk's fees for appellate, district, and bankruptcy courts. Reflective of the ongoing nature of this responsibility, I note that the Conference has modified this schedule three times in the last four years. Pursuant to 28 U.S.C. § 753(d), the Judicial Conference prescribes the records and reports required to be maintained by court reporters, and under subsection (f) approves transcript rates prescribed by individual courts. In a similar vein, the Conference is authorized under the Criminal Justice Act at 18 U.S.C. § 3006A(d)(1) to establish hourly rates of compensation for appointed defense counsel in excess of those prescribed in the Act to the extent justified in a circuit or for particular districts within a circuit. Finally, I note that the Director is authorized by 28 U.S.C. § 1827(b)(1) to prescribe, determine, and certify the qualifications of certified court interpreters, and to establish either on his own initiative or upon the request of the Judicial Conference the languages for which certification will be offered.

In light of the above, I believe it would be both lawful and efficient to vest in the Judicial Conference or the Director the authority to promulgate and modify from time to time the various technical printing requirements set out in F.R.A.P. 32.

I hope you and the Committee find this response helpful. Please do not hesitate to contact me if I can be of any further assistance. Best personal regards,

Sincerely,

William R. Burchill, Jr.
General Counsel

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

FROM: Carol Ann Mooney, Reporter

DATE: September 30, 1992

SUBJECT: 91-5, proposal to add a rule authorizing the courts of appeals to use special masters

Although Fed. R. Civ. P. 53 authorizes only district courts to use special masters, "its principles have been applied by analogy in references ordered by courts of appeals." 9 Charles A. Wright and Arthur R. Miller, Federal Practice and Procedure, § 2602 (1971). The courts of appeals have been using masters for sometime; the cases cited by Wright and Miller are NLRB enforcement cases from the 1940's (Polish National Alliance v. NLRB, 159 F.2d 38 (7th Cir. 1946); NLRB v. Arcade-Sunshine Co., 132 F.2d 8 (D.C. Cir. 1942); NLRB v. Remington Rand, Inc., 130 F.2d 919 (2d Cir. 1942)). Masters continue to be useful in contempt proceedings in labor cases but their usefulness is increasing due to the growing number of instances when a court of appeals must make factual determination such responding to fee petitions and in forma pauperis petitions.

None of the circuits has a local rule authorizing the use of masters. Apparently, when masters are use Fed. R. Civ. P. 53 is used as a guideline.

At the Advisory Committee's December 1991 meeting, the committee briefly considered a draft rule authorizing the courts of appeals to use special masters. That draft was modeled upon Fed. R. Civ. P. 53. The Committee consensus at that time was that a shorter, simpler rule might be preferable.

Rule 49. Masters

A court of appeals may appoint a special master to hold hearings, if necessary, and to make recommendations concerning any factual matter, or matter of mixed fact and law. Unless the order referring a matter to a master specifies or limits the masters powers, a master shall have power to regulate all proceedings in every hearing before the master and to do all acts and take all measures necessary or proper for the efficient performance of the master's duties under the order including, but not limited to, requiring the production of evidence upon all matters embraced in the reference and putting witnesses and parties on oath and examining them. If the master is not a court officer, the court shall determine the master's compensation and whether the cost will be charged to any of the parties.

Committee Note

This rule authorizes a court of appeals to appoint a special master to make recommendations concerning a factual matter, or a matter of mixed fact and law. The courts of appeals have long used masters in contempt proceedings where the issue is compliance with an enforcement order. *See Polish National Alliance v. NLRB, 159 F.2d 38 (7th Cir. 1946); NLRB v. Arcade-Sunshine Col, 132 F.2d 8 (D.C. Cir. 1942); NLRB v. Remington Rand, Inc., 130 F.2d 919 (2d Cir. 1942).* There are other instances when the question before a court of appeals is not purely legal but also requires a factual determination. An application for fees or eligibility for Criminal Justice Act status on appeal are examples.

Questions for Consideration

The last sentence contemplates that a court might occasionally use someone other than a court officer as a special master. If the Committee's judgment is that only court officers should be masters the last sentence is unnecessary.

At the December meeting several members of the committee expressed the opinion that a master should act only upon "auxiliary matters." Is that term sufficiently understood to be used in a rule? Rather than using those words, I confined a master's area of inquiry to matters of fact or mixed fact and law on the assumption that the primary job of a court of appeals is to determine and apply the law and, therefore, that factual determinations are "auxiliary."

The draft states that a master may hold hearings, if necessary, and make "recommendations" to the court. The rule says nothing about whether a masters "findings" are binding, or whether parties should have an opportunity to react to a master's findings. Is that omission troublesome?

A copy of the December draft and memorandum are included for your reference.

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

FROM: Carol Ann Mooney, Reporter

DATE: November 4, 1991

SUBJECT: Item 91-5, proposal to add rule authorizing use by the courts of appeals of special masters

Chief Judge Merritt of the sixth circuit and Judges Sloviter and Ripple have suggested that the committee consider adding a rule that would authorize the courts of appeals to use special masters. Copies of letters from Chief Judge Merritt and Judge Sloviter are attached.

Although Fed. R. Civ. P. 53 authorizes the use of masters only by district courts "its principles have been applied by analogy in references ordered by courts of appeals." 9 Charles A. Wright and Arthur R. Miller, Federal Practice and Procedure, § 2602 (1971). The courts of appeals have been using masters for sometime; the cases cited by Wright and Miller are all NLRB enforcement cases from the 1940's (Polish National Alliance v. NLRB, 159 F.2d 38 (7th Cir. 1946); NLRB v. Arcade-Sunshine Co., 132 F.2d 8 (D.C. Cir. 1942); NLRB v. Remington Rand, Inc., 130 F.2d 919 (2d Cir. 1942)). As Judge Sloviter's letter indicates the use of masters in contempt proceedings in labor cases continues but masters also could be useful in other instances in which the courts of appeals need to determine facts such as establishing the basis for attorney's fees.

None of the circuits has a local rule authorizing the use of masters. Apparently, when masters are used Fed. R. Civ. P. 53 is

used as a guideline. Therefore, as a starting point for discussion I have redrafted Civil Rule 53. Because this will be the committee's initial discussion of this issue, the memorandum raises a number of questions for discussion.

Rule 53. Masters

(a) Appointment and Compensation. Each court of appeals with the concurrence of a majority of all the judges thereof may appoint one or more standing masters and ~~The~~ a court of appeals in which any action is pending may appoint a special master therein. As used in these rules the word "master" includes a referee, an auditor, an examiner, and an assessor. The compensation to be allowed to a master shall be fixed by the court, and shall be charged upon such of the parties ~~or paid out of any fund or subject matter of the action, which is in the custody and control of the court~~ as the court may direct~~, provided that this provision for compensation shall not apply when a United States magistrate is designated to serve as a master pursuant to Title 28, U.S.C. § 636(b)(2)~~. The master shall not retain the master's report as security for the master's compensation; but when the party ordered to pay the compensation allowed by the court does not pay it after notice and within the time prescribed by the court, the master is entitled to a writ of execution against the delinquent party.

(b) Reference. ~~A reference to a master shall be the exception and not the rule. In actions to be tried by a~~

~~jury,-a-reference-shall-be-made-only-when-the-issues-are complicated;-in-actions-to-be-tried-without-a-jury,-save-in matters-of-account-and-of-difficult-computation-of-damages, a-reference-shall-be-made-only-upon-a-showing-that-some exceptional-condition-requires-it.--Upon-the-consent-of-the parties-a-magistrate-may-be-designated-to-serve-as-a-special master-without-regard-to-the-provisions-of-this-subdivision.~~ A reference to a master shall be made only for factual matters or for matters of mixed fact and law.

(c) Powers. The order of reference to ~~the~~ a master may specify or limit the master's powers and may direct the master to report only upon particular issues or to do or perform particular acts or to receive and report evidence only and may fix the time and place for beginning and closing the hearings and for the filing of the master's report. Subject to the specifications and limitations stated in the order, the master has and shall exercise the power to regulate all proceedings in every hearing before the master and to do all acts and take all measures necessary or proper for the efficient performance of the master's duties under the order. The master may require the production before the master of evidence upon all matters embraced in the reference, including the production of all books, papers, vouchers, documents, and writings applicable thereto. The master may rule upon the admissibility of evidence unless otherwise directed by the order of reference

and has the authority to put witnesses on oath and may examine them and may call the parties to the action and examine them upon oath. When a party so requests, the master shall make a record of the evidence offered and excluded in the same manner and subject to the same limitations as provided in the Federal Rules of Evidence for a court sitting without a jury.

(d) Proceedings.

(1) *Meetings.* When a reference is made, the clerk shall forthwith furnish the master with a copy of the order of reference. Upon receipt thereof unless the order of reference otherwise provides, the master shall forthwith set a time and place for the first meeting of the parties or their attorneys to be held within 20 days after the date of the order of reference and shall notify the parties or their attorneys. It is the duty of the master to proceed with all reasonable diligence. Either party, on notice to the parties and master, may apply to the court for an order requiring the master to speed the proceedings and to make the report. If a party fails to appear at the time and place appointed, the master may proceed ex parte or, in the master's discretion, adjourn the proceedings to a future day, giving notice to the absent party of the adjournment.

(2) *Witnesses.* The parties may procure the attendance of witnesses before the master by the issuance and service of subpoenas as provided in Rule Fed. R. Civ. P. 45. If

without adequate excuse a witness fails to appear or give evidence, the witness may be punished as for a contempt and be subjected to the consequences, penalties, and remedies provided in ~~Rules~~ Fed. R. Civ. P. 37 and 45.

(3) *Statement of Accounts.* When matters of accounting are in issue before the master, the master may prescribe the form in which the accounts shall be submitted and in any proper case may require or receive in evidence a statement by a certified public accountant who is called as a witness. Upon objection of a party to any of the items thus submitted or upon a showing that the form of statement is insufficient, the master may require a different form of statement to be furnished, or the accounts or specific items thereof to be proved by oral examination of the accounting parties or upon written interrogatories or in such other manner as the master directs.

(e) Report.

(1) *Contents and Filing.* The master shall prepare a report upon the matters submitted to the master by the order of reference and, if required to make findings of fact ~~and conclusions of law~~, the master shall set them forth in the report. The master shall file the report with the clerk of the court and serve on all parties notice of the filing. ~~In an action to be tried without a jury,~~ Unless otherwise directed by the order of reference, the master shall file with the report a transcript of the proceedings and of the

evidence and the original exhibits. Unless otherwise directed by the order of reference, the master shall serve a copy of the report on each party.

(2) ~~*In Non-Jury Actions:*~~ *Acceptance of the Findings.* When the parties stipulate that a master's findings of fact shall be final, the court shall accept the master's findings except in the event of an abuse of discretion. ~~In an action to be tried without a jury.~~ In all other cases the court shall accept the master's findings of fact unless clearly erroneous. Within 10 days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in ~~Rule 6(d)~~ Fed. R. App. P. 27. The court ~~after hearing~~ may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.

~~(3) *In Jury Actions:* In an action to be tried by a jury the master shall not be directed to report the evidence. The master's findings upon the issues submitted to the master are admissible as evidence of the matters found and may be read to the jury, subject to the ruling of the court upon any objections in point of law which may be made to the report.~~

~~(4) *Stipulation as to Findings.* The effect of a master's~~

~~report is the same whether or not the parties have consented to the reference; but, when the parties stipulate that a master's findings of fact shall be final, only questions of law arising upon the report shall thereafter be considered.~~

~~(5)~~ (3) *Draft Report.* Before filing the master's report a master may submit a draft thereof to counsel for all parties for the purpose of receiving their suggestions.

~~(f) A magistrate is subject to this rule only when the order referring a matter to the magistrate expressly provides that the reference is made under this Rule.~~

ANALYSIS OF SUGGESTED CHANGES

A. Appointment and Compensation. The provision authorizing courts of appeals to appoint standing masters follows the language that appeared in Rule 53 until August 1, 1983. The statutory creation of full time magistrates eliminated the need for district courts to have standing masters and, effective August 1, 1983, Rule 53 dropped the authorization for them. Because magistrates are appointed by and serve district courts, 28 U.S.C. § 631(a), and not courts of appeals, the courts of appeals may find it useful to appoint standing masters. It may be that the courts of appeals do not have sufficient need for masters to warrant the appointment of standing masters; if so, the authority need not be exercised.

The draft suggests striking the language allowing district courts to order that a master's compensation be paid out of funds

subject to the court's custody and control. Is it correct that that a court of appeals is far less likely to have funds within its "custody and control?"

The draft also suggests striking the language making the compensation provisions of Rule 53 inapplicable when a United States magistrate judge serves as a special master pursuant to 28 U.S.C. § 636(b)(2). The United States Magistrate statute does not give the courts of appeals express authority to appoint magistrates to serve as special masters. Although the statute does provide that "a magistrate may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States," 28 U.S.C. § 636(b)(3), the fact that magistrates serve district courts would seem to make an appointment by a court of appeals unlikely.

B. Reference. The draft recommends striking all of the text of Rule 53(b). Because district courts are in the business of fact finding, Rule 53 limits district court referrals to masters to exceptional cases. Because courts of appeals are not structured for fact finding tasks, no such limitations would seem appropriate in a rule designed for use by courts of appeals. Because the draft recommends striking the limitations, there is no need for the provision that if the parties consent, a magistrate may be designated to serve without regard to the limitations.

However, because a court of appeals can and should handle the legal questions that come before it, the draft suggests

limiting referrals to masters to factual questions or mixed questions.

C. Powers. No changes.

D. Proceedings.

1. Meetings. No changes

2. Witnesses. The draft suggests only cosmetic changes making it clear that the rules referred to are civil rules and not appellate rules. Is it sufficient to do so? Fed. R. Civ. P. 45 governs the issuance of subpoenas. For obvious reasons there are no provisions in the appellate rules governing subpoenas and thus a reference to the civil rules is necessary. But, when a master is acting pursuant to a reference from a court of appeals, what court will issue the subpoenas? Should this be made clear in the rule?

3. Statement of Accounts. No change

E. Report.

1. Contents and Filing. In conformity with the suggestion that referrals be made to masters only for factual questions or questions of mixed fact and law, the draft deletes the reference to masters making conclusions of law. The draft also deletes the reference to actions tried without juries but retains the substance of the direction applicable to actions tried without juries -- that masters file with their reports transcripts of the proceedings and of the evidence and the original exhibits.

2. The draft suggests changing the caption of this

subdivision from "In Non-Jury Actions" to "Acceptance of the Findings." Rule 53 provides that in actions to be tried without a jury, the court should accept a master's findings of fact unless clearly erroneous. Of course at the court of appeals all actions are decided without a jury. Once the unnecessary reference to "non-jury actions" is deleted, the substance of the subdivision concerns the court's acceptance of the factual findings. Because the draft suggests that the masters should not undertake questions of law, there is no need for the caption to distinguish between factual and legal findings.

The draft moves the material that is found in Rule 53(e)(4) to the begining of this subdivision. Because Rule 53 deals separately with the use of a master's report in jury and non-jury actions and because the material in subdivision four on the effect of a master's report applies to both jury and non-jury actions, in Rule 53 that material logically follows the subdivisions on jury and non-jury actions. An appellate rule, however, does not need to be concerned with jury actions, therefore material on the effect of a master's report may be placed in the same subdivision as the material on its acceptance by the court.

The transposed language is altered to make explicit the understanding that even when parties have stipulated that a master's findings of fact shall be final, the findings may be reviewed if there has been an abuse of discretion. *See*

Eastern Fireproofing Co. V. United States Gypsum Co., 50 F.R.D. 140, 142 (D. Mass. 1970); *cf.* 9 U.S.C. § 10 (reasons for overturning an arbitration award). Is this a good idea? The language allowing review of a master's conclusion of law is omitted because the draft suggests that the courts of appeals should not refer questions of law to a master.

In those instances in which the parties have not stipulated that the master's findings shall be final, the draft retains the clearly erroneous standard used in the district courts. While recognizing that Fed. R. Civ. P. 53(e)(2) applies only to references made by district courts, the court of appeals have also applied the clearly erroneous standard to masters' findings. 5A James W. Moore and Jo D. Lucas, Moore's Federal Practice, ¶ 53.12[7](2d ed. 1991). *See, e.g.*, NLRB v. Local 825, International Union of Operating Engineers, 659 F.2d 379 (3d Cir. 1981); NLRB v. Crockett-Bradley, Inc. 598 F.2d 971 (5th Cir. 1979).

The draft suggests that objections to a master's report should be made by motion and upon notice as prescribed by Fed. R. App. P. 27 rather than as prescribed by Fed. R. Civ. P. 6(d). The draft also suggests deleting the provision that restricts a court from acting upon a report until after it has held a hearing on any objections to the report. Although a court of appeals may hold a hearing on objections to a master's report, it may determine that the information supplied by the master's report, by the motion, and by any

response thereto (Fed. R. App. P. 27 authorizes responses to motions) are sufficient.

3. In Jury Actions. Deleted as inapplicable.

4. Stipulation as to Findings. Deleted because the draft moves the material to the beginning of subdivision (e)(2). Note that the phrase stating "[t]he effect of a master's report is the same whether or not the parties have consented" was not moved and therefore has been deleted entirely. This was done because the draft also deletes the provision in (b) which eliminates the exceptional conditions requirement when a reference is made to a magistrate with the consent of the parties. Are there likely to be references upon consent nonetheless?

5. Draft Report. No changes.

(F) Application to Magistrates. Deleted on the assumption that the courts of appeals are unlikely to appoint magistrates as special masters.

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

FROM: Carol Ann Mooney, Reporter

DATE: September 30, 1992

SUBJECT: Item 91-7, regarding appellate review of order remanding case to state court

In August 1991, Mr. Craig Nelson wrote to Judge Keeton suggesting amendment of the United States Code or of the Federal Rules of Civil Procedure to provide an appeal as a matter of right from an order remanding a case to the state court from which it had been removed. A copy of his letter is attached.

Judge Keeton circulated Mr. Nelson's suggestion to all of the advisory committees because it bears upon the appellate, civil, and bankruptcy rules. The Advisory Committee on Appellate Rules must consider the suggestion and determine whether any action by the committee is appropriate.

Statutory Provisions

Section 1441 of title 28 of the United States Code sets forth the general rule authorizing removal of an action from state court to federal court. It provides:

> (a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdicion, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. . . .

Section 1446 contains the procedures that must be followed to remove a case to federal court.

Section 1447(c) authorizes a district court to remand a case to the state court; § 1447(c) states:

> (c) A motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. . . .

Section 1447(d) limits review of such remand orders. It provides generally:

> (d) An order remanding a case to the State court from which it was removed

is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.[1]

The Thermtron Exception

In Thermtron Products, Inc. v. Hermansdorfer, 423 U.S. 336 (1976), the Supreme Court considered the provision in section 1447(d) prohibiting review of an order remanding a case to the state court from which it has been removed.

In Thermtron Kentucky plaintiffs brought a damages action in a Kentucky state court against an Indiana corporation and an employee of the corporation who resided in Indiana. The defendants removed the case to federal district court. The district court conceded that the defendants had a right to remove the action but remanded the case to state court because the federal court docket was so full that the court would be unable to try the case without an unjust delay. The defendants filed a petition for mandamus or prohibition claiming that the action had been properly removed and that the district court did not have authority to remand it on the grounds asserted.

The Supreme Court needed to determine whether § 1447(d) prohibited review of the remand order. The court concluded that 1447(c) and (d) should be construed together and that "only remand orders issued under § 1447(c) and invoking the grounds specified therein . . . are immune from review under § 1447(d)." Thermtron, 423 U.S. at 346. Because the grounds recited by the district court - delay resulting from an overcrowded docket - were not those specified in § 1447(c), review by way of mandamus was permitted. The Court said:

> . . . in order to prevent delay in the trial of remanded cases by protracted litigation of jurisdictional issues . . . Congress immunized from all forms of appellate review any remand order issued on the grounds specified in § 1447(c), whether or not that order might be deemed erroneous by an appellate court. But we are not convinced the Congress ever intended to extend carte blanche authority to the district courts to revise the federal statutes governing removal by remanding cases on grounds that seem justifiable to them but which are not recognized by the controlling statute. *Id.* at 351.

The Thermtron exception has been narrowly construed so that review is possible only when a district court clearly and affirmatively states that it is relying on a non-§ 1447(c) ground for remand. Tillman v. CSX Transp., Inc., 929 F.2d 1024 (5th Cir. 1991). If the articulated ground for a remand is jurisdictional or an error in the removal process, review is not permitted even if the district court acted erroneously in entering the remand order.

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[1] This exception pertains to the removal of civil rights cases.

Tillman, 929 F.2d at 1027; Seedman v. United States District Court for the Central District of California, 837 F.2d 413 (9th Cir. 1988); *but cf.*, Air-Shields v. Fullam, 891 F.2d 63, 65-66 (3d Cir. 1989) (court of appeals held that review of a remand order was appropriate even though the order was based upon error in the removal process because the order was entered *sua sponte* long after the 30 day limit imposed by § 1447(c) and, therefore, was not based upon the controlling statute).

Although the Thermtron exception is narrow, three justices dissented in the Thermtron case on the ground that there should be no exceptions to the ban on review. Justice Rehnquist, joined in his dissent by then Chief Justice Burger and Justice Stewart, concluded that the plain language of § 1447(d) bars review of all orders remanding a case to the state court from which it was removed, other than the narrow exception contained in § 1447(d) for remands in civil rights cases.

Should Reviewability Be Expanded?

The question of whether a remand order should be reviewable involves competing tensions. The ban in section 1447(d) on routine review of remand orders prevents defendants from delaying what should be ongoing state court litigation. On the other hand, defendants have a statutory right to a federal forum in certain cases brought in state court. Erroneous remand decisions undercut that right.

Copies of two recent law review articles discussing reviewability of remand orders are attached. The writers reach differing conclusions about the desirability of expanding review.

Mr. Herrmann, believes that the Thermtron exception strikes the correct balance between the two competing interests.[2] Mr. Hermann supports the ban on review of remand orders based upon jurisdiction (including remands for errors in the removal process). He notes that jurisdictional issues affect only the forum and not the substantive rights of the parties. He further notes that "most jurisdictional issues - the presence or absence of diversity of citizenship or a federal question - are threshold questions that generally can be readily resolved by reference to a well-established body of law."[3] He concludes that precluding a defendant from delaying a state court proceeding by banning review of a remand order is justified when the remand order is based upon jurisdiction because there is little likelihood of a prejudicial error. Conversely, Mr. Herrmann believes that in order to guard against significant prejudicial error there should be review of a remand order based on

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[2] Mark Herrmann, *Obtaining Review of Federal Trial Court Remand Orders: An Analysis of How They Are Not Only Reviewable, But Also, in Some Courts, Appealable*, 37 FED. B. NEWS & J. 538 (1990).

[3] *Id.*, at 539.

a ground not authorized by law - as in the Thermtron case - or based upon a substantive question of law.

Mr. Herrmann uses a ninth circuit case, Pelleport Investors, Inc. v. Budco Quality Theatres, Inc., 741 F.2d 273 (9th Cir. 1984), as an example of a substantive remand order that should be appealable. In Pelleport the parties had signed a contract that contained a forum selection clause providing that all claims related to the contract would be heard in state court. When the defendant attempted to remove a breach of contract action from state to federal court, the district court enforced the forum selection clause and remanded the case. The ninth circuit held that the remand order was appealable because the district court first decided the enforceability of the forum selection clause and thereafter remanded the case. The district court's enforcement of the forum selection clause was a substantive decision on the merits and appealable as such. Pelleport, 741 F.2d at 276-277.

The other author, Mr. Braun, does not agree that preventing delay in the progress of a suit in state court justifies the ban on reviewability contained in section 1447(d).[4] He suggests that section 1447(d) should be amended to permit review of a remand order in a federal question case even if the remand is based upon jurisdiction or removal process defects. Mr. Braun is less certain than Mr. Hermann that district courts will correctly determine issues of federal question jurisdiction.[5]

Mr. Braun supports his suggestion with several arguments. First, he argues that it is unfair to prohibit review of a clearly erroneous remand order simply because the remanding court bases its decision upon lack of jurisdiction or error in the removal process. He cites Seedman v. United States District Court for the Central District of California, 837 F.2d 413 (9th Cir. 1988), as an example. In Seedman the plaintiff had filed a complaint in state court alleging federal RICO violations. The defendants removed the case to federal court but the district court remanded the case to state court on the grounds that the removal petition had been untimely. After the remand order had been certified to state court, the district court concluded that the original remand order had been based on clerical error and vacated its earlier remand order. The ninth circuit granted the plaintiff's mandamus petition and ordered the case remanded to state court holding that once a remand order is certified to the state court, a district court cannot reconsider a remand order that was based upon the "improvidently granted" ground enunciated in section 1447(c)[6]. Because the district court erred when it initially remanded the case and because the court could not thereafter correct

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[4] Jerome I. Braun, *Reviewability of Remand Orders: Striking the Balance in Favor of Equality Rather Than Judicial Expediency*, 30 SANTA CLARA L. REV. 79 (1990).

[5] *Id.* at 88.

[6] Section 1447(c) was amended in 1988. Prior to the amendment, the statute authorized a district court to remand a case if the removal had been improvidently granted. That provision was replaced by the current language concerning a defect in the removal procedure.

its error, the defendants had to litigate a federal question in a state court even though there was federal question jurisdiction and the case had been properly removed.

Mr. Braun also argues that section 1447(d) is internally inconsistent because it prohibits review of orders granting remand motions, but permits review of orders denying remand. Although the justification for prohibiting review of a remand order is preventing delay, Mr. Braun notes that review of an order denying remand can result in serious delay and duplication of effort. In support of his argument he cites La Chemise LaCoste v. Alligator Co., 506 F.2d 339 (3d Cir. 1974). In that case, after completion of a trial on the merits in federal district court, the third circuit held that the district court had improperly denied the plaintiff's remand motion and, therefore, vacated the district court judgment and ordered the district court to remand the case to the state court. (Mr. Braun fails to explain, however, how it could ever be appropriate to prohibit a court from determining, as it did in La Chemise, that there was no federal jurisdiction and that the case could only be tried in a state court.)

The fact that a district court's mere recital in a remand order of the magic words from section 1447(c) makes the remand order unreviewable even when clearly erroneous leads to unfortunate results in some cases. Whether the incidence of such errors justifies a change in the law is one of the factors to be considered by the committee. Such errors result in a defendant's loss of a federal forum and in a state court interpretation of federal law, which can, as Mr. Braun notes, "frustrate . . . the formation of a uniform, interpretive body of federal law."[7] A change in the law concerning reviewability would not only increase the case load in the courts of appeals, although Mr. Braun argues that the increase would be "relatively insignificant,"[8] but it might also cause unnecessary delays in the many cases that are properly remanded to state court.

The Federal Courts Study Committee did not directly address the question of reviewability of remand orders. However, the Committee did imply that more effective review of such orders is desirable. The Federal Courts Study Committee recommended abolishing federal diversity jurisdiction. The Committee argued that repealing diversity jurisdiction would free the federal courts to concentrate on "their central task . . . protecting federal rights and interests."[9] The Committe suggested a number of ways that the federal courts could more effectively protect federal rights, one of which was "simplifying removal from state to federal court of suits founded on federal law and providing effective judicial

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[7] *Id.* at 88.

[8] *Id.* at 89.

[9] Federal Courts Study Committee Report 15 (1990).

review of orders sending removed suits back to state court."[10]

If any change is desirable, it apparently would require amendment of section 1447(d) rather than amendment of the court rules. Should the Advisory Committee conclude that change is desirable, it could communicate that message to the Standing Committee for further action.

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[10] The Committee "made no definitive recommendations along these lines except with respect to pendent party jurisdiction, but we commend them for consideration in a post-diversity era in which federal courts are not preoccupied with the enforcement of rights under state law." *Id.*

SEP RECD

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August 29, 1991

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Attn: Honorable Robert E. Keeton

RE: Appeal of Remand Orders

Dear Judge Keeton:

I have been corresponding some time now with Senator Joseph R. Biden regarding an Act of Congress and/or amendment of the Federal Rules of Civil Procedure which would allow an appeal of remand orders. As you know the jurisprudence mandates any remand based upon lack of jurisdiction, even if clearly erroneous, cannot be reviewed by an appeal, mandamus, or otherwise. Tillman v. CSX Transportation, Inc., 929 F.2d 1023. In fact the only time the issuance of a writ of mandamus by the Appellate Court is appropriate is when the district court enters a remand order on grounds not found in the remand statute. In Re: Allied-Signal, Inc., 919 F.2d 277 (CA 5th, 1990). The Fifth Circuit's position is based upon the Supreme Court decision of Thermtron Products, Inc. v. Hermansdorfer, 423 U.S. 336, 96 S.Ct. 584, 46 L.Ed. 2d 542 (1976). Until this decision is either overruled by the current court or by an act of Congress, litigators who represent foreign corporations will never have the opportunity to have remand orders, as a practical matter, heard by the Court of Appeal. Seldom if ever do they grant writs on this issue. I don't know of the statistics but in dozens of cases where I have been directly involved in as counsel for a corporate defendant

that has removed a case from the State court, the district judges in Louisiana are constantly remanding cases back to the state courts. When they do this they are frequently using the skimpiest of reasons/evidence to do so which in turn subjects the corporations to the hostile climate of the State's judicial system.

I am writing you to ask if Congress has ever considered passing such a statute or amending the rules of Federal Civil Procedure which would allow such appeal as a matter of right rather than relegate them to writ applications. If not, I would like to talk to you further if I could regarding this issue. It is very important to my clients because virtually all of my cases that are tried in Federal court, the results are far more favorable on liability and quantum issues that we get in the state system.

Thank you for your consideration and I look forward to hearing from you in the near future.

Cordially,

Craig R. Nelson

CRN:pim

cc: Senator Joseph R. Biden, Jr.

Obtaining Review of Federal Trial Court Remand

An analysis of how they are not only reviewable, but also,

By Mark Herrmann*

In the Judiciary Act of March 3, 1887, Congress first provided that if an action "was improperly removed," so that a federal court ordered remand, "such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the . . . court so remanding such cause shall be allowed." Although this, or a similar, statutory prohibition on review of remand orders remained in effect for the next hundred years, the Ninth Circuit recently celebrated the centennial by holding, in one case, that a remand order "is reviewable on a petition for a writ of mandamus," and, in a second, that, "the district court's remand order [is] appealable."

This occurrence is not limited to the Ninth Circuit. The Second, Third, Fourth, Fifth, Seventh and Eleventh Circuits have also begun to permit review of remand orders within the past two years. And, as these inroads are made, defense counsel nationally will surely become more aggressive in seeking review of remand orders they perceive to be erroneous. Remarkably, despite the language of the controlling statute and the confusion in the cases, careful analysis reveals a principled basis for permitting review of certain types of remand orders.

The First Hundred Years

The general prohibition on review of remand orders effected by the Judiciary Act of March 3, 1887, still stands today. The language changed slightly with enactment of the Judicial Code of 1911, was altered again in 1948, and was amended into its present form in 1988. Thus, 28 U.S.C. § 1447(c) now provides in part that, "[a] motion to remand the case on the basis of any defect in removal procedure must be made within thirty days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded."

The following subjection, 28 U.S.C. § 1447(d), then generally forbids review of remand orders. With one narrow exception for civil rights cases, "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise." For decades, this language was read to mean what it says—review of all (non-civil rights) remand orders was categorically prohibited.[1]

In 1976, however, the Supreme Court decided a hard case that appeared to make bad law. In *Thermtron Products v. Hermansdorfer*,[2] two resident plaintiffs brought a personal injury suit against two non-resident defendants in Kentucky state court. Defendants removed the case and proceeded with discovery. Approximately nine months later, the district court issued an order stating that the court had "no available time in which to try the above-styled action in the foreseeable future."[3] The order required defendants to show cause "why the ends of justice do not require this matter [to] be remanded."[4] After briefing, the district court remanded the case to protect the plaintiffs' right to prompt trial.[5]

The Sixth Circuit denied the defendants' petition for a writ of mandamus because it read section 1447(d) to preclude review of all remand orders. The Supreme Court reversed the denial. Reasoning that history required that sections 1447(c) and 1447(d) be construed together, Justice White concluded that "only remand orders issued under § 1447(c) and invoking the grounds specified therein [procedural irregularities in the removal process or lack of subject matter jurisdiction] are immune from review under § 1447(d)."[6] The Supreme Court held that because the trial court remand order was not issued pursuant to and did not invoke the grounds set forth in section 1447(c), it could be reviewed.

The Court devoted few words to identifying the proper vehicle for review of the remand order. It reasoned only that "an order remanding a removed action does not represent a final judgment reviewable by appeal," thus, "the remedy in such a case is by mandamus to compel action, and not by writ of error to review what has been done."[7] The Sixth Circuit ruling was reversed and remanded for further proceedings.

On an emotional level, one can hardly quibble with the Supreme Court's decision. Judge Hermansdorfer had no right to refuse to hear a case because he was too busy, any more than he would have the right to refuse to hear a case because he preferred to play golf. His remand order was thus unlawful; it was beyond his jurisdiction to enter the order.

The troubling aspect of the Supreme Court ruling was that it offered no limiting principle. On its face, *Thermtron* suggested that only if a remand order was either issued pursuant to, or invoked, section 1447(c), would it be insulated from review. But surely the governing principle could not permit a trial court to remand on an improper ground, yet evade appellate review simply by invoking the magic language of section 1447(c). A rule avoided so easily is no rule at all.

Mandamus Becomes Appeal

In the decade following 1976, the Supreme Court and lower federal courts grappled with questions relating to the scope of *Thermtron*.[8] By 1984, in *Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.*,[9] *Thermtron* appeared to have been pulled completely from its moorings. There, the parties had signed a contract that contained a forum selection clause, providing that all claims related to the contract would be heard in state court. When plaintiff sued for breach of the underlying contract, the defendant removed the action to federal court. The

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Orders
in some courts, appealable.

district court enforced the forum selection clause and remanded the case. The defendant filed both a petition for a writ of mandamus and a notice of appeal with the Ninth Circuit.

The Ninth Circuit determined that appeal was the proper vehicle for review of the remand order. The court reasoned that because the district court had first decided the enforceability of the forum selection clause and only then remanded the case, the district court had "reached a substantive decision on the merits apart from any jurisdictional issue."[8] The trial court ruling enforcing the forum selection clause was a binding determination that preceded the decision to remand and was thus appealable. "To hold otherwise would deprive Budco of its right to appeal a substantive determination of contract law."[9] The court heard the appeal from the trial court decision to enforce the forum selection clause, affirmed that decision, and thus effectively affirmed the remand order.

Not surprisingly, after *Pelleport* came the deluge. In the five years since *Pelleport* there have been more than a dozen reported opinions in which defendants have sought review of purportedly erroneous remand orders. Some cases have permitted review by writ of mandamus; others by appeal; and yet others have held that review of the remand order was flatly barred. And despite the seeming inconsistencies, there is a method to the madness.

A Framework for Assessing the Reviewability of Remand Orders

Careful analysis reveals the consistent principles unifying section 1447(d), *Thermtron*, and *Pelleport*. By articulating and adhering to the principles implicitly established in those cases, courts can create an appropriate system for review of remand orders.

Two competing tensions have created difficulty in deciding when remand orders are reviewable. First, section 1447(d) reflects an explicit legislative choice that Congress does not want remand orders routinely to be reviewed. If defendants were given the opportunity for such review, they might seize the chance to delay what should be ongoing state court litigation.[10]

At the same time, defendants have a statutory right to a federal forum in certain cases brought in state court. Erroneous decisions to remand undercut those rights. The challenge is to find an approach to reviewing remand orders that gives proper weight to these competing values.

The challenge is met by reading section 1447(d) exactly as the Court did in *Thermtron*. Section 1447(d) bars review only of remand orders issued pursuant to section 1447(c), that is, where the court found that it lacked jurisdiction or that the defendant erred procedurally when removing the case. That restrictive reading of the statute is sound. Parties are ordinarily entitled to one level of appellate review as a matter of right when a trial court finally decides a dispositive issue. Thus, any restriction on the right of appeal, such as section 1447(d), ought to be read narrowly. Section 1447(d) should be interpreted as expressing a congressional intent to bar review *only* of *jurisdictional* remand orders (including remands for errors in the removal process).

This interpretation yields practical benefits. First, remand orders that decide only jurisdictional issues affect only the forum in which a case will be heard and not the substantive rights of the parties. Accordingly, there is less danger to the defendant if review of these orders is prohibited. Moreover, most jurisdictional issues—the presence or absence of diversity of citizenship or a federal question—are threshold questions that generally can be readily resolved by reference to a well-established body of law. Because it is less likely that a trial court will err in deciding a jurisdictional issue than a substantive one, jurisdictional remand orders—and only jurisdictional remand orders—should be unreviewable.[11] On the other hand, *all* non-jurisdictional remand orders should be reviewable. The hard question is to identify the proper vehicle for review. Again, *Thermtron* and *Pelleport* implicitly answered the question correctly.

In *Thermtron*, a district court remanded a case on a ground unauthorized by law. Mandamus has always been the remedy to correct a court's refusal to hear a case simply because the judge is too busy.[12] Thus, in the relatively small body of cases where the district court refuses to accept a removed case on a ground not authorized by law, the district court remand order should be reviewed by mandamus.

Conversely, in *Pelleport*, although the remand order was not for lack of jurisdiction, the order was lawful. The district court made an independent ruling on a substantive question of law—whether the forum selection clause was enforceable—and *legitimately* (whether or not *correctly*) exercised its power to send the case back to state court. Where, as in *Pelleport*, a trial court decides a question of substantive law apart from the jurisdictional question, the defendant should have the right to appeal that ruling.

This framework permits review of substantive remand orders because that review is necessary. In that context, the trial court is likely to err in a way that significantly prejudices the defendant. Simultaneously, the framework prohibits review of jurisdictional remand orders because prejudicial error is likely in those cases, and because Congress prefers that defendants ordinarily not have the chance to delay state court proceedings.

Later Cases Fit the Model

Most of the reported cases since *Thermtron* in which defendants have sought review of remand orders fit this analytic framework. First, in some cases

defendants have sought review of orders that have remanded cases for lack of jurisdiction. In those cases, review has generally been denied.[14]

Second, in relatively few cases, the pure *Thermtron* situation has arisen again—a district court has remanded a case lawfully. In that situation, review should be, and generally has been, by mandamus.[15]

Third, district courts frequently decide substantive issues of law that then require remand. Those remand orders should properly be reviewed by appeal. For example, several recent cases have echoed *Pellepor*t; defendants have sought review of a decision to enforce contractual language as a waiver of the right to remove. Those appellate courts properly held that the trial court decisions were appealable.[16]

Finally, defendants have sought review of remand order in cases that originally contained both federal and pendent state law claims, but where, after removal, the federal claims were dismissed and the plaintiff then sought and obtained remand. Some courts have permitted review of those remand orders by appeal; others, by mandamus.[17]

The confusion in these cases is understandable. Before 1988, it was not clear whether a federal district court had legal authority to remand pendent state law claims dangling in federal court after the federal claims that originally justified removal had been dismissed. In *Carnegie-Mellon University v. Cohill*,[18] the Supreme Court ultimately decided that district courts possessed this power, thus rendering remand in this situation lawful.

After *Carnegie-Mellon*, the proper result in the "pendent state claim remand" cases is clear. The remand of pendent state law claims after the federal claims have been dismissed is in fact lawful. Thus, the decision to remand is simply a decision on substantive law unrelated to any jurisdictional question: the trial court has *power* to hear the state law claims to judgment if it so desires, but exercises its *discretion* not to do so. These lawful remand orders for non-jurisdictional reasons should thus be appealable. Because the cases allowing mandamus review of such remand orders generally pre-date *Carnegie-Mellon*, courts are free to follow the more recent cases, permitting review by appeal, as accurate statements of current law.

Conclusion

Questions of when and how remand orders can be reviewed have created much litigation in the past decade. The cases have now finally revealed a unifying theme. Where cases are remanded for lack of jurisdiction, the remand order is unreviewable. Where cases are remanded for reasons other than lack of jurisdiction, the remand order is reviewable by standard rules of appellate procedure. Thus, if the remand order is based on a ground not authorized by law, the trial court decision ought to be corrected by mandamus. Conversely, if the remand order simply resolves a substantive question of law apart from the jurisdictional issue, any error should be corrected by appeal. These rules embody a conceptual framework that balances the plaintiff's right to a prompt trial with the defendant's right to appellate review of dispositive issues of law.

ENDNOTES

[1] *See, e.g.*, Frith v. Blazon-Flexible Flyer, Inc., 512 F.2d 899, 901 (5th Cir. 1975) (barring review by collateral attack), Volunteers, Inc. v. Clark, 432 F.2d 530, 533 (6th Cir. 1970) (barring review by interlocutory appeal); Sullivan v. Simons, 337 F.2d 239 (4th Cir. 1964) (barring review by writ of mandamus).

[2] 423 U.S. 336 (1976).

[3] *Id.* at 339.

[4] *Id.*

[5] *Id.* at 340-41.

[6] *Id.* at 346.

[7] *Id.* at 352-53.

[8] Those cases are collected in Herrmann, *Thermtron Revisited: When and How Federal Trial Court Remand Orders are Reviewable*, 19 Ariz. St. L.J. 395, 411 nn. 89 & 91 (1987).

[9] 741 F.2d 273 (9th Cir. 1984).

[10] *Id.* at 276.

[11] *Id.* at 277.

[12] *See e.g.*, United States v. Rice, 327 U.S. 742, 751-52 (1946).

[13] *See generally* Herrmann, *supra* note 8, at 413-18.

[14] *See e.g.*, Bankers Life & Casualty Co. v. Holland, 346 U.S. 379, 382 (1953).

[15] *See* Whitman v. Raley's Inc., 89 Daily Journal D.A.R. 12,240 (9th Cir. Oct. 3, 1989), Hansen v. Blue Cross of California, 89 Daily Journal D.A.R. 12,189 (9th Cir. Oct. 2, 1989), Alleghany Corp. v. United States District Court, 881 F.2d 777 (9th Cir. 1989), Ballard's Service Center, Inc. v. Transue, 865 F.2d 447 (1st Cir. 1989), Schmidt v. Insurance Co. of North America, 845 F.2d 1546 (9th Circ. 19898), Kunzi v. Pan American World Airways, Inc., 833 F.2d 1291 (9th Cir. 1987); Vatican Shrimp Company, Inc. v. Solis, 820 F.2d 674 (5th Cir. 1987); Glasser v. Amalgamated Workers Union Local 88, 806 F.2d 1539 (11th Cir. 1986). *But see* State of Florida v. Simanonok, 850 F.2d 1429 (11th Cir. 1989) (improperly reviewing a jurisdictional remand order by mandamus); *In re* Bendectin Litig., 857 F.2d 290 (6th Cir. 1988) (dictum on jurisdictional remand).

[16] *See, e.g.*, *In re* Wilson Industries, Inc., 886 F.2d 93 (5th Cir. 1989) (mandamus to review unauthorized remand prompted by dismissal of third-party claim), Bloom v. Barry, 755 F.2d 356 (3d Cir. 1985) (case removed from Florida state court to Florida federal court, transferred to New Jersey federal court, and unlawfully remanded to New Jersey state court). *But see* Kolbash v. Committee on Legal Ethics of West Virginia Bar, 872 F.2d 571 (4th Cir. 1989) (unlawful remand reviewed by appeal).

[17] *See* Karl Koch Erecting Co. v. New York Convention Center Dev. Corp., 838 F.2d 656 (2d Cir. 1988); Hunt Wesson Foods, Inc. v. Supreme Oil Co., 817 F.2d 75 (9th Cir. 1987); The Clorox Co. v. United States District Court, 779 F.2d 517 (9th Cir. 1985). *But cf.* Rothner v. City of Chicago, 879 F.2d 1402 (7th Cir. 1989) (review by mandamus of waiver of right to remove by conduct during litigation)

[18] *Compare* Baker, Watts & Co. v. Stockbridge, 876 F.2d 1101 (4th Cir. 1989) (en banc) (review by appeal) *and* Scott v. Machinist Automotive Trades District Lodge No. 190, 827 F.2d 589 (9th Cir. 1987) (review by appeal), *with* Hewlett v. Davis, 844 F.2d 109 (3rd Cir. 19898) (review by mandamus of remand after trial of state law claims) *and* Prince v. PSA, Inc., 829 F.2d 871 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 1732 (1988) (review by mandamus after summary dismissal of state law claims) *and* Survival System Division of the Whittaker Corp. v. United States District Court, 825 F.2d 1416 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 774 (1988) (same) *and* Page v. Henry J. Kaiser Co., 826 F.2d 857 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 2819 (1988) (same) *Cf.* National Audubon Soc'y v. Department of Water, 858 F.2d 1409 (9th Cir. 1988) (review by appeal under Section 1292 of remand of state law claims while federal claims still pending, Corcoran v. Ardra Ins. Co., 842 F.2d 31 (2d Cir. 1988) (review by mandamus of remand on ground of abstention)

[19] 108 S. Ct. 614 (1988)

REVIEWABILITY OF REMAND ORDERS: STRIKING THE BALANCE IN FAVOR OF EQUALITY RATHER THAN JUDICIAL EXPEDIENCY

Jerome I. Braun*

I. The Issue

A federal district court order denying remand to state court is reviewable on appeal. An order granting remand (with limited exceptions) is not. Can this distinction be rationalized or justified? The thrust of this article is that it cannot.

II. An Overview

The Constitution does not explicitly provide defendants with an absolute right to remove state court actions to federal district court. Nonetheless, such a right has been recognized by Congress since the enactment of the original Judiciary Act in 1789.[1] This statutory right of removal is the mechanism by which federal district courts exercise the original jurisdiction granted to them under Article III of the Constitution.[2]

In spite of the obvious importance of the right to a federal forum in certain cases, by enacting 28 U.S.C. § 1447(d) (hereinafter "section 1447(d)"), Congress has severely circumscribed the ability of defendants to establish that jurisdiction properly lies in federal district court. Denying any review of orders remanding removed ac-

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Although the views expressed here are solely those of the author, this Article is an outgrowth of a resolution proposed by the author and adopted by the judge and lawyer attendees at the 1988 Judicial Conference for the Ninth Judicial Circuit. The resolution was referred to the United States Judicial Conference, who, based on the recommendation of the Committee on Federal-State Court Judiciary, disapproved it.

The author is indebted to and appreciative of the efforts of Richard Van Duzer and Ronald J. Shingler who labored diligently on this project. Without their able assistance, this Article would not have come to fruition.

1 Judiciary Act, ch. 20, § 12, 1 Stat. 79-80 (1789) (current version at 28 U.S.C. § 1441 (1988)).

2 *See generally* Chicago & N.W. Ry. Co. v. Whitton, 80 U.S. 271, 272 (1872).

tions to state court effectively sabotages the mechanism and frustrates important federal policy.

There is a paucity of legislative history or expression of congressional intent respecting the public policy supposedly furthered by the interdiction of section 1447(d). It has been judicially declared, however, that its purpose is self-evident and clear: to prevent prolonged litigation concerning jurisdictional questions from unnecessarily interrupting and delaying the progress of a lawsuit.[3] Clearly articulated or not, this ascribed congressional concern for judicial efficiency and expediency creates a needless and unfair judicial imbalance.

Although the avoidance of *unnecessary* delay is always a legitimate legislative and judicial concern, that concern must be balanced against the interests that are sacrificed when review of remand orders is completely precluded. The interest sacrificed by Congress' "no review" policy is access to a federal forum in cases where Article III establishes original jurisdiction in the federal judicial system. Whatever may be said about the merits of diversity jurisdiction,[4] where removal is based upon the arguable presence of a federal question, non-reviewability of remand orders compels defendants to suffer the possibility of adverse judgments by state court judges less familiar with federal law. This problem is compounded by the fact that defendants have virtually no access to a federal forum in which to challenge such judgments.[5]

The thesis here is that the policy underlying this principle of

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3. In Thermtron Prods., Inc. v. Hermansdorfer, 423 U.S. 336, 351 (1976), the United States Supreme Court noted, "There is no doubt that in order to prevent delay in the trial of remanded cases by protracted litigation of jurisdictional issues . . . Congress immunized from all forms of appellate review any remand order issued on the grounds specified in § 1447(c) . . . ." (citations omitted).

4. This Article does not address the continuing diversity jurisdiction controversy except to the extent that it may explain hostility towards removal of diversity cases and the *a fortiori* antagonism towards appellate review of orders remanding such cases to state court. For the latest word on this subject, see FEDERAL COURTS STUDY COMMITTEE, TENTATIVE RECOMMENDATIONS FOR PUBLIC COMMENT (1989). (This committee, appointed by United States Supreme Court Chief Justice William Rehnquist, suggested that further restrictions on ordinary diversity jurisdiction are necessary.) Similarly, this Article acknowledges but does not address what Judge Spencer Williams has characterized as "an unarticulated bias against the 'expansion' of removal jurisdiction [that is not] grounded in logic [or] commonsense." Motor Vehicle Casualty Co. v. Russian River County Sanitation Dist., 538 F. Supp. 88, 492 (N.D. Cal. 1981).

5. The only federal recourse defendants have is a petition for writ of certiorari to the United States Supreme Court. The statistical improbability of such review, however, is well known. For example, according to the Clerk's Office of the United States Supreme Court, of the 5,268 petitions that were filed in 1987, only three percent were granted.

non-reviewability—judicial expediency—is secondary to the more compelling concern that federal district courts fully exercise the jurisdiction granted to them by the Constitution and by Congress. This is particularly true in cases where the jurisdiction of federal district courts is founded upon the presence of a question "arising under" federal law. In order to ensure that this concern is addressed, section 1447(d) should, at the very least, be amended to permit expeditious review of remand orders in federal question cases. Statistical evidence indicates[6] that such an amendment would only slightly affect judicial efficiency and expediency. Additionally, this amendment would afford removing litigants with a federal forum in which to present federal questions, and permit federal district courts more fully to exercise the jurisdiction granted to them by the Constitution and by Congress.

III. THE CURRENT STATUTORY SCHEME

The right of defendants to remove certain actions from state court to federal district court has been recognized by Congress continuously since 1789. Orders remanding such actions, however, did not become reviewable until 1875 when Congress specifically provided for the review of remand orders by a writ of error or appeal.[7] Twelve years later, in 1887, Congress reversed course, explicitly stating that no appeal or writ of error would be allowed from decisions remanding cases to state court.[8] The state of the law concerning the reviewability of remand orders remained unchanged until 1948, when the original version of 28 U.S.C. § 1447 was enacted.[9]

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6. *See infra* notes 50-51 and accompanying text.

7. Judiciary Act, ch. 137, § 5, 18(3) Stat. 472 (1875) (current version at 28 U.S.C. § 1447(d) (1988)). Section 5 of the Judiciary Act of 1875 provided, in relevant part: "[T]he order of [a circuit court of the United States] . . . remanding [a] cause to the State court shall be reviewable by the Supreme Court on writ of error or appeal, as the case may be."

8. Judiciary Act, ch. 373, § 2, 24 Stat. 553 (1887) (current version at 28 U.S.C. § 1447 (1988)). Section 2 of the Judiciary Act of 1887 provided that if a circuit court decided that a cause was improperly removed and, therefore, remanded the cause back to the state court, "such remand shall be immediately carried into execution, and no appeal or writ of error . . . shall be allowed."

9. The current version of 28 U.S.C. § 1447 (1988) provides in its entirety:

> (a) In any case removed from a State court, the district court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise.
>
> (b) It may require the petitioner to file with its clerk copies of all records and proceedings in such State court or may cause the same to be brought before it by writ of certiorari issued to such State court.
>
> (c) A motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under

As originally drafted, section 1447 provided for remand of cases from federal district court to state court, but did not contain a provision prohibiting review of such orders.[10] One year later, Congress added subsection (d) to section 1447. Section 1447(d) currently provides:

> *An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise*, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title [pertaining to removal of civil rights cases] shall be reviewable by appeal or otherwise.[11]

Pursuant to section 1447(d), with one limited exception,[12] orders remanding cases to state court and depriving defendants of a federal forum in which to litigate federal questions are unreviewable *even if clearly erroneous*.[13] Therefore, by enacting section 1447(d), Congress expressly granted federal district courts virtually non-reviewable power, presumably in the interests of judicial economy and efficiency, to deprive defendants of their statutory right to have federal district courts adjudicate federal questions.

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section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

(e) If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court.

10. 1A J. MOORE & B. RINGLE, MOORE'S FEDERAL PRACTICE 0.169 [2-1] (2d ed. 1987) [hereinafter MOORE'S FEDERAL PRACTICE].

11. 28 U.S.C. § 1447(d) (1988) (emphasis added).

12. Section 1447(d) expressly excepts cases removed pursuant to 28 U.S.C. § 1443 (1948) from its "no review" rule. Section 1443 generally allows a defendant to remove cases in which state action has denied him or her "equal civil rights." For a thorough discussion of this exception, see Markowski, *Remand Order Review After Thermtron Products*, 4 U. ILL. L.F. 1086, 1095-99 (1977).

13. *See* Herrmann, *Thermtron Revisited: When and How Federal Trial Court Remand Orders are Reviewable*, 19 ARIZ. ST. L.J. 395, 405 & n.48 (1987). The reviewability of remand orders is also discussed in Ribie, *Federal Courts: Review of the Remand Order*, 9 ST. MARY'S L.J. 274 (1970); Myers, *Federal Appellate Review of Remand Orders: Expansion or Eradication?*, 48 MISS. L.J. 741 (1977); Markowski, *supra* note 12; MOORE'S FEDERAL PRACTICE, *supra* note 10, 0.169 *et seq.*; 14 A. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE 3739 *et seq.* (2d ed. 1985).

IV. THERMTRON: A TOOTHLESS EXCEPTION TO THE "NO REVIEW" RULE OF SECTION 1447(d)

In *Thermtron Products, Inc. v. Hermansdorfer*,[14] the United States Supreme Court created a very narrow judicial exception to section 1447(d)'s sweeping prohibition against review of remand orders. In *Thermtron*, two Kentucky residents filed suit in a Kentucky state court against Thermtron Products, Inc., an Indiana corporation, for damages arising out of an automobile accident. Asserting that the federal district court had original diversity jurisdiction over the case, Thermtron Products petitioned the United States District Court for the Eastern District of Kentucky for removal pursuant to 28 U.S.C. § 1441.[15] The federal district court subsequently remanded the case on the basis that its docket was overcrowded, that other cases had priority on available trial time, and that the plaintiffs' right of redress would be severely impaired if the case were permitted to stay in federal court.[16] Thermtron Products then filed a petition for an alternative writ of mandamus or prohibition in the United States Court of Appeals for the Sixth Circuit, asserting that the federal district court had no authority to remand the case on such grounds.[17] The Sixth Circuit denied Thermtron Product's petition for two reasons: (1) the federal district court had jurisdiction to enter the order of remand; and 2) the Sixth Circuit had no jurisdiction to review that order or to issue mandamus because of the broad prohibition against review of remand orders set forth in section 1447(d).[18]

Justice White, writing for five members of the Court, reversed.[19] The majority said sections 1447(c) and (d), when read together, require that federal district courts remand cases for one of the two reasons specifically enumerated in section 1447(c).[20] Unless a remand order is expressly issued on the basis of one of those two reasons, section 1447(d)'s prohibition against review of remand orders is inapplicable.[21] The Court noted that the federal district court judge in *Thermtron* did not expressly assert that it was remanding the case to Kentucky state court pursuant to section 1447(c) or that the case was "improvidently removed" or the federal district court

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14 423 U.S. 336, 337 (1976)
15 *Id.* at 338
16 *Id.* at 340-41
17. *Id.* at 341
18 *Id.* at 341-42.
19 *Id.* at 345.
20 *Id.* at 345-46
21 *Id.* at 345

was "without jurisdiction."[22] Accordingly, the Court held that section 1447(d) did not apply.[23] If, however, the trial court had simply uttered the shibboleth of section 1447(c) and purported to remand the case on such grounds, its order would have been totally immune from challenge by appeal, mandamus or otherwise.[24] This ritualistic reliance on boilerplate statutory language elevates form over substance and, in effect, renders *Thermtron*'s exception virtually toothless.[25]

V. The "No Review" Rule of Section 1447(d) Has Led To Clearly Unfair and Erroneous Decisions In The Lower Federal Courts

Section 1447(d)'s blanket prohibition on reviewability of remand orders has led to some egregious decisions in the lower federal courts which are difficult to reconcile with any sense of even-handed justice.[26] The Ninth Circuit, for example, has rigidly applied section 1447(d) to deny review of virtually all remand orders even where those orders have been clearly erroneous. A fairly recent example of the sometimes startling effect of section 1447(d)'s "no review" rule is *Seedman v. U.S. District Court for the Central District of California*.[27] The plaintiff in *Seedman* filed a complaint in state court, al-

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22. *Id.* The terms "improvidentaly removed" and "without jurisdiction" were in the then-existing version of section 1447(c), which, in its entirety, provided

> If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case, and may order the payment of just costs. A certified copy of the order of remand shall be mailed by its clerk to the clerk of the State court. The State court may thereupon proceed with such case.

For the current language of section 1447, *see supra* note 9.

23. *Thermtron*, 423 U.S. at 345.

24. *Id.* at 345-46.

25. *See* Herrmann, *supra* note 13, at 409-10 ("Because *Thermtron* was read to insulate remand orders from review *either* if they were based on grounds set out in section 1447(c) *or* if they simply invoked the language of that section, lower courts declined to review remand orders that invoked the 'magic words' of Section 1447(c)."") (emphasis in original). *See also* Myers, *supra* note 13, at 754 ("The courts have generally declined to review remand orders which do not fall within the narrow legalisms of *Thermtron*.") In an exhaustive analysis of *Thermtron*, the Court in Rothner v. City of Chicago, 879 F.2d 1402 (7th Cir. 1989) held reviewable a remand order based on a waiver of the right to remove. The Court made clear that if the magic words of section 1447(c)—"improvidently removed" or "without jurisdiction"—had been used, the remand order would have been non-reviewable.

26. *See generally* Myers, *supra* note 13, at 745-50. These types of decisions "clarify the indispensable need for appellate review of remand orders in all litigation and provide a compelling argument for amendment of the removal statutes to explicitly provide for such redress." Myers, *supra* note 13, at 745.

27. 837 F.2d 413 (9th Cir. 1988). *But see* Air-Shields, Inc. v. Fullam, 891 F.2d 63, 65-

leging federal RICO violations against multiple defendants.[28] The defendants subsequently petitioned for removal to federal district court.[29] The district court *sua sponte* remanded the case to state court on the grounds that the removal petition was untimely.[30] After the district court's remand order had been certified to the state court, the defendants filed a second removal petition, asserting that the original remand order was based on a clerical error.[31] Plaintiff then moved to remand the case to state court for a second time. The district court denied the motion and vacated its earlier remand order, concluding that the first remand order had been based on a clerical error.[32]

After the district court denied the plaintiff's second remand motion, the plaintiff petitioned the Ninth Circuit for mandamus on the ground that the district court had been without jurisdiction to reconsider its original remand order.[33] The Ninth Circuit agreed, holding that so long as a remand order is purportedly based on section 1447(c), neither an appellate court nor the district court that issued the order has the power to vacate or correct it.[34]

The result in *Seedman* is disturbing. A case over which a federal district court clearly had original federal question jurisdiction (and which, in fact, had been properly removed) was remanded to state court.[35] The defendants in *Seedman*, therefore, were forced to litigate a substantial federal question in state court even though they were clearly entitled to have that question adjudicated by the federal district court under 28 U.S.C. § 1441. While there are, and may always be, wrongs without remedies, the result in *Seedman* is difficult to reconcile with any notion of procedural fairness.

VI. THE INHERENT INCONSISTENCIES OF SECTION 1447(d)

In addition to resulting in unfair and erroneous decisions, sec-

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66 (3d Cir. 1989). In *Air-Shields*, the Third Circuit reviewed a district court order remanding the case to state court under the 1982 version of section 1447(c), rather than the recently amended 1988 version. In order to justify its decision to review the district court's order and avoid what clearly was an erroneous and unjust ruling, the Third Circuit relied upon a refreshingly liberal reading of *Thermtron*'s exception to section 1447(d)'s "no review" rule.

28. *Seedman*, 837 F.2d at 413.
29. *Id.*
30. *Id.*
31. *Id.* at 414.
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*

tion 1447(d) itself is inherently inconsistent. It expressly prohibits review of orders *granting* motions to remand, but by clear implication permits review of orders *denying* remand.[36] There is no logical reason for making this rather arbitrary distinction. In fact, unless the judicial system is willing to concede that a plaintiff's right to the forum of its choice is more vital or important than a defendant's right to a federal forum in which to litigate substantial federal questions, a conclusion that this Article expressly rejects, the distinction made by section 1447(d) makes no sense.[37]

Indeed, in reality, permitting review of an order denying remand can result in even more serious delay, interruption and duplication of effort than permitting review of an order granting remand.[38] For example, in *La Chemise LaCoste v. Alligator Co., Inc.*,[39] the Third Circuit ruled, after a complete trial on the merits in federal district court, that the district court had improperly denied the plaintiff's remand motion.[40] For that reason, the Third Circuit vacated the district court judgment, remanded the case to the district court, and ordered the district court to remand the case to the state court.[41] The state court, therefore, was required to relitigate the entire matter.

In addition to being inherently inconsistent, the inflexibility of section 1447(d)'s "no review" rule has inspired lower federal courts to fashion further judicial exceptions to its sweeping prohibition. These exceptions, which technically are mechanisms of avoidance, have led to irrational inconsistencies. For example, the Ninth Circuit has developed two additional exceptions to section 1447(d)'s "no review" rule. First, the Ninth Circuit has held that section 1447(d) does not preclude review of remand orders which are premised on a "substantive decision on the merits apart from any jurisdictional de-

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36. *See supra* note 9 *See also* Capital Bancshares, Inc. v. North Am. Guar. Ins. Co., 433 F.2d 279, 283 (5th Cir. 1970)

37. *See* Boys Mkts., Inc. v. Retail Clerks Union Local 770, 398 U.S. 235, 246 n.13 (1970) (noting that federal question removal jurisdiction intended to provide a federal forum for protection of federal rights and to encourage the development of expertise by the federal courts in the interpretation of federal law).

38. If a district court refuses to remand a case to state court, that decision is reviewable, absent certification under 28 U.S.C. § 1292 (1982), only on appeal from a final judgment. *See, e.g.*, Sheeran v. General Elec. Co., 593 F.2d 93, 97 & n.6 (9th Cir. 1979), *cert. denied*, 444 U.S. 868 (1979) *See also* Aaron v. National Union Fire Ins. Co., 876 F.2d 1157, 1158, 1160 (5th Cir. 1989).

39. 506 F.2d 339 (3d Cir. 1974).

40. *Id.* at 346

41. *Id.* at 347.

cision."[42] Second, the Ninth Circuit has determined that a decision remanding pendent state law claims to state courts is also reviewable because it is a matter of discretion rather than a matter governed by section 1447(c).[43]

By creating these two exceptions, the Ninth Circuit has ameliorated some of the one-sidedness of section 1447(d)'s "no review" rule. Consequently, it has clearly contravened both the explicit language of the statute and the stated public policy underlying the rule. The Ninth Circuit has apparently created these exceptions in an effort to bring some judicial balance, however modest, to the current statutory scheme by effectively narrowing section 1447(d)'s severe proscription. Indeed, although the Ninth Circuit has posited no pragmatic rationale for why these exceptions should not fall within the harsh ambit of section 1447(d)'s "no review" rule,[44] one could

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42 *See* Schmitt v. Insurance Co. of N. Am., 845 F.2d 1546, 1550 (9th Cir. 1988); Clorox Co. v. U.S. District Court, 779 F.2d 517, 520 (9th Cir. 1985); Pelleport Invs., Inc. v. Budco Quality Theatres, Inc., 741 F.2d 273, 276 (9th Cir. 1984). *See also* Regis Assocs. v. Rank Hotels (Management) Ltd., 894 F.2d 193, 194-95 (6th Cir. 1990); Kolibash v. Committee on Legal Ethics of W. Va. Bar, 872 F.2d 571 (4th Cir. 1989); Peabody v. Maud Vancortland Hill Schroll Trust, 89 D.A.R. 1175 (9th Cir. 1989) (holding that notwithstanding section 1447(d), a remand order which also imposed sanctions for frivolous removal required some examination of the merits of the removal and the remand). *See generally* Herrmann, *Reviewing the Unreviewable*, 6 CAL. LAW. 75 (1986).

Although this exception presumably was crafted to soften rather than accentuate the harshness of section 1447(d)'s "no review" rule, the Ninth Circuit has interpreted the exception rather narrowly and, in doing so, has raised a somewhat troubling *res judicata* question: "Does a federal district court, in the course of deciding whether Congress has completely preempted a select group of state law claims, render a "substantial decision on the merits apart from any jurisdictional issue" that falls within the exception?"

Two different Ninth Circuit appellate panels have recently addressed this question. In Hansen v. Blue Cross, No. 88-5910 (9th Cir. Oct. 2, 1989) (LEXIS, States library, Cal. file), the panel acknowledged that the district court's decision might effectively preclude the defendant from raising preemption as an affirmative defense in state court. The Hansen court held, however, that *the state court* "must determine the propriety of extending *res judicata* effect to [the] district court's . . . decision" in light of the fact "that [the district court's decision], by statute, is immune from appellate review even if clearly wrong." *Id.* If the state court decides that the district court's decision should be given *res judicata* effect, so be it. In such a case, section 1447(d) would preclude the defendant from seeking appellate review of a decision on the merits of an affirmative defense.

In Whitman v. Raley's Inc., 886 F.2d 1177 (9th Cir. 1989), the court simply defined this troubling *res judicata* issue away. According to the *Whitman* court, the "jurisdictional issue of whether 'complete preemption' exists is very different from the substantive inquiry of whether a 'preemption defense' may be established." Because the issues were not identical, the appellate court concluded that the district court's ruling concerning "complete preemption," "[had] no preclusive effect on the state court's consideration of the substantive preemption defense."

43 *Schmitt*, 845 F.2d at 1550 (citing *Pelleport*, 741 F.2d at 276). *Cf.* Rothner v. City of Chicago, 879 F.2d 1402 (7th Cir. 1989).

44 Although technically speaking, one can argue that under the current statutory scheme only "strictly jurisdictional" remand orders are non-reviewable and, therefore, that

argue that these exceptions implicitly suggest and support the need for procedural change. Surely a defendant's right to litigate *substantial federal questions* in a federal forum is equally, if not more important than that same defendant's right to litigate *pendent state law claims* in such a forum.[45]

On the other hand, a rational and practical reason arguably does exist for distinguishing between cases in which the original jurisdiction of a federal district court is based on diversity of citizenship, rather than the presence of a federal question. First, it is highly unlikely that a federal district court will erroneously decide whether diversity of citizenship exists or whether the minimum amount in controversy requirement has been met.[46] Therefore, the need for review of remand orders based upon such determinations is likely to be insignificant.[47] Second, by permitting state court judges to decide federal questions, federal district courts frustrate, rather than facilitate, the formation of a uniform, interpretive body of federal law.[48] Accordingly, this Article proposes that section 1447(d) be amended to provide for expeditious review of remand orders only in federal question cases.[49]

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these exceptions are "jurisprudentially sound," *see, e.g.*, Herrmann, *supra* note 42, such an argument misses the point. The point is that these exceptions nevertheless serve to undermine Congress' stated purpose in making remand orders non-reviewable and, therefore, should be treated no differently than "strictly jurisdictional" orders. It is not what the *Pelleport* court characterized as the "substantive decision on the merits" that is appealable *Pelleport*, 741 F.2d at 276. It is the remand order itself.

45. *Pelleport*, 741 F.2d 273 (9th Cir. 1984).

46. *See* Herrmann, *supra* note 13, at 414 (noting that the presence or absence of diversity is a threshold question readily resolved by reference to a well-established body of law). *See also* Merrell Dow Pharmaceuticals, Inc. v. Thompson, 478 U.S. 804 (1986) (illustrating the complexity of deciding whether a particular case "arises under" federal law). *But see* Herrmann, *supra* note 13, at 414 (arguing that after *Merrell Dow*, the issue will be much simpler).

47. Congress recently amended 28 U.S.C. § 1332 (1988) and, in doing so, narrowed the bases of diversity jurisdiction. *See* Cirillo, *Judicial Improvements and Access to Justice Act. Significant Changes in the Laws Governing Removal, Diversity, and Operation of Federal Courts*, 11 CIV. LIT. REP. (CEB) 14, 16 (1989). Specifically, Congress (1) increased the amount in controversy requirement from $10,000 to $50,000, (2) provided that citizenship in representative party cases shall be determined by reference to the represented party; and (3) provided that permanent resident aliens shall be treated as citizens of their state of domicile. *Id.*

48. *See* Markowski, *supra* note 12, at 1106, 1109 (stating that "nonreviewability of remand orders prevents the development of a body of uniformly applied law on removability" and "federal question jurisdiction facilitates the formation of a uniform body of interpretive law"). *See also supra* note 5.

49. The Author would not oppose a broader proposal making *all* remand orders reviewable. The need for review of federal question remand orders and the lack of any significant need for review of diversity remand orders, however, impels the not entirely logical but pragmatic distinction made here.

VII. Providing For Appellate Review Of Remand Orders In Federal Question Cases Will Not Overburden The Appellate Court System

By amending section 1447(d) to permit review of remand orders in federal question cases, Congress would undoubtedly cause an increase in the caseload of federal appellate court judges. The critical question, however, is by how much? The most recent statistical evidence indicates that the resultant increase would be relatively insignificant in light of the importance of providing defendants with a federal forum in which to litigate substantial federal questions. According to the Statistical Analysis and Reports Division of the Administrative Office of the United States Courts,[50] in 1988 a total of 21,221 cases were removed from state courts to federal district courts in the twelve federal judicial circuits.[51] Of those cases, approximately 3,106 (14.5%) were remanded to state court. Of the 3,106 cases that were remanded to state court, approximately 1,218 (39% of the 14.5% remanded) were originally removed based upon the alleged presence of a federal question.

Consequently, if section 1447(d) is amended to permit review of such cases by a customary three-judge panel, the workload of each active circuit court judge would increase by, at the very most, approximately twenty-four appeals per year. This projection assumes the worst case scenario in which *all* remand orders would be appealed and senior status judges would not share any of the increased appellate burden. If senior status judges shared the increased appellate burden equally, the number would decrease to approximately seventeen appeals per year. This relatively insignificant increase is not a disproportionate price to pay for the assurance that federal courts would decide all federal questions that are properly presented

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50. The statistics reported in this Article were prepared with the help of the Statistical Analysis and Reports Division of the Administrative Office of the U.S. Courts. Although these statistics are not published by the Administrative Office in the form reported in this Article, the raw statistical data is available from the Author upon request.

51. The statistical evidence with respect to 1988 is not aberrational. In 1986, 17,776 cases were removed from state courts, 2,602 of which (14.8%) were eventually remanded. Of those 2,603, 931 (35.8%) were originally removed based upon the alleged presence of a federal question. Similarly, in 1987, 19,966 cases were removed from state courts, 2,874 of which (14.4%) were eventually remanded. Of those 2,874, 1,021 (35.5%) were originally removed based upon the alleged presence of a federal question. Had remand orders in federal question cases been reviewable in 1986 and 1987, the workload of appellate judges would have increased, on average, by approximately 19.4 and 21.3 cases per year respectively. Moreover, if senior status judges had shared the increased burden equally, those numbers would have decreased to 13.9 and 14.9 respectively. Finally, if section 1447(d) had permitted single-judge review, those numbers would have decreased even further to 6.5 and 7.1 respectively.

to them.[52]

In the event that this relatively modest increase proves unacceptable, however, section 1447(d) can and should be amended to provide for single-judge review. Although such an amendment would conflict with Federal Rule of Appellate Procedure 27[53] and several similar local rules,[54] there is nothing in the Constitution that would prohibit the adoption of such a procedure. If a single judge, as opposed to a customary three-judge panel, were permitted to review federal question remand orders, the workload of active circuit court judges would increase by a maximum of approximately eight appeals per year rather than twenty-four. Moreover, permitting single-judge review of federal question remand orders would almost certainly decrease the time within which the review itself could be completed. Instead of requiring a consensus among three appellate court judges, the appeal could be decided more expediantly by a single judge.

The following table, utilizing statistics from 1988, illustrates what the effect of such an amendment would be on each of the twelve judicial circuits, assuming that senior status judges *are not* required to carry any of the increased caseload resulting from the amendment.

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52. The author is not insensitive to characterizing a workload increase as "insignificant." The streamlined procedures discussed at pages 91-93 of the text, however, may make this characterization more fair and accurate. While the author believes that the increase in appellate court workload resulting from reviewing federal question remand orders is "relatively insignificant," candor requires recognition of the fact that the subsequent reversal of federal question remand orders may further increase the workload of both the district and circuit courts. For example, if a case is remanded to state court, it is unlikely that it will later return to the federal court system. If the order of remand is reviewed and then reversed, however, the district court will hear the case and any appeal thereafter will be filed in the circuit court.

53. FED. R. APP. P. 27(c) provides:

> 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 may be acted upon by the court. The action of a single judge may be reviewed by the court

(emphasis added).

54. *See, e.g.*, 2D CIR. R. 27(f), 5TH CIR. R. 27(2), 8TH CIR. R. 5(b).

Circuit	No. of Active Judges	Total Cases Removed	Total Cases Remanded	Total Cases Remanded (Federal Question)	Percentage of Cases Remanded (Federal Question)	Increased No. of Appeals Per Judge (Assuming Three-Judge Panel)	Increased No. of Appeals Per Judge (Assuming Single-Judge Review)
DC	11	72	7	4	57	1.9	4
1st	6	556	52	17	33	8.5	2.8
2d	12	1,031	93	45	48	11.2	3.7
3d	12	1,635	224	87	39	21.7	7.2
4th	11	1,587	133	44	33	12.0	4.0
5th	15	4,085	545	179	33	35.8	11.9
6th	14	2,760	334	168	50	36.0	12.0
7th	11	1,141	146	58	40	15.8	5.3
8th	9	1,349	180	97	54	32.3	10.8
9th	25	3,688	977	390	40	46.8	15.6
10th	10	1,199	129	34	26	10.2	3.4
11th	12	2,118	286	95	33	23.7	7.9
Total	148	21,221	3,106	1,218	39.2	24.7	8.2

VIII. SUMMARY APPELLATE PROCEDURES CAN BE USED TO MINIMIZE DELAY

The additional burden placed on appellate court judges by the proposal made in this Article would be relatively slight in light of the benefits derived from review of federal question remand orders. Nevertheless, in order to reduce the resulting burden and to minimize the potential for abusive delay,[55] various summary appellate procedures could be employed.[56]

For example, because review of remand orders generally will require resolution of a single discrete legal issue, both the time in which review of this nature must be sought and the length of the briefs that must be filed in support or opposition could be diminished appreciably.[57] Furthermore, the review itself could be accomplished

55. The delay inherent in the review process will in all likelihood be mitigated somewhat by the recent statutory amendments to the laws governing removal. *See* Cirillo, *supra* note 47, at 15-16 (motions to remand on the basis of a defect in removal must now be filed within 30 days after filing of the notice of removal, and removal of a case on diversity grounds must be made within one year after commencement of the action).

56. Summary procedures already exist in a number of circuits for the disposition of appeals that are frivolous or without merit. *See, e.g.*, 6TH CIR. R. 9, 10TH CIR. R. 8. The Ninth Circuit utilizes such procedures although they are not expressly formalized in court rules or procedures.

57. FED. R. APP. PRAC. 31(a) provides

> The appellant shall serve and file a brief within 40 days after the date on which the record is filed. The appellee shall serve and file a brief within 30 days after service of the brief of the appellant. The appellant may serve and file a reply brief within 14 days after service of the brief of the appellee, but, except for

without oral argument.[58] In addition, section 1447(d) could be amended to provide for mandatory monetary sanctions—including the payment of *actual* expenses, costs and attorneys' fees—in cases where the request for review "is not well-grounded in fact," "warranted by existing law," or "interposed for any improper purpose."[59]

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good cause shown, a reply brief must be filed at least 3 days before argument. *If a court of appeals is prepared to consider cases on the merits promptly after briefs are filed and its practice is to do so, it may shorten the periods prescribed above for serving and filing briefs, either by rule for all cases or for classes of cases, or by order for specific cases.*

(emphasis added).

Pursuant to Federal Rules of Appellate Practice 31(a), circuit courts could enact rules decreasing the time within which the appellant must file its brief to 20 days, and the time within which the appellee must file its brief to 15 days. No reply brief should be permitted.

Similarly, Federal Rules of Appellate Practice 28(g) could be amended or rules could be enacted to limit the length of principal briefs to 20 pages, exclusive of pages containing the table of contents, tables of citations, and any addendum containing statutes, rules, and regulations.

58 Federal Rules of Appellate Practice 34(a) currently provides for oral argument in the majority of cases. Rule 34(a) specifically provides:

> Oral argument shall be allowed in all cases unless pursuant to local rule a panel of three judges, after examination of the briefs and record, shall be unanimously of the opinion that oral argument is not needed. Any such local rule shall provide any party with an opportunity to file a statement setting forth the reasons why oral argument should be heard. A general statement of the criteria employed in the administration of such local rule shall be published in or with the rule and such criteria shall conform substantially to the following minimum standard:
>
> Oral Argument will be allowed unless
>
> (1) the appeal is frivolous, or
>
> (2) the dispositive issue or set of issues has been recently authoritatively decided; or
>
> (3) the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument.

Federal Rules of Appellate Practice 34(a) must be amended either to prohibit oral argument in all remand order cases or permit courts of appeal to promulgate rules to that effect. *Cf.* FED. R. APP. PRAC. 1(a) (permitting courts of appeal to shorten briefing periods in particular cases).

That it is possible to expedite appellate review of remand orders is graphically illustrated in Air-Shields, Inc. v. Fullam, 891 F.2d 63 (3d Cir. 1989). In *Air-Shields*, defendant filed a petition for writ of mandamus on April 13, 1989, seeking an order directing the district court to vacate its remand order. In accordance with the Third Circuit's local rule 12(6), the Court of Appeals, without hearing oral argument, rendered its order to vacate the remand order on December 7, 1989—a mere eight months after the petition was filed. With tight briefing schedules the review could, no doubt, be compressed even more.

59 In other words, parties seeking review of remand orders should be subject to Rule 11 standards, but not necessarily Rule 11 sanctions. *See* Falconer & Herrmann, *Legislation Enacted in November Alters Law Governing Removal*, NAT'L L.J. 18 (1989) (noting the difference between Rule 11 sanctions and the sanctions provided for in the newly amended version of 28 U.S.C. § 1447(c)).

Finally, the appellate court, in its discretion, could permit further pretrial proceedings in the federal district court, including discovery, to continue during the pendency of the review.[60]

IX. CONCLUSION

Avoidance of undue delay is a legitimate judicial and legislative concern. That concern, however, must be balanced against the interests sacrificed when appellate review of remand orders is denied: the interest of access to a federal forum in cases where Article III establishes original jurisdiction in the federal judicial system. Where removal jurisdiction is based upon the asserted presence of a federal question, non-reviewability of a remand order compels the defendant to suffer the possibility of an adverse judgment by a state court on the federal question.

The defendant, of course, has no recourse to a federal tribunal, other than filing a seldom granted petition for writ of certiorari in the United States Supreme Court. Commenting upon similar perils faced by litigants in circumstances where a federal district court incorrectly abstains from deciding issues presented to it, the Supreme Court noted in *England v. Louisiana State Board of Medical Examiners*[61] that:

> There are fundamental objections to any conclusion that a litigant who has properly invoked the jurisdiction of a Federal District Court to consider federal . . . claims can be compelled, without his consent and through no fault of his own, to accept instead a state court's determination of those claims. Such a result would be at war with the unqualified terms in which Congress, pursuant to constitutional authorization, has conferred specific categories of jurisdiction upon the federal courts. . . .[62]

The inconsistent and irrational results occasioned by application of section 1447(d)'s "no review" rule are similar to those occasioned by the now obsolete "derivative" jurisdiction rule created by the United States Supreme Court in *Lambert Run Coal Co. v. Baltimore & Ohio Railway Co.*[63] The *Lambert* rule of "derivative" juris-

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60. Markowski, *supra* note 12, at 1110. *See also* AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 418 (1969).

61. 375 U.S. 411 (1964).

62. *Id.* at 415.

63. 258 U.S. 377 (1922). The *Lambert* rule of "derivative" jurisdiction provided that since removal jurisdiction is derived from the state court, if a state court lacked jurisdiction over a case, a federal court did not acquire jurisdiction upon removal even if it would have had jurisdiction had the suit originally been filed there. Accordingly, the district court could only

diction was repeatedly criticized for its inexplicable results. Judge Duniway pointedly observed:

> [T]his is the kind of legal *tour de force* that most laymen cannot understand . . . One would have thought that the purpose of removal . . . is to get the case . . . into the court that has jurisdiction, and to keep it in [that] court, so that it can be tried and a valid judgment can be entered.[64]

Appellate review of remand orders in federal question cases would ensure that those cases which are properly removed to federal court stay there. The proposal made in this Article attempts to minimize the inevitable increase in appellate court caseload, and the potential for abusive, tactical delay on the part of removing parties. These goals can be achieved by making review of such remand orders as efficient and expeditious as possible while, at the same time, providing the removing litigant a limited, but important right to appellate review of remand orders in federal question cases.

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dismiss the action. *Id.* at 382. The *Lambert* "derivative" jurisdiction rule was squarely overturned by Congress in 1986 with the enactment of 28 U.S.C. § 1441(e).

64. Washington v. American League of Professional Baseball Clubs, 460 F.2d 654, 658-59 (9th Cir. 1972) (emphasis in original).

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

FROM: Carol Ann Mooney, Reporter

DATE: September 30, 1992

SUBJECT: Item 91-11, amendment of Rule 45 regarding the authority of clerks to return or refuse documents that do not comply with national or local rules.

This is one of the topics that the Local Rules Project referred to the Advisory Committee for consideration. Seven circuits have rules that permit the clerk to return or refuse to file documents if the clerk determines that the documents do not comply with the federal or local rules. The Local Rules Project recommended amendment of Fed. R. App. P. 45 to state that a clerk does not have authority to return or refuse documents.

The committee briefly discussed the topic at its December 1991 meeting and decided that the item should be assigned high priority because granting a clerk authority to refuse documents can have jurisdictional implications.

Effective December 1, 1991, Fed. R. Civ. P. 5(e) was amended. The last sentence of that rule now states:

> "The clerk shall not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or any local rules or practices."

The Committee Note accompanying the 1991 change states:

> Several local district rules have directed the office of the clerk to refuse to accept for filing papers not conforming to certain requirements of form imposed by local rules or practice. This is not a suitable role for the office of the clerk, and the practice exposes litigants to the hazards of time bars; for these reasons, such rules are proscribed by this revision. The enforcement of these rules and of the local rules is a role for a judicial officer. A clerk may of course advise a party or counsel that a particular instrument is not in proper form, and may be directed to so inform the court.

At its June 1992 meeting the Standing Committee approved a parallel change in Bankruptcy Rule 5005 and the proposal was sent to the Judicial Conference for its consideration at its September meeting.

The January 1992 Court Administration Bulletin indicates that the amendment of Civil Rule 5(e) "has raised a number of issues concerning what kinds of deficiencies are matters of 'form' and whether there are now any grounds on which the clerk may still refuse to accept a

document." The General Counsel's response to the inquiries has been that the clerk may refuse only documents that are not accompanied by the required filing fee, or by a petition to proceed in forma pauperis. The General Counsel also recommends that "the clerk should date stamp everything upon receipt, whether it is filed immediately or not." The General Counsel further notes that if the clerk notices a deficiency in a document that is accepted, the clerk may call the deficiency to the attention of a judicial officer before it is filed, and the judicial officer may issue the same type of deficiency notice that the clerks' offices formerly sent to litigants. (A copy of the relevant portions of the bulletin is attached to this memorandum.)

I do not think that the concerns noted above are sufficient to delay action by the appellate rules committee, nor do I think that they indicate the need for further refinement of the language of Civil Rule 5(e).

The Local Rules Project recommended that Rule 45 be amended to make it clear that a clerk does not have authority to refuse to accept nonconforming documents. Rule 45 governs the clerks' duties and thus is a possible location for such a proscription. The Civil and Bankruptcy Rules Committees both placed the provision in their rules on filing and service, Fed. R. Civ. P. 5 and Bankr. R. 5005. The prohibition is more likely to come to the attention of parties and their lawyers in the filing rule than in the rule describing clerks' duties. For that reason, as well as consistency with the other, I recommend that if the committee wants to include such a prohibition in the appellate rules, it should be placed in Fed. R. App. P. 25(a).

The following draft simply inserts the language of Civil Rule 5(e) in FRAP Rule 25(a).

(a) ***Filing.*** - Papers required or permitted to be filed in a court of appeals ~~shall~~ must be filed with the clerk. Filing may be accomplished by mail addressed to the clerk, but filing ~~shall not be~~ is not timely unless the clerk receives the papers ~~are received by the clerk~~ within the time fixed for filing, except that briefs and appendices ~~shall be deemed~~ are treated as filed on the day of mailing if the most expeditious form of delivery by mail, excepting special delivery, is utilized. If a motion requests relief ~~which~~ that may be granted by a single judge, the judge may permit the motion to be filed with the judge, in which event the judge shall note thereon the ~~date of~~ filing date and shall thereafter ~~transmit~~ send it to the clerk. A court of appeals may, by local rule, permit papers to be filed by facsimile or other electronic means, provided such means are

authorized by and consistent with standards established by the Judicial Conference of the United States. The clerk shall not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or by any local rules or practices.

Committee Note

Subdivision (a). Several circuits have local rules that authorize the office of the clerk to refuse to accept for filing papers that are not in the form required by these rules or by local rules. This is not a suitable role for the office of the clerk and the practice exposes litigants to the hazards of time bars; for these reasons, such rules are proscribed by this amendment. The enforcement of both national and local rules is a role for a judicial officer. A clerk may advise a party or counsel that a particular document is not in proper form and may be directed to so inform the court.

incorporates recent statutory changes, amendments to the Federal Rules of Bankruptcy Procedure which were effective in August, 1991, and amendments to the Federal Rules of Civil Procedure which were effective in December, 1991. The second edition also reflects the comments of clerks who have given suggestions for changes and additions to the manual after using the first edition on a daily basis.

The manual was designed to serve as a basic research tool and training guide for newly-appointed clerks and as a convenient reference work for more experienced clerks. During the last year and a half, the Administrative Office has received enthusiastic reactions to the manual from many courts and it is apparent that the manual can be of considerable assistance on a daily basis in clerks' offices.

The approach of the manual is to identify legal requirements found in the statutes, rules, and Judicial Conference resolutions and to emphasize practicality and common sense in applying them. Preparation of the manual was a cooperative, national project, drawing upon the expertise of clerks and deputy clerks, who submitted documents and ideas to CAD, offered procedural guidance, and reviewed draft chapters. Other Divisions of the AO, most notably the Bankruptcy Division and the Office of General Counsel, provided invaluable assistance in reviewing and commenting on the revised draft.

A number of courts have requested and received additional copies of the manual since the initial distribution in 1990. The cover letter from the Director, which accompanies the second edition, asks that those courts which received these additional copies and now require replacement pages, contact Philip R. Argetsinger in CAD on 202/FTS 633-6221. Extra copies of the text of the manual have been printed; however, a limited number of the three-ring binders and divider tabs are available. Courts requesting additional copies of both the present edition and binders should contact Mr. Argetsinger by letter or memorandum and specify the number of copies required. Due to the limited supply of binders, CAD may be unable to fill all requests, and courts may wish to consider providing their own binders and divide tabs for large orders.

■

AMENDMENT TO CIVIL RULE 5(e) CONCERNING ACCEPTANCE OF DOCUMENTS FOR FILING

The General Counsel has received many questions and comments from clerks of cour about the 1991 amendment to Rule 5(e) of the Federal Rules of Civil Procedure. The las sentence of that rule, as amended effective December 1, 1991, states: "The clerk shall no refuse to accept for filing any paper presented fo that purpose solely because it is not presented ir proper form as required by these rules or any local rules or practices." This rule also applies tc adversary proceedings in bankruptcy, by virtue o Rule 7005, Federal Rules of Bankruptcy Procedure.

This amendment has raised a number of issues concerning what kinds of deficiencies are matters of "form" and whether there are now any grounds on which the clerk may still refuse to accept a document. For example, what if a document is wholly or partially illegible, or the party does no tender the proper number of copies required by local rule, or the document is not accompanied by a certificate of service required by Rule 5(d), Federal Rules of Civil Procedure (as amended effective December 1, 1991)?

Although not presently prepared to address al these issues, the General Counsel's Office can offer guidance on the following questions tha many clerks have raised. It is the opinion of the Administrative Office that:

1. The clerk **may refuse** to accept a document that is not accompanied by the appropriate filing fee or an affidavit and petition to proceed *in forma pauperis*. The fees are prescribed by statute or by resolution of the Judicial Conference pursuant to statute; therefore, the requirement of a filing fee is beyond the scope of Civil Rule 5(e) because it is not a

matter of "form as required by [the Federal Rules of Civil Procedure] or any local rules or practices."

2. The clerk should **date-stamp everything** upon receipt, whether it is filed immediately or not. This will preserve the earliest possible filing date for the litigant, as contemplated by the Advisory Committee Note to the 1991 amendment to Civil Rule 5(e).

3. If the clerk notices a deficiency in a document that is accepted, the clerk may call the deficiency to the attention of a judicial officer (district judge, bankruptcy judge, or magistrate judge) before it is filed. Any judicial officer may sign the same type of deficiency notice that the clerk's office used to send to the litigant, giving the litigant a grace period in which to correct the deficiency, in order to obtain the earliest possible filing date.

Please direct any questions to the General Counsel on 202/FTS 633-6127 *[see MEMO Burchill, Dec. 27, 1991 & **CAB**, Nov. 1991 at 2].* ■

FORUM ON CIVIL JUSTICE REFORM ACT

Mark D. Shapiro
Attorney [CAD] 202/FTS 633-6221

On December 17, 1991 the Association of the Bar of the City of New York, in conjunction with the ABA Section on Litigation, conducted a forum on the Civil Justice Reform Act (CJRA). The meeting was designed as a general discussion of CJRA with particular emphasis on the work and reports of the Advisory Groups appointed in the Southern and Eastern Districts of New York.

The forum, a panel discussion attended by approximately 75 people, was moderated by David M. Brodsky, co-chair of the Trial Practice Committee and member of the Federal Courts Committee of the Association of the Bar of the City of New York. The speakers were the Honorable Thomas C. Platt, Chief Judge of the Eastern District of New York; Honorable Charles L. Brieant, Chief Judge of the Southern District of New York; Honorable Thomas P. Griesa of the Southern District of New York; Edwin J. Wesely, Chair, Eastern District Advisory Committee; Professor Margaret A. Berger, member Eastern District Advisory Committee; and Stacey J. Moritz, Benito Romano, and Shira A. Scheindlin, members of the Southern District Advisory Committee.

The evening began with a brief overview of CJRA and its legislative history delivered by Mr. Brodsky and continued with brief opening remarks by Chief Judge Platt and Judge Griesa. The majority of the time was consumed by the answers of individual panel members to questions posed by Mr. Brodsky and concluded with a brief question and answer period.

In his opening remarks Chief Judge Platt announced that the Eastern District of New York had, earlier that day, adopted a Civil Justice Expense and Delay Plan. He added that the plan was nearly identical to that proposed by the District Advisory Group with the only significant difference being what Chief Judge Platt referred to as a "savings clause". The "savings clause" allows any judge with good cause shown to "modify or suspend any one or more or all of the provisions of [the] plan." Judge Platt lamented the heavy burden criminal cases put on the Court and echoed the oft heard pleas for more judges, more facilities, and suspension or modification of the Speedy Trial Act. He highlighted the elements of the District's plan including automatic disclosure and settlement conference with the presiding judge.

Judge Griesa summed up the theme of the Southern Districts' Plan as "Judicial Management." The most sweeping innovation in the Southern District's plan is the switch from the Case Management Conference to a Case Management Plan. A second focus of the plan, according to Judge Griesa was viewing the court as a single institution versus several individual courts. To this end the district attempted to reduce and

TO: Honorable Kenneth F. Ripple

FROM: Carol Ann Mooney, Reporter

DATE: September 30, 1992

RE: 91-12, amendment of Rule 33 concerning prehearing conferences

The Local Rules Project noted that five circuits allow attorneys, as well as judges, to preside at prehearing conferences and that in another circuit, prehearing conferences are held without a presiding person. The Local Rules Project took the position that those local rules are inconsistent with Rule 33. Rather than suggesting repeal of the local rules, however, the Project suggested that the Advisory Committee consider amending Rule 33 to permit attorneys to preside at prehearing conferences. The Project suggested two other changes in Rule 33; the first, to permit a party to request a conference; and the second, to provide that the results of a conference be confidential.

At the Advisory Committee's December 1991 meeting, when the Committee first considered the recommendations made by the Local Rules Project Report, the Committee decided to review Rule 33. Judge Ripple asked Judges Hall and Logan, and the Solicitor General's office, to assist the reporter in developing drafts.

Correspondence between the subcommittee members has resulted in two drafts, which I will present for your consideration.

Current Rule 33.

Rule 33. Prehearing conference

The court may direct the attorneys for the parties to appear before the court or a judge thereof for a prehearing conference to consider the simplification of the issues and such other matters as may aid in the disposition of the proceeding by the court. The court or judge shall make an order which recites the action taken at the conference and the agreements made by the parties as to any of the matters considered and which limits the issues to those not disposed of by admissions or agreements of counsel, and such order when entered controls the subsequent course of the proceeding, unless modified to prevent manifest injustice.

Draft one was initially prepared by the Solicitor General's office and has been redrafted in light of comments made by other subcommittee members. The proposed committee note is a slightly altered version of one prepared by the Solicitor's office. I made the alterations to conform the note to the revised draft. Mr. Kopp informs me that there may be yet another version of the draft before the meeting. If so, I will send it to you immediately.

Rule 33. Prehearing Conference

(a) The court may direct the attorneys for the parties to appear ~~before the court or a judge thereof~~ for a prehearing conference to ~~consider the simplification of the issues and such other matter as may aid in the disposition of the proceeding by the court.~~ address any matter that may aid in the disposition of the proceeding, including the simplification of the issues and the possibility of settlement. The prehearing conference may be conducted by the court, a judge thereof, or an attorney designated by the court for that purpose. Conferences may be conducted by telephone, unless there is substantial need for counsel to appear in person.

(b) In advance of the prehearing conference, counsel are encouraged to obtain authority to make commitments as reasonably may be anticipated to be necessary to narrow the issues, settle the case, or otherwise aid in the management of the proceeding. Government attorneys, however, may not be required to obtain advance authority inconsistent with the authority specified in applicable statutes and regulations.

~~The court or judge shall make an order which recites the action taken at the conference and the agreements made by the parties as to any of the matters considered and which limits the issues to those not disposed of by admissions or agreements of counsel, and such order when entered controls the subsequent course of the proceeding, unless modified to prevent manifest~~

~~injustice.~~

(c) To effectuate the purposes and results of the prehearing conference, the circuit judge or clerk of the court shall enter a prehearing conference order controlling the course of the proceedings. A prehearing conference order, when entered, shall control the subsequent course of the proceeding, unless modified to prevent manifest injustice.

(d) Except to the extent disclosed by the prehearing conference order, the statements made during the prehearing conference are confidential, and may not be disclosed by the conference judge or conference attorney nor by counsel in briefs or argument.

Advisory Committee Note

The amendment revises the rule to allow a court-designated attorney to conduct a prehearing conference, a practice currently used in several circuits. The amendment also permits a court to use a prehearing conference to determine whether the proceeding can be settled without the need for further participation by the court, another practice already used by some circuits.

The amendment provides that a prehearing conference may be conducted by telephone unless there is substantial need for counsel to appear in person. Experience among the circuits has shown that a prehearing conference can be adequately conducted by means of a telephone conference call and that this procedure saves substantial time and money.

The amendment encourages attorneys to seek authority from their clients to make commitments that could aid in achieving the purposes of the conference. Government attorneys, however, may not be required to obtain authority inconsistent with the authority specified in applicable statutes or regulations.

The amendment also adds a provision that protects the confidentiality of statements made by counsel during a prehearing conference. The amendment is intended allow an attorney to make all necessary statements free of the concern that such statements will prejudice the client's case.

Some Questions about Draft One

1. The draft states that "conferences may be conducted by telephone, unless there is substantial need for counsel to appear in person." Does that provision simply create a

limitation on the use of telephone conferences and not a preference for them?

2. When may the clerk of the court enter a prehearing conference order? Does the provision in the rule need to delineate that authority?

3. With regard to confidentiality, the draft states that counsel may not disclose statements made during a prehearing conference in briefs or argument. Does that leave the attorneys at conference free to disclose statements to the press, their clients, or others? Judge Hall has suggested that the last sentence state:

> Except as incorporated in the order, statements made between attorneys during the conference shall not be disclosed to any person.

Draft Two

Judge Logan enlisted the aid of the Tenth Circuit's settlement conference director, Mr. David Aemmer, and another conference attorney, Mr. Lance Olwell, both of whom had prior experience with the Sixth Circuit's settlement conference program. They, together with Mr. Steven Kinnard, the new settlement conference director in the Eleventh Circuit, produced an annotated draft.

Rule 33. Appellate Conference

The court may direct the attorneys and the parties to participate in a conference and other discussions to address any matter that may aid in the disposition of the proceeding, including the simplification of the issues and the possibility of settlement. The conference may be conducted by a judge or an attorney designated by the court for that purpose. The judge or designated attorney may cause to be entered an order controlling the course of the proceeding. Such order may implement any agreement reached by the parties regarding settlement or management of the case. Statements made in discussions held pursuant to this rule shall be confidential in accordance with local rule and policy.

Annotated Rule

Text	Commentary
Rule 33. Appellate Conference	The word "Prehearing" has been deleted to reflect the occasional practice in some circuits to conduct conferences after oral argument.
The court may direct the attorneys and the parties	This change clarifies that the court may order the parties as well as counsel to attend conferences.
. . . to participate in a conference and other discussions . . .	The phrase "appear before the court . . ." has been changed to "participate" to eliminate any question that the word "appear" implies that an in-person conference is required. With this change we do not believe it is necessary to specify that a conference may be in-person or by telephone. We agree with Judge Hall that this choice should be left to the discretion of the court. If some clarifying language is desired, we would suggest general language, inserted after the word "discussions," such as, "in any manner that the court directs." This is wide enough to include in-person and telephone conferences while leaving latitude for developments such as teleconferencing.
(Reporter's Note: the comments about "requiring substantial need" are responsive to an earlier draft that said "Conferences should be conducted by telephone unless there is substantial need for the attorneys to appear in person."	We also disagree with the provision in the Kopp draft that appears to require "substantial need" before an in-person conference can be required. This standard would virtually bar current practice in some circuits and inhibit flexibility in others. The phrase "and other discussions" was added to reflect the fact that much work takes place in separate discussions before

(**Reporter's Note:** The comments about settlement authority are responsive to an earlier draft from the Solicitor's office which said: "Parties shall authorize their attorneys in advance to make such commitments as reasonably may be anticipated to be necessary to narrow the issues . . ." The Solicitor's more recent draft provides: ". . . counsel are encouraged to obtain authority . . .")

or after scheduled conferences and that this rule applies to such discussions.

We have not incorporated the language or concept from the Kopp draft regarding the requirement that counsel have authority from their clients for settlement. We share Judge Hall's concerns about placing demands upon counsel which they cannot fulfill. If the Committee wishes to address this matter within the Rule, we would suggest the following language: "Each attorney shall consult with his client regarding settlement prior to the conference and obtain as much authority as feasible to settle the case and resolve procedural matters." However, we believe it is best to simply leave the provision out. The court has specific authority under the proposed rule to require the attendance of parties and this should provide sufficient leverage with recalcitrant counsel or parties. The authority to require adequate authorization of counsel by parties prior to the conference may, as a practical matter, be implicit in the court's authority to require attendance by parties since the court may choose to exercise that authority if sufficient authorization is not given to counsel. *See,* G. Heileman Brewing Co. v. Joseph Oat Corp., 871 F.2d 648 (7th Cir. 1989) and In re Novak, 932 F.2d 1397, 1405-09 (11th Cir. 1991). We see no need to address this question specifically in the national rule at this point and the matter should be left to the circuits to address as they see fit.

. . . to address any matter that may aid in the disposition of the proceeding, including the simplification of the issues and the possibility of settlement.

This language is taken from the Kopp draft. It rewrites the current Rule slightly and adds settlement as a subject of the conference to conform to current practice.

The conference may be conducted by a

This language is also generally taken from

judge or an attorney designated by the court for that purpose.

the Kopp draft but we have eliminated the word "pre-hearing" before conference and the word "court" as we think "judge" covers that. Most importantly, of course, the language clarifies that an attorney designated by the court may conduct the conference.

The judge or designated attorney may cause to be entered an order controlling the course of the proceeding.

This language retains the concept of a "conference order" that controls the course of the proceeding, but sidesteps the issue of how such an order may be entered when conferences are conducted by attorneys. We contemplate leaving the details of entering such orders to the individual circuits. *See, e.g.*, Sixth Circuit Rule 18(d) and Tenth Circuit Rule 33.1.

This language also changes the mandatory "shall" to the permissive "may" to clarify that the issuance of a conference order is discretionary with the judge or designated attorney as the case requires.

The word "subsequent" prior to "course of proceeding" has been eliminated to reflect the practice of entering conference program orders before the conference, *e.g.*, to schedule the conference or to extend the due date for the brief until after the conference.

We have also eliminated the phrase "unless modified to prevent manifest injustice." We feel the court has the inherent power to alter conference orders if necessary and when such alteration is necessary should be left to the court. We are particularly concerned about imposing a "manifest injustice" standard when conference orders frequently deal with such mundane matters as briefing schedules that are often adjusted as circumstances require.

Such order may implement any agreement reached by the parties regarding settlement or management of the case.	This language retains the concept in the original Rule that a conference order may put into effect agreements reached at the conference but without requiring that the order "recite actions taken at the conference," which may be unnecessary and may implicate confidentiality concerns.
Statements made in discussions held pursuant to this rule shall be confidential in accordance with local rule and policy.	This provision is similar to a provision in the Kopp draft and adopts the policy of confidentiality followed by all or most circuits. This provision, however, clarifies that confidentiality extends to statements made in all settlement discussions, not just in conferences. It also eliminates the exception for disclosure in "conference orders" as a conference order ought not to be an open-ended vehicle for disclosing that which would otherwise be confidential. There are certainly matters which should be or even must be disclosed, *e.g.*, agreements by the parties regarding the briefing schedule. As Judge Hall's comments indicate, however, the exact parameters of the scope of confidentiality is a matter of some delicacy and uncertainty. We believe that it is preferable to recognize the importance of confidentiality in the Rule but that the exact parameters should be left to development through local rule, policy and experience. This change also moots Judge Hall's concerns as to whom confidential statements may be disclosed.

Some questions and observations about draft two

1. Draft two permits a court to require the parties, as well as their attorneys, to participate in a conference. As discussed in the annotations accompanying the draft, the ability to require participation of parties may make it easier for the conference to produce an agreement because questions concerning counsels' authority to agree or settle are removed. On the other hand, a conference in which only attorneys participate is far less likely to result in an agreement or settlement achieved by intimidation.

2. Regarding the provision that a judge or presiding attorney "may cause to be entered an order controlling the course of the proceeding," Judge Logan spoke with the drafters and conveys the following:

> As to the "cause to be entered language, they mentioned to me that some things that come out of a settlement conference may merely be a scheduling order or a briefing matter, which would be well within the delegation the judges might make to the clerk. Thus, the settlement conference officer may simply send it to the clerk to be entered rather than having three judges sign the order. Other things are so important that three judges should sign the order. There are also some differences in practice between the different circuits on what they do when a case is settled in which both parties want the lower court's opinion wiped out. We in this circuit use the Supreme Court's Munsingwear case as a basis of an order by our court to erase the lower court decision. The Sixth Circuit apparently uses the case of First National Bank of Salem v. Hirsch, 535 F.2d 343 (6th Cir. 1976), as its method. In accord with that case apparently the parties go to the district court and get it to send a message to the circuit that it will vacate its judgment if the court will remand the case to the district court. This demonstrates that maybe we ought not be too specific in specifying how the order should be entered.

3. This draft leaves some of the aspects of confidentiality to local rule and practice. Judge Logan also discussed this with the drafters and reports:

> They mentioned that some things that are said in the settlement conference may have to be revealed to co-counsel in order to obtain a settlement. They also mentioned that there should be room for local variation, that some circuits may want to be a little more rigid than others on this. I am persuaded that while the discussion should be confidential, and not revealed to the court itself insofar as concessions may be made on the merits, there are other statements that might be made in the discussion which could be publicly revealed, e.g., agreements on narrowing issues.

Requests for a Conference

The Local Rules Project suggested that the rule should allow a party or the party's attorney to request a conference. Neither draft does so. Would this be a good idea? *See* 6th Cir. R. 18(c)(1); 10th Cir. R. 33.1.

LOCAL RULES ON PREHEARING CONFERENCES

1st Cir. R. 47.5 Civil Appeals Management Plan.

* * *

2. *Pre-Argument Conference; Pre-Argument Conference Order.*

(a) In cases where he may deem this desirable, the Settlement Counsel, who shall be appointed by the Court of Appeals, may direct the attorneys, and in certain cases the clients, to attend a pre-argument conference to be held as soon as practicable before him or a judge designated by the Chief Judge to consider the possibility of settlement, the simplification of the issues, and any other matters which the Settlement Counsel determines may aid in the handling or the disposition of the proceeding. The Settlement Counsel shall consult the Clerk on setting dates for Pre-Argument Conferences.

(b) At the conclusion of the conference, the Settlement Counsel shall consult with the Clerk concerning the Clerk's entry of a Conference Order which shall control the subsequent course of the proceeding.

3. *Confidentiality.* The Settlement Counsel shall not disclose the substance of the Pre-argument Conference, nor report on the same, to any person or persons whomever (including, but not limited to, any judge). The attorneys are likewise prohibited from disclosing any substantive information emanating from the conference to anyone other than their clients or co-counsel; and then, only upon receiving due assurance that the recipients will honor the confidentiality of the information. See In re Lake Utopia Paper Ltd., 608 F.2d 929 (Second Circuit 1979). The fact of the conference having taken place, and the bare results thereof (e.g., "settled," "not settled," "continued"), including any resulting Conference Order, shall not be considered to be confidential.

4. *Non-Compliance, Sanctions.* If the appellant has not taken each of the actions set forth in paragraph 1 of this Program, or in the Conference Order, within the time therein specified, the appeal may be dismissed by the Clerk without further notice.

* * *

2d Cir. Civil Appeals Management Plan

* * *

5. Pre-argument Conference; Pre-argument Conference Order.

a) In cases where he may deem this desirable, the staff counsel may direct the attorneys to attend a pre-argument conference to be held as soon as practicable before him or a judge designated by the Chief Judge to consider the possibility of settlement, the simplification of the issues, and any other matters which the staff counsel determines may aid in the handling or the disposition of the proceeding.

(b) At the conclusion of the conference the staff counsel shall enter a pre-argument conference order which shall control the subsequent course of the proceeding.

2d Cir. Guidelines for Conduct of Pre-Argument Conference

* * *

Confidentiality

All matters discussed at a conference, including the views of Staff Counsel as to the merits, are confidential and not communicated to any member of the court. Likewise parties are prohibited from advising members of the court or any unauthorized third parties of discussions or action taken at the conference. *In re Lake Utopia Paper Limited*, 608 F2d 929 (2d Cir 1979). Thus the court never knows what transpired at a conference.

Presence of Clients

Ordinarily attorneys are expected to attend the conference without their clients. However, with the permission of Staff Counsel, clients may attend with their attorneys. In the limited number of cases where Staff Counsel reasonably believes that presence of clients may be helpful, he may request--or, in exceptional circumstances, require--an attorney to have his client attend the conference with him. Staff Counsel does not talk with clients outside of the presence of their attorneys.

Conferences By Telephone or at Distant Locations

Where considerable distances or other substantial reasons warrant, Staff Counsel may in appropriate cases conduct prearranged telephonic conferences. Where a sufficient number of cases can be accumulated and judicial efficiency and economy permit, Staff Counsel may also hold conferences within the Circuit, at locations other than Foley Square, New York City.

These provision are designed to accommodate parties whose attorneys would otherwise be seriously inconveniences by being forced to travel long distances or for other reasons.

* * *

6th Cir. R. 18. Pre-Argument Conference Procedure.

* * *

(c) Pre-argument conference.

(1) All civil cases shall be reviewed to determine if a pre-argument conference, pursuant to Rule 33, Federal Rules of Appellate Procedure, would be of assistance to the court or the parties. Such a conference may be conducted by a circuit judge or a staff attorney of the court known as the conference attorney. An attorney may request a pre-argument conference in a case if he or she thinks it would

be helpful.

(2) A circuit judge or conference attorney may direct the attorneys for all parties to attend a pre-argument conference, in person or by telephone. Such conference shall be conducted by the conference attorney or a circuit judge designated by the chief judge, to consider the possibility of settlement, the simplification of the issues, and any other matters which the circuit judge or conference attorney determines may aid in the handling of the disposition of the proceedings.

(3) A judge who participates in a pre-argument conference or becomes involved in settlement discussions pursuant to this rule will not sit on a judicial panel that deals with that case, except that participation in a pre-argument conference shall not preclude a judge from participating in any en banc consideration of the case.

(4) The statements and comments made during the pre-argument conference are confidential, except to the extent disclosed by the pre-argument conference order entered pursuant to Rule 18(d), and shall not be disclosed by the conference judge or conference attorney nor by counsel in briefs or argument.

(d) Pre-argument conference order. To effectuate the purposes and results of the pre-argument conference, the circuit judge or the clerk of the court at the behest of the conference attorney shall enter a pre-argument conference order controlling the subsequent course of the proceedings.

(e) Non-compliance sanctions.

(1) If the appellant, petitioner or applicant has not taken the action specified in paragraph (b) of this procedure within the time specified, the appeal, petition or application may be dismissed by the clerk without further notice.

(2) Upon failure of a party or attorney to comply with the provisions of this rule or the provisions of the pre-argument conference order, the court of appeals may assess reasonable expenses caused by the failure, including attorney's fees; assess all or a portion of the appellate costs; or dismiss the appeal.

7th Cir. R. 33. Prehearing Conference.

A conference may be set by the court to consider matters that may aid in the disposition of the proceeding. At the conference the court may, among other things, examine its jurisdiction, simplify and define issues, consolidate cases, establish the briefing schedule, set limitations on the length of briefs, and explore the possibility of settlement.

8th Cir. R. 33A. Prehearing Conference Program.

(a) Scope of Program. In any civil appeal included in the court's prehearing conference program, a conference shall be held promptly to review, limit, or clarify the issues on appeal, to discuss settlement, and to consider any other matter relating to the appeal. This rule does not apply to: petitions for postconviction relief; social security cases; cases dismissed below for lack of jurisdiction; interlocutory appeals certified under 28

U.S.C. § 1292(a)(1); federal or state agency cases; and federal income tax cases. Cases arising under Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1983, labor arbitrations, and suits brought under ERISA will also be excluded unless there is a specific money judgment involved.

(b) Proceedings. The conference shall be conducted by the director of the prehearing conference program, or by a senior district judge on special assignment from the chief judge, at a site convenient to the parties. Conferences usually will be held in St. Louis, Missouri; St. Paul, Minnesota; or Little Rock, Arkansas.

(c) Confidentiality. Settlement-related material and settlement negotiations shall be maintained in confidence by the director of the prehearing conference program or the senior district judge who conducts the conference. A judge who considers the appeal on its merits does not have access to settlement material, except as agreed by the parties.

9th Cir. R. 33-1. Civil Appeals Docketing Statement; Prebriefing Conference Program.

. . . In any civil case, the court may direct that a conference be held before a judge of the court or a senior staff member designated as a conference attorney. The procedures governing the prebriefing conference program are available from the Clerk.

10th Cir. R. 33. Prebriefing and Settlement Conference.

33.1. Scheduling Conference. All appropriate civil cases will be reviewed promptly upon docketing to determine whether a prebriefing conference would be of assistance either to the court or to the parties. Upon the court's order, counsel's participation will be required. Counsel may request a conference. The purposes of the conference include:

(a) Jurisdictional review;

(b) Simplification, clarification, and reduction of the issues;

(c) Discussion of the possibility of settlement, and

(d) Consideration of any other matter relating to the efficient management and disposition of the appeal.

Prebriefing conferences shall be conducted by the conference director who may permit or require clients to attend with counsel. Conferences may be conducted telephonically or otherwise. Before the conference, counsel shall seek and obtain the broadest feasible authority to narrow the issues, settle the appeal, or agree on case management matters.

Except to the extent disclosed by a conference order, statements and comments made during a conference shall be confidential and shall not be disclosed to the court either by the conference director or by counsel in briefs or arguments. To effectuate the results of the conference, the conference director may apply to the court or clerk for the entry of a judgment or an order controlling the subsequent course of the proceedings.

The time allowed by: 1) 10th Cir. R. 10.1.2 for ordering a transcript and 2) 10th Cir. R. 31.1 for filing of briefs will not be tolled during the pendency of a prebriefing

conference. If counsel believe that the size of necessary transcript may be substantially reduced by discussion at a prebriefing conference, or that there is a substantial possibility that the case may be settled, or that the issues on appeal will be simplified or reduced, appellant may file a motion for an extension of time to order the transcript or to file an opening brief.

33.2. Settlement Conference. Settlement conferences shall be conducted in all civil proceedings which do not seek relief from criminal convictions. Within 10 days after notice that the matter has been set for oral argument, or after notice that the court intends to submit the matter on the briefs, counsel for the appellant/petitioner shall initiate a conference with counsel for the appellee/respondent regarding prospective settlement of the issues on appeal. Such conference may be conducted by telephone. Within 10 days after this mandatory settlement conference, counsel for appellant/petitioner shall serve and file a "Report of Settlement Conference" setting forth the occurrence and date of the settlement conference and the results thereof, i.e. whether settlement was achieved, and, if not, whether further settlement negotiations are contemplated.

Fed. Cir. R. 33. Prehearing conference.

In appeals under 28 U.S.C. §§ 1292(c)(1)-(2); 1295(a)(1); 1295(a)(4)(A) [with respect to patent interferences only]; 1295(a)(4)(B) [with respect to inter partes proceedings only]; 1295(a)(4)(C) [with respect to civil actions under 35 U.S.C. § 146 only]; and 1295(a)(6), in cases in which all parties are represented by counsel; the parties through counsel shall discuss settlement of the case within 7 days after filing and service of the principal briefs. Thereafter, but not later than the time for filing a separate appendix under Rule 30(a)(4) of these Federal Circuit Rules, the parties shall file either a joint statement of compliance with this rule indicating that settlement discussions have been conducted or an agreement that the proceeding be dismissed under Rule 42(b) of the Federal Rules of Appellate Procedure. This rule does not preclude the parties from discussing settlement or agreeing to dismiss the proceedings at other times.

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

FROM: Carol Ann Mooney, Reporter

DATE: September 30, 1992

RE: Item 91-13, uniform standards for granting a stay of mandate

Fed. R. App. P. 41 provides that "[a] stay of the mandate pending application to the Supreme Court for a writ of certiorari may be granted upon motion . . ." Rule 41 is silent as to any standard that should be used to determine the appropriateness of a stay. Ten circuits, however, have local rules that enunciate standards to be used in determining whether to stay a mandate. (The texts of the rules are appended to this memorandum.) The Local Rules Project suggested that the Advisory Committee consider amending Rule 41 to include standards for granting a stay of a mandate.

Statutory Authority

The statute authorizing a stay pending a petition for a writ of certiorari does not contain any standards for granting a stay. *See* 28 U.S.C. § 2101(f). The statute states:

> (f) In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court. The stay may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court, and may be conditioned on the giving of security, approved by such judge or justice, that if the aggrieved party fails to make application for such writ within the period allotted therefor, or fails to obtain an order granting his application, or fails to make his plea good in the Supreme Court, he shall answer for all damages and costs which the other party may sustain by reason of the stay.

The statute provides that a stay may be issued by "a judge of the court rendering the judgment or decree or by a justice of the Supreme Court. Although the statute authorizes a single justice of the Supreme Court to stay the mandate of a lower court, absent "the most extraordinary circumstances," a party must first apply to "the appropriate court, or courts below," or to "a judge or judges thereof," before applying to the Circuit Justice. Sup. Ct. R. 23.3.

Circuit Rules

Ten circuits have local rules that enunciate standards to be used in determining whether a mandate should be stayed pending a petition for writ of certiorari. The standards contained in the local rules vary.

The seventh circuit has the most detailed rule. It requires a motion for a stay to include 1) a "certification of counsel" that a petition for certiorari is being filed and is not merely for delay, 2) a statement of the "specific issues" to be raised, and 3) a substantial showing that the petition for certiorari raises an "important question" meriting review by the Supreme Court.

Six other circuits state that they will not grant a stay if the petition for certiorari would be frivolous or filed merely for delay.[1] Three of the six, however, modify or expand upon those grounds. The first circuit requires a showing of "probable cause" that a petition would not be frivolous. The fourth and eleventh circuits require a showing of a "substantial question" or "good or probable cause" for the stay.

Two circuits, the fifth and eighth, require that a motion for a stay set forth "good cause" for the stay or clearly demonstrate that a "substantial question" will be presented to the Supreme Court. The D.C. circuit only requires "good cause" for a stay.

The Supreme Court's Tests

The Supreme Court's Rule on stays does not enunciate any standards for determining whether a mandate should be stayed. The rule states:

> **Rule 23. Stays**
>
> * * *
>
> .3. An application for a stay must set forth with particularity why the relief sought is not available from any other court or judge thereof. Except in the most extraordinary circumstances, an application for a stay will not be entertained unless the relief requested has first been sought in the appropriate court or courts below or from a judge or judges thereof. An application for a stay must identify the judgment sought to be reviewed and have appended thereto a copy of the order and opinion, if any, and a copy of the order, if any, of the court or judge below denying the relief sought, and must set forth with specificity the reasons why the granting of a stay is deemed justified. The form and content of an application for a stay are governed by Rule 22.

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[1] 1st Cir. R. 41; 4th Cir. IOP 41.2; 6th Cir. R. 15(a); 9th Cir. R. 41-1; 10th Cir. R. 41.1; 11th Cir. R. 41-1.

* * *

Over time, however, the Court "has settled upon three conditions that must be met before issuance of a § 2101(f) stay is appropriate." Barnes v. E-Systems, Inc. Group Hospital Medical & Surgical Insurance Plan, 112 S.Ct. 1 (Scalia, Circuit Justice 1991). The three conditions are:

1. There must be a reasonable probability that certiorari will be granted. *Id.* In other words, there must be a reasonable probability that four justices will consider the issue sufficiently meritorious to grant certiorari.

2. There must be a significant possibility that the judgment below will be reversed. *Id.*

3. There must be a showing of likelihood of irreparable harm if the stay is not granted. *Id.*

Even if all three conditions are present, however, a stay may be denied. The Court will "balance the equities," *i.e.*, "explore the relative harms to the applicant and respondent, as well as the interests of the public at large." Rostker v. Goldberg, 448 U.S. 1306, 1308 (Brennan, Circuit Justice 1980). Although granting a stay may prevent irreparable harm to the applicant, the harm to the applicant prevented by the stay may be slight while the same stay may cause grave and irreparable harm to the respondent. In such cases, the Court may deny the stay.

Uniform Standards?

None of the circuit rules are as detailed as the tests developed by the Supreme Court. The standards found in the circuit rules, however, are apparently derived from the Supreme Court jurisprudence. Most of the rules make it clear that a stay will not be granted if a petition for a writ of certiorari would be "frivolous" or filed "merely for delay." Some go as far as to say that the party must demonstrate that a "substantial question" will be presented to the Supreme Court. These standards are related to the first two Supreme Court requirements - that there be a reasonable probability that the Court will grant certiorari and that there be a significant possibility that the lower court judgment will be reversed. A number of the circuit rules also require "good cause" for the stay. That language suggests the "irreparable injury" test enunciated by the Supreme Court.

The suggestion that the FRAP rules contain uniform standards raises an interesting question about the line between substance and procedure and the role of national rules versus that of local rules. Neither the statute, § 2101(f), nor the Supreme Court Rules, contain any standards for determining whether a stay should be issued. The standards used by the Supreme Court have been developed by the Justices over time. The standards are arguably substantive; they deal with the basis for a decision not with the means by which a party communicates its case to a Justice.

The circuit rules, however, go further. The circuit rules tell a party not only that the party may file a motion and how to do so, but also what the motion must "show" to be successful. It may be more appropriate for a circuit rule to do so than for a national rule. A circuit is free to develop its own jurisprudence about the granting of stays. (The tests developed by the Supreme Court are for applications made to that court.) Once a court of appeals has developed standards to be used in determining stay motions, it may be appropriate for the court to use its rules as a simple means of communicating to parties what a motion must show in order to be successful.

It is probably a close call as to whether a national rule crosses the line from substance to procedure if it states that a stay will be denied unless the movant shows that a petition for certiorari would not be frivolous. However, there are FRAP rules that function very similarly to the proposal under consideration. Rule 9(c) governing bail is captioned "Criteria for release" and provides in part: "The burden of establishing that the defendant will not flee or pose a danger to any other person or to the community and that the appeal is not for purposes of delay and raises a substantial question of law or fact likely to result in reversal or in an order for a new trial rests with the defendant." *See also* Rules 34(a), 35(a), and Rule 38.

Replacement page (10/14/92)

Rule 41. Issuance of Mandate; Stay of Mandate

* * *

(b) *Stay of Mandate Pending Application for Certiorari.* ~~A stay of mandate pending application to the Supreme Court for a writ of certiorari may be granted upon motion, reasonable notice of which shall be given to all parties.~~ A party who files a motion requesting a stay of mandate pending application to the Supreme Court for a writ of certiorari shall file, at the same time, proof of service on all other parties. The motion must show that a petition for certiorari would present a substantial question and that there is good cause for a stay. The stay ~~shall~~ cannot exceed 30 days unless the period is extended for cause shown ~~. If~~ or unless during the period of the stay ~~there is filed with the clerk of the court of appeals~~ , a notice from the clerk of the Supreme Court is filed showing that the party who obtained the stay has filed a petition for the writ ~~in that court~~, in which case the stay ~~shall~~ will continue until final disposition by the Supreme Court. ~~Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari the mandate shall issue immediately.~~ The court of appeals shall issue the mandate immediately when a copy of a Supreme Court order denying the petition for writ of certiorari is filed. The court may require a bond or other security ~~may be required~~ as a condition to the grant or continuance of a stay of the mandate.

Alternatives for the second sentence.

1. The stay will be denied if the court determines that a petition for certiorari would be frivolous or filed merely for delay.

2. The stay will be denied if the court determines that a petition for certiorari would be frivolous or that there is not good cause for a stay.

Alternatives 1 and 2 do not make it clear that the burden of proof rests upon the movant. They could be recast as follows:

3. The motion must show that a petition for certiorari would not be frivolous or filed merely for delay.

4. The motion must show that a petition for certiorari would not be frivolous and that there is good cause for a stay.

5. The motion must state the issue to be raised in the petition for certiorari, show a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari, show a possibility that the decision below will be reversed, and show a likelihood that irreparable harm will result if the motion for stay is denied.

D.C. Cir. R. 15(b) Mandates.

(1) Stay of Mandate. A motion for a stay of the issuance of mandate shall not be granted unless the motion sets forth facts showing good cause for the relief sought.

1st Cir. R. 41. Stay of Mandate

Whereas an increasingly large percentage of unsuccessful petitions for certiorari have been filed in this circuit in criminal cases in recent years, in the interests of minimizing unnecessary delay in the administration of justice mandate will not be stayed hereafter in criminal cases following the affirmance of a conviction simply upon request. On the contrary, mandate will issue and bail will be revoked at such time as the court shall order except upon a showing, or an independent finding by the court, of probable cause to believe that a petition would not be frivolous, or filed merely for delay. See 18 U.S.C. § 3148. The court will revoke bail even before mandate is due. A comparable principal will be applied in connection with affirmed orders of the NLRB, *see NLRB v. Athbro Precision Engineering,* 423 F.2d 573 (1st Cir. 1970), and in other cases where the court believes that the only effect of a petition for certiorari would be pointless delay.

4th Cir. IOP 41.2. Motion for Stay of the Mandate

A motion for stay of the issuance of the mandate shall not be granted simply upon request. Ordinarily the motion shall be denied unless there is a specific showing that it is not frivolous or filed merely for delay. The motion must present a substantial question or set forth good or probable cause for a stay. Only the original of the motion need be filed. Stay requests are normally acted upon without a request for a response.

5th Cir. R. 41. Issuance of Mandate; Stay of Mandate

41.1. Stay of Mandate-Criminal Appeals. A motion for a stay of the issuance of a mandate in a direct criminal appeal filed under FRAP 41 shall not be granted simply upon request. Unless the petition sets forth good cause for a stay or clearly demonstrates that a substantial question is to be presented to the Supreme Court, the motion shall be denied and the mandate thereafter issued forthwith.

6th Cir. R. 15. Mandate

(a) Stay of Mandate. In the interest of minimizing unnecessary delay in the administration of justice, the issuance of the mandate will not be stayed simply upon request. The mandate ordinarily will issue pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure unless there is a showing, or an independent determination by the court, that a petition for writ of certiorari would not be frivolous or filed merely for delay.

7th Cir. R. 41. Stay of Mandate or Stay of Execution of Judgment Enforcing Administrative Order

(a) Mandate Ordinarily Will not Be Stayed. In the interest of minimizing unnecessary delay in the administration of justice, this court's mandate will normally issue 21 days after decision or seven days after the denial of the petition for rehearing, whichever is later. In the absence of extraordinary need, the mandate will not be stayed at the request of a party, except upon a specific motion which includes:

(1) A certification of counsel that a petition for certiorari to the Supreme Court of the United States is being filed and is not merely for delay.

(2) A statement of the specific issues to be raised in the petition for certiorari.

(3) A substantial showing that the petition for certiorari which is being filed raises an important question meriting review by the Supreme Court.

8th Cir. R. 41A. Stay or Recall of Mandate

In a direct criminal appeal, the court will grant a motion for stay of issuance of a mandate under FRAP 41 only if the motion sets forth good cause for a stay or clearly demonstrates a substantial question is to be presented to the Supreme Court.

In civil cases including agency proceedings, the court may deny a stay of mandate if the question would not likely be appropriate for determination by the Supreme Court.

Once issued a mandate shall be recalled only to prevent injustice.

9th Cir. R. 41-1. Stay of Mandate

In the interest of minimizing unnecessary delay in the administration of criminal justice, a motion for stay of mandate pursuant to FRAP 41(b), pending petition to the Supreme Court for certiorari, will not be granted as a matter of course, but will be denied if the Court determines that the petition for certiorari would be frivolous or filed merely for delay.

In other cases including National Labor Board proceedings, the Court may likewise deny a motion for stay of mandate upon the basis of a similar determination.

10th Cir. R. 41.1 Issuance of Mandate; Stay of Mandate

41.1. Stay not Routinely Granted

41.1.1. Criminal Cases. To minimize delay in the administration of justice, following the affirmance of a conviction in criminal cases the mandate will issue and bail will be revoked at such time as the court shall order except upon showing that a petition to stay the mandate would not be frivolous or filed merely for delay, or an independent finding by the court or by a judge of the hearing panel to the same effect. The court, or a judge of the hearing panel, may revoke bail before the mandate is issued. *See* 18 U.S.C. § 3141(b).

41.1.2. Civil Cases. A principal comparable to 10th Cir. R. 41.1.1. will be applied in connection with affirmed orders of the National Labor Relations Board and in other cases, absent a finding by the court that a petition for certiorari would not result in pointless delay.

11th Cir. R. 41-1. Stay or Recall of Mandate

(a) A motion filed under FRAP 41 for a stay of the issuance of a mandate in a direct criminal appeal shall not be granted simply upon request. Ordinarily the motion will be denied unless it shows that it is not frivolous, nor filed merely for delay, and shows that a substantial question is to be presented to the Supreme Court or otherwise sets forth good cause for a stay.

(b) A mandate once issued shall not be recalled except to prevent injustice.

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

FROM: Carol Ann Mooney, Reporter

DATE: April 22, 1992

SUBJECT: 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.

Fed. R. App. P. 21 provides that a judge actually be named as a party and be treated as a party with respect to service of papers. Nine circuits have local rules according to which a petition for mandamus shall not bear the name of the district judge. Six of these rules also provide that unless otherwise ordered, if relief is requested of a particular judge, the judge shall be represented pro forma by counsel for the party opposing the relief who appears in the name of the party and not of the judge. Although Rule 21 anticipates that a judge may not wish to appear in the proceeding, the rule requires the judge to so advise the clerk and all parties by letter. Six of the local rules reverse the presumption and require a judge who wishes to appear to seek an order permitting the judge to appear. (Copies of the local rules are attached to this memorandum.)

The Local Rules Project suggested that the Advisory Committee consider amending Rule 21 to reflect the presumptions in the local rules. At the December meeting the Advisory Committee discussed the suggestion and favored amending Rule 21 and asked that a draft be prepared for the spring meeting.

DRAFT

Rule 21. Writs of mandamus and prohibition directed to a judge or judges and other extraordinary writs

(a) Mandamus or prohibition to a judge or judges; petition for writ; service and filing. - Application for a writ of mandamus or of prohibition directed to a judge or judges shall be made by filing a petition therefor with the clerk of the court of appeals with proof of service on the ~~respondent~~ judge or judges and on all parties to the action

in the trial court. The petition shall be entitled simply, In re _____, Petitioner. The petition shall contain a statement of the facts necessary to an understanding of the issues presented by the application; a statement of the issues presented and of the relief sought; a statement of the reasons why the writ should issue; and copies of any order or opinion or parts of the record which may be essential to an understanding of the matters set forth in the petition. Upon receipt of the prescribed docket fee, the clerk shall docket the petition and submit it to the court.

(b) Denial, order directing answer. - If the court is of the opinion that the writ should not be granted, it shall deny the petition. Otherwise, it shall order than an answer to the petition be filed by the respondents within the time fixed by the order. The order shall be served by the clerk on the judge or judges ~~named respondents~~ to whom the writ would be directed, if granted, and on all other parties to the action in the trial court. All parties below other than the petitioner shall ~~also~~ be deemed respondents for all purposes. Two or more respondents may answer jointly. ~~If the judge or judges named respondents do not desire to appear in the proceeding, they may so advise the clerk and all parties by letter, but the petition shall not thereby be taken as admitted.~~ To the extent that relief is requested of a particular judge, unless otherwise ordered, the judge

shall be represented pro forma by counsel for the party opposing the relief, who shall appear in the name of the party and not that of the judge. The clerk shall advise the parties of the dates on which briefs are to be filed, if briefs are required, and of the date of oral argument. The proceeding shall be given preference over ordinary civil cases.

* * *

Committee Note

Subdivision (a) is amended so that a petition for a writ of mandamus or prohibition does not bear the name of the judge.

Subdivision (b). The amendment provides that even if relief is requested of a particular judge, the judge shall be represented pro forma by counsel for the party opposing the relief who appears in the name of the party and not of the judge. A judge who wishes to appear, may seek an order permitting the judge to appear.

D.C. Circuit Rule 7(j)

(j) Petitions for Special Writs

(1) A petition for a special writ to the district court or an administrative agency shall be treated as a motion for purposes of these Rules, except that no responsive pleading shall be permitted unless requested by this Court; no such petition shall be granted in the absence of such a request.

(2) A petition for a writ of mandamus or a writ of prohibition to the district court shall not bear the name of the district judge, but shall be entitled, "In re _____ _____, Petitioner." Unless otherwise ordered, the district judge shall be represented *pro forma* by counsel for the party opposing the relief, who shall appear in the name of such party and not that of the judge.

1st Cir. Rule 21

Loc.R. 21 PETITIONS FOR SPECIAL WRITS. A petition for writ of mandamus or writ of prohibition shall be entitled simply, In re _____, Petitioner. To the extent that relief is requested of a special judge, unless otherwise ordered, the judge shall be represented pro forma by counsel for the party opposing the relief, who shall appear in the name of the party and not that of the judge.

2nd Cir Rule 21

§ 21. Petitions for Writs of Mandamus and Prohibition

A petition for writ of mandamus or writ of prohibition pursuant to Rule 21 shall not bear the name of the district judge, but shall be entitled simply, In re _____, Petitioner. To the extent that relief is requested of a particular judge, unless otherwise ordered, the judge shall be represented pro forma by counsel for the party opposing the relief, who shall appear in the name of the party and not that of the judge.

Local Rule 21. Petitions for Special Writs.

A petition for a writ of mandamus or writ of prohibition shall not bear the name of the district judge, but shall be entitled simply "In re _____, Petitioner." To the extent that relief is requested of a particular judge, unless otherwise ordered, the judge shall be represented pro forma by counsel for the party opposing the relief, who shall appear in the name of the party and not that of the judge.

I.O.P.-21.1. Petitions for Mandamus or Prohibition. An application for an extraordinary writ pursuant to 28 U.S.C. § 1651 is originated by filing an original and three copies of the petition with the Clerk of the Court of Appeals. Proof of service on the respondent judge or judges and on all parties in the trial court is required. The clerk will dismiss the petition if, within a reasonable time, the petitioner has not paid the prescribed docket fee of $100.00, payable to the Clerk, U.S. Court of Appeals, or submitted a properly executed application for leave to proceed in forma pauperis. The parties are required to submit Disclosure of Corporate Affiliations and Other Entities with a Direct Financial Interest in Litigation statements with the petition and answer. See FRAP 26.1, Local Rule 26.1, and Form A. Strict compliance with the requirements of FRAP 21 is required even from pro se litigants.

After docketing, the clerk shall submit the application to a three-judge panel. If the Court believes the writ should not be granted, it will deny the petition without calling for an answer. Otherwise the Court directs the clerk to request an answer. All parties to the action in the trial court other than petitioner who oppose the relief requested are deemed respondents and shall be responsible for filing a requested answer within the time fixed by the clerk. After an answer has been filed, the Court ordinarily will decide the petition on its merits on the materials submitted without oral argument. Occasionally, however, briefs may be requested and the matter set for oral argument.

5th Cir Rule 21

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

Petition for Writ. A petition for writ of mandamus, writ of prohibition, or other extraordinary writ shall not bear the name of the District Judge, but shall be entitled, In re:....., Petitioner. To the extent that relief is requested of a particular Judge, unless otherwise ordered, the Judge shall be represented pro forma by counsel for the party opposing the relief, who shall appear in the name of the party and not that of the Judge.

The petition shall contain a certificate of interested persons as described in Loc.R. 28.2.1.

The application shall be accompanied by a copy of any memorandum or brief filed in the district court in support of the application to that court for relief and any memoranda or briefs filed in opposition thereto as well as a statement by petitioner of any oral reasons assigned by the district judge for his action complained of.

8th Cir Rule 21A

Rule 21A. Petitions for Writs of Mandamus and Prohibition

A petition for writ of mandamus or writ of prohibition against a federal judge, bankruptcy judge, or federal magistrate under FRAP 21 shall not bear the name of the judge or magistrate. It shall be entitled:

In re _____, Petitioner.

Within 15 days after the filing of the petition or as the court orders, the court shall either dismiss the petition or direct that an answer be filed. A judge may indicate a desire not to appear as FRAP 21(b) provides.

9th Cir Rules 21-1 and 21-2 and 21-3 and 21-4

Rule 21–1.* Writs of Mandamus, Prohibition, Other Extraordinary Writs

Petitions for writs of mandamus, prohibition or for other extraordinary relief shall conform to and be filed in accordance with the provisions of FRAP 21(a).

Rule 21–2.* Captions

Petitions for writs of mandamus, prohibition or other extraordinary relief directed to a judge or magistrate or bankruptcy judge shall bear the title of the appropriate court and shall not bear the name of the district judge or judges, magistrate, or bankruptcy judge as respondent in the caption. Petitions shall include in the caption: the name of each petitioner; the name of the appropriate court as respondent; and the name of each real party in interest. Other petitions for extraordinary writs shall include in the caption: the name of each petitioner; and the name of each appropriate adverse party below as respondent.

Rule 21–3.* Certificate of Interested Parties

Petitions for writs of mandamus or prohibition, and for other extraordinary writs, shall include the certificate as to interested parties required by Circuit Rule 28–2.1 and the statement of related cases required by Circuit Rule 28–2.6.

Rule 21–4.* Answers to Petitions

No answer to such a petition may be filed unless ordered by the Court. Except in emergency cases, the Court will not grant a petition without a response.

Rule 21–1. Writs of Mandamus and Prohibition Directed to a Judge or Judges and Other Extraordinary Writs

(a) A petition for writ of mandamus, writ of prohibition, or other extraordinary writ shall not bear the name of the district judge but shall be entitled, "In re [name of petitioner]." To the extent that relief is requested of a particular judge, unless otherwise ordered, the judge shall be represented pro forma by counsel for the party opposing the relief and this counsel shall appear in the name of the party and not the name of the judge.

(b) As part of the required showing of the reasons why the writ should issue, the petition should include a showing that mandamus is appropriate because there is no other adequate remedy available.

(c) The petition shall include a Certificate of Interested Persons and Corporate Disclosure Statement as described in FRAP 26.1 and the accompanying circuit rules.

(d) The petition must be served on the respondent (including any judge named as respondent) and all parties to the action in the district court. Service is the responsibility of the petitioner, not the clerk.

Fed. Cir. Rule 21

Local Rule 21. Writs of mandamus and prohibition directed to a judge or judges and other extraordinary writs

(a) *Title; copies; fee; answer.*—A petition for writ of mandamus or writ of prohibition shall be entitled simply: "In Re [Name of Petitioner] , Petitioner." Four copies shall be filed with the original, but the court may direct that additional copies be furnished. The fee prescribed by Federal Circuit Rule 52(a)(1) shall accompany the petition. No answer shall be filed by any respondent unless ordered by the court.

(b) *Length of petition, answer; briefs.*—A petition for writ of mandamus or writ of prohibition, or answer if one is ordered, shall not exceed 25 double-spaced pages. Separate briefs supporting or answering petitions shall not be filed.

(c) *Service of order denying petition.*—If the petition is denied, the petitioner shall serve a copy of the order denying the petition upon all persons served with the petition unless such a person has entered an appearance in the proceeding or has been sent a copy of the order by the clerk.

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

FROM: Carol Ann Mooney, Reporter

DATE: September 30, 1992

SUBJECT: 91-22, amendment of Rule 9 regarding the type of information that should be presented to a court of appeals in bail matters

Fed. R. App. P. 9(a) governs appeals from orders respecting release pending trial and 9(b) governs motions for release pending appeal. Both subdivisions state that review of bail determinations shall be made " without the necessity of briefs . . . upon such papers, affidavits and portions of the record as the parties shall present." The rule leaves to the discretion of the parties which papers and information will be presented to the court.

Seven circuits have local rules that specify, some in great detail, the type of information the courts want a party to present in the "papers" and several require memoranda. (The texts of the Local Rules are appended to this memorandum.) The Local Rules Project classified those rules as in conflict with the federal rule. The Fifth Circuit is one of those circuits and when responding to the Local Rules Project Report, the Fifth Circuit urged the Advisory Committee to consider amending Rule 9 to specify the type of information that should be presented.

At the Advisory Committee's December 1991 meeting the Committee briefly discussed the suggestion. Some members remarked that the type of information a court wants may vary locally and the subject may not be susceptible to national rule. Others observed that the courts have an obligation to act upon release matters with dispatch and if the parties fail to give the court the information it needs, that failure delays the decisional process.

Professor Squiers, the consultant for the Local Rules Project, noted that the rule now states that a decision shall be based upon such papers as the parties present. Changing the rule to state that a decision shall be made after consideration of such papers as the court may require would authorize the local variations.

The Committee asked the reporter to look into the matter and to prepare drafts for the Committee's consideration.

Government Appeals

Before addressing the question regarding the type of information that should be presented to a court of appeals in bail matters, there are other portions of Rule 9 that need attention.

The current rule only provides for appeals by defendants (appeals from orders refusing release or imposing conditions on release). However, the law now permits the government to

appeal. Section 3145 of title 18 of the United States Code governs review and appeal of release or detention orders. It provides:

> (c) **Appeal from a release or detention order.**--An appeal from a release or detention order, or from a decision denying revocation or amendment of such an order is governed by the provisions of section 1291 of title 28 and section 3731 of this title. The appeal shall be determined promptly. . . .

Section 3731 of title 18 states:

> * * *
>
> An appeal by the United States shall lie to a court of appeals from a decision or order, entered by a district court of the United States, granting the release of a person charged with or convicted of an offense, or denying a motion for revocation of, or modification of the conditions of, a decision or order granting release.
>
> The appeal in all such cases shall be taken within thirty days after the decision, judgment or order has been rendered and shall be diligently prosecuted.
>
> * * *

Fed. R. App. P. 9(a) should be amended so that it covers not only appeals from orders "refusing or imposing conditions of release" but from all orders "of release or detention, or from a decision denying revocation or amendment of such an order." Subdivision 9(b) should be similarly amended so that it authorizes appeals by both the defendant and the government. ."

Information Required by Courts When Reviewing a Bail Decision

Although Fed. R. App. P. 9 states that review of bail determinations shall be made "upon such papers, affidavits and portions of the record as the parties shall present," the local rules in several circuits mandate the presentation of certain materials.

The level of specificity concerning the materials required to be presented to the courts varies. The type of information required, however, is rather uniform.

In appeals from pretrial release or detention orders, it is common to require the following:

1. a copy of the order under review and of the district court's statement of reasons,[1]

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[1] D.C. Cir. 18(a)(1); 5th Cir. R. 9.3; 9th Cir. 9-1.1; 10th Cir. 9.5.1 and 9.5.4; 11th Cir. R. 9-1.

and

2. if the appellant questions the factual basis for the order, a transcript of the bail proceeding in the district court; and if the appellant is unable to obtain a transcript a statement of the reasons why it has not been obtained.[2]

After conviction, if review of a release or detention order is sought the following materials are commonly required:

1. the name of the appellant; the district court number of the case; the offense(s) of which appellant was convicted; and the date and term of sentence;[3]
2. reasons given by the district court for its decision;[4]
3. a transcript of the bail proceedings in the district court, if the appellant questions the factual basis for the order, or an explanation of why a transcript is unavailable;[5]
4. showing that the appeal from the conviction raises a substantial question;[6]
5. basis for the contention that the appellant is not likely to flee or pose a danger to the safety of any other person or the community.[7]

Fed. R. App. P. 9 also states that the review will be conducted promptly and without the necessity of briefs. However, six circuits require the appellant to file a memorandum of law and fact.[8] In four circuits the appellee is given the opportunity to file a response to the appellant's memorandum; presumably a decision ordinarily is not made until after the time for filing such a response expires.[9] One circuit also provides the appellant additional time to reply to the

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[2] 5th Cir. 9.3; 9th Cir. 9-1.1; 10th Cir. 9.5.4.

[3] D.C. Cir. R. 18(b)(1); 2d Cir. R. 9(1); 5th Cir. R. 9.2

[4] D.C. Cir. 18(b)(2); 2d Cir. R. 9(2); 4th Cir. R. 9.2; 5th Cir. R. 9.3; 9th Cir. R. 9-1.2; 10th Cir. R. 9.5.1(c), 9.5.4(b); 11th Cir. R. 9-1.

[5] 5th Cir. R. 9.3; 9th Cir. R. 9-1.2(a); 10th Cir. R. 9.5.4.

[6] D.C. Cir. R. 18(b)(3); 2d Cir. R. 9(3); 5th Cir. 9.2(c); 10th Cir. R. 9.5.7.

[7] D.C. Cir. R. 18(b)(5), (6), (7), (8); 5th Cir. R. 9.2(a)

[8] *See* D.C. Cir. R. 18 (a)(1), 18(b); 4th Cir. IOP 9.1; 5th Cir. R. 9.1, 9.2; 7th Cir. R. 9(d); 9th Cir. R. 9-1.1; 10th Cir. R. 9.5.5.

[9] *See* D.C. Cir. R. 18(a) (appellee may file a responsive memorandum not later than five days after the filing of appellant's memorandum); 18(b) (mentions a response to an application for release but sets no time limit);

5th Cir. R. 9.5 (the government is required to file a written response to all requests for release within 7 days after service thereof);

appellee's filing.[10]

The competing interests are obvious. A person's liberty (or the safety of the community) is at stake and a prompt review of bail decision is not only desirable, it is statutorily mandated. On the other hand, in order for a review of the decision to be fair and meaningful, the reviewing court needs information.

As the attached local rules and the footnotes accompanying the text above show, it is true that there are common themes among those circuits that require the presentation of certain materials to the court when a bail decision is being reviewed. However, the number of circuits requiring any particular item is usually far less than one-half of the circuits. This may support the observation made in December 1991 that the subject is not susceptible to national rulemaking. I have prepared two drafts. Draft one uses the common themes identified in the local rules to require the presentation of certain materials to the courts of appeals in all bail cases. Draft two, simply authorizes the existing local rules.

9th Cir. 9-1.1(b) (appellee may file a response within 7 days after receiving appellant's memorandum), 9-1.2(c) (the government shall file a written response to all motions for bail pending appeal within 7 days after receiving a copy of the motion);

cf. 10th Cir. R. 9.5.5 (within 15 days after the notice of appeal or motion for relief is filed, the parties file simultaneous memorandum briefs; each party may file a reply within 5 days after service of the opposing party's opening memorandum).

[10] D.C. Cir. R. 18 (a)(3) (appellant may file a reply memorandum within 3 days after the filing of appellee's memorandum), *cf.* 10th Cir. R. 9.5.5 (within 15 days after the filing of the notice of appeal or motion, tha parties simultaneously file memorandum briefs; each party may file a reply within 5 days after service of the opposing party's opening memorandum).

Rule 9. Release in a Criminal Cases.

(a) ~~*Appeals from orders*~~ *An Appeal from an Order Respecting Release Entered Prior to a Judgment of Conviction.*--An appeal authorized by law from an order ~~refusing or imposing conditions of release shall~~ of release or detention, or from a decision denying revocation or amendment of such an order, must be determined promptly. ~~Upon entry of an order refusing or imposing conditions of release, t~~ The district court shall state in writing the reasons for the action taken. A copy of the district court's order and the court's statement of reasons for the order must be filed with the notice of appeal. If the appellant questions the factual basis for the court's decision, the appellant also shall file with the notice of appeal a transcript of the release proceedings in the district court or an explanation of why a transcript has not been obtained. The appeal ~~shall~~ must be heard without the necessity of briefs after reasonable notice to the appellee upon such other papers, affidavits, and portions of the record as the court may require and the parties shall present. The court of appeals or a judge thereof may order the release of the appellant pending appeal.

(b) *Release Pending Appeal from a Judgment of Conviction.*--Application for release after a judgment of conviction ~~shall~~ must be made in the first instance in the district court. ~~If the district court refuses release pending appeal, or imposes conditions or release, the court~~ The district court shall state in writing the reasons for the action taken. Thereafter, ~~if an appeal is pending, a motion for release or for modification of the conditions of release, pending review may be made to the court of appeals or to a judge thereof.~~ review by a court of appeals of the district court's order respecting release pending appeal may be obtained either by filing a notice

of appeal, or, if the party seeking review has already filed a notice of appeal from the judgment of conviction, by motion. The application for review must contain the following:

(1) the name of the appellant; the district court docket number of the case; the offense of which the appellant was convicted; the date and terms of the sentence;

(2) a copy of the district court's order respecting release and the reasons given by the district court for the action taken; and

(3) if the appellant questions the factual basis for the order, a transcript of the release proceedings in the district court, or an explanation of why a transcript has not been obtained.

The ~~motion shall~~ application must be determined promptly upon such other papers, affidavits, and portions of the record as the court may require or the parties shall present and after reasonable notice to the appellee. The court of appeals or a judge thereof may order the release of the appellant pending disposition of the ~~motion~~ application.

(c) *Criteria for release.*--The decision as to release pending appeal shall be made in accordance with Title 18 U.S.C. § 3143. The burden of establishing that the defendant will not flee or pose a danger to any other person or to the community and that the appeal is not for purpose of delay and raises a substantial question of law or fact likely to result in reversal or in an order for a new trial rests with the defendant.

Rule 9. Release in a Criminal Cases.

(a) ~~*Appeals from orders*~~ *An Appeal from an Order Respecting Release Entered Prior to a Judgment of Conviction.*--An appeal authorized by law from an order ~~refusing or imposing conditions of release shall~~ of release or detention, or from a decision denying revocation or amendment of such an order, must be determined promptly. ~~Upon entry of an order refusing or imposing conditions of release, t~~ The district court shall state in writing the reasons for the action taken. The appeal ~~shall~~ must be heard without the necessity of briefs after reasonable notice to the appellee upon such papers, affidavits, and portions of the record as the court may require and the parties shall present. The court of appeals or a judge thereof may order the release of the appellant pending appeal.

(b) *Release Pending Appeal from a Judgment of Conviction.*--Application for release after a judgment of conviction ~~shall~~ must be made in the first instance in the district court. ~~If the district court refuses release pending appeal, or imposes conditions or release, the court shall~~ The district court must state in writing the reasons for the action taken. Thereafter, ~~if an appeal is pending, a motion for release or for modification of the conditions of release, pending review may be made to the court of appeals or to a judge thereof.~~ review by a court of appeals of the district court's order respecting release pending appeal may be obtained either by filing a notice of appeal, or, if the party seeking review has already filed a notice of appeal from the judgment of conviction, by motion. The ~~motion shall~~ application for review must be determined promptly upon such papers, affidavits, and portions of the record as the court may require and the parties shall present and after reasonable notice to the appellee. The court of appeals or a judge thereof

may order the release of the appellant pending disposition of the ~~motion~~ application.

(c) *Criteria for release.*--The decision as to release pending appeal shall be made in accordance with Title 18 U.S.C. § 3143. The burden of establishing that the defendant will not flee or pose a danger to any other person or to the community and that the appeal is not for purpose of delay and raises a substantial question of law or fact likely to result in reversal or in an order for a new trial rests with the defendant.

18 U.S.C. § 3145. Review and appeal of a release or detention order

(a) Review of a release order.--If a person is ordered released by a magistrate, or by a person other than a judge of a court having original jurisdiction over the offense and other than a Federal appellate court--

(1) the attorney for the Government may file, with the court having original jurisdiction over the offense, a motion for revocation of the order or amendment of the conditions of release; and

(2) the person may file, with the court having original jurisdiction over the offense, a motion for amendment of the conditions of release.

The motion shall be determined promptly.

(b) Review of a detention order.--If a person is ordered detained by a magistrate, or by a person other than a judge of a court having original jurisdiction over the offense and other than a Federal appellate court, the person may file, with the court having original jurisdiction over the offense, a motion for revocation or amendment of the order. The motion shall be determined promptly.

(c) Appeal from a release or detention order.--An appeal from a release or detention order, or from a decision denying revocation or amendment of such an order is governed by the provisions of section 1291 of title 28 and section 3731 of this title. The appeal shall be determined promptly. A person subject to detention pursuant to section 3143(a)(2) or (b)(2), and who meets the conditions of release set forth in section 3143(a)(1) or (b)(1), may be ordered released, under appropriate conditions, by the judicial officer, if it is clearly shown that there are exceptional reasons why such person's detention would not be appropriate.

18 U.S.C. § 3731

* * *

An appeal by the United States shall lie to a court of appeals from a decision or order, entered by a district court of the United States, granting the release of a person charged with or convicted of an offense, or denying a motion for revocation of, or modification of the conditions of, a decision or order granting release.

The appeal in all such cases shall be taken within thirty days after the decision, judgment or order has been rendered and shall be diligently prosecuted.

D.C. Cir. R. 18. Release in Criminal Cases.

(a) *Appeals From Pretrial Release or Detention Orders.* Appeals from pretrial release or detention orders shall be expedited. Appellant shall make immediate arrangements for preparation of all necessary transcripts, including the transcript of proceedings before a magistrate, and shall notify this Court in writing of those arrangements. Unless otherwise ordered by this Court or a judge thereof, the following schedule shall apply:

(1) Not later than five days after the transcript of record is filed, the appellant shall serve and file an original and nine copies of a memorandum of law and fact, not to exceed twenty typewritten pages, setting forth as many of the matters required by Rule 18(b) as are relevant. The memorandum of law and fact shall be accompanied by a copy of the order under review and the statement of reasons (including related findings of fact and conclusions of law) entered by the trial court.

(2) The appellee may file a responsive memorandum of no more than twenty pages, not later than five days after the filing of appellant's memorandum.

(3) The appellant may file a memorandum of no more than eight pages in reply within three days after the filing of appellee's memorandum.

The appeal shall be determined by a panel of this Court on the record and pleadings filed, unless oral argument is directed by the Court.

(b) *Release Pending Appeal From a Judgment of Conviction.* The appellant shall file an original and four copies of an application pertaining to release pending appeal from a judgment of conviction. The application for release and the response thereto shall not exceed twenty double-spaced pages. A reply to the response shall not exceed eight double-spaced pages. These page limits may be exceeded only if authorized by order of this court, or a judge thereof, on motion showing good cause. The application shall be determined by a panel of this Court on the record and pleadings filed, unless argument is directed by the Court. The application shall contain, in the following order:

(1) Name of the appellant; the district court number of the case; the offenses(s) of which appellant was convicted; the date and terms of sentence.

(2) Reasons given by the district court for the denial, if known, or the facts and reasons with respect to why the action by the district court on the application does not afford the relief that the appellant seeks.

(3) Concise statement(s) of the question or questions involved on the appeal, with a showing that the appeal raises a substantial question of law or fact likely to result in reversal or in an order for new trial. (*See* Rule 9(c), Federal Rules of Appellate Procedure.) Sufficient facts shall be set forth to give the essential background and the manner in which the question or questions arose in the trial court.

(4) Certificate by counsel, or by appellant if acting *pro se*, that the appeal is not taken for delay.

(5) Factual showing with reference to the following:

(A) Appellant's date and place of birth, length of time appellant has been a resident of the District of Columbia area, previous places of residence within the last five years and for what periods, residence address at time of arrest and residence address at time of application.

(B) Marital status:

(i) If married, for how long; spouse's name; and whether living with spouse at time of arrest, during pretrial release, and currently (unless incarcerated).

(ii) Children, if any; their ages; and their current residence(s).

(C) Employment:

(i) By whom, at time of arrest and time of application; nature of work, and how long so employed.

(ii) Former place or places of employment within the past three years; nature of work performed; and for what periods of time.

(D) Names and addresses of relatives, if any, or other persons in the District of Columbia area with whom appellant has kept close contact.

(E) Whether appellant has previously been admitted to bail, release on other conditions, or detained in any criminal case; if so, in what court(s), for what offense(s), and the amount(s) of bail or conditions of release; and, if such bail was ever forfeited or such release revoked; the date(s) of forfeiture or revocation and the reason(s) therefor.

(F) Whether appellant was ever on probation or parole; if so, in what court(s), and, if either was ever revoked, the date(s) of such revocation(s) and reason(s) therefor.

(G) Health:

(i) Appellant's present state of health.

(ii) Whether appellant ever has been hospitalized for a mental illness; if so, details relating to the dates and places of hospitalization.

(iii) Whether appellant at present is a habitual or regular user of narcotics.

(H) Means of support prior to arrest in this case and at present.

(I) Appellant's probable activities if released pending appeal:

(i) What plans, if any appellant has.

(ii) If appellant expects employment, by whom.

(J) Financial ability of appellant, or friends or relatives upon whom appellant could rely for assistance, to provide bail.

(K) Such further assurances as may be offered to this Court that appellant will respond to court orders.

(6) If the appellant's conviction is for any crime defined in 18 U.S.C. § 3142(f)(1), all other convictions for crimes described therein.

(7) Whether the charged offense was committed while appellant was on bail or other release, or on probation, parole or mandatory release pending trial or completion of sentence(s) for a federal, state or local offense(s).

(8) Whether appellant has been adjudicated an addict under D.C. Code § 23-

1323, under federal law or under the laws of any State.

(9) Such other matters as may be deemed pertinent.

The application shall be ruled upon by a panel of this Court.

2d Cir. R. 9. Release in criminal cases.

An application pursuant to Rule 9(b) shall contain in the following order:

(1) The name of appellant; the District Court docket number of the case; the offense of which appellant was convicted; the date and terms of sentence; and the place where appellant has been ordered confined.

(2) The facts with respect to whether application for bail has been made and denied, and the reasons given for the denial, if known; and the facts and reasons why the action by the District Court on the application does not afford the relief to which the applicant considers himself entitled.

(3) A concise statement of the questions involved on the appeal, with sufficient facts to give the essential background and a showing that the questions on appeal are not frivolous.

(4) Such other matters as may be deemed pertinent.

(5) A certificate by counsel, or by applicant if acting *pro se*, that the appeal is not taken for delay.

4th Cir. I.O.P.

9.1 Release prior to judgment of conviction. A criminal defendant may be released in accordance with the conditions set by the district court prior to judgment of conviction. If the district court refuses to release the prisoner, or sets conditions for release that cannot be met, the order is appealable as a matter of right and will be given prompt consideration by the Court of Appeals. Counsel should submit memoranda in support of their position on appeal and in cases involving corporate defendants, Disclosure of Corporate Affiliations and Financial Interest statements required by FRAP 26.1 and Local Rule 26.1. The appeal is usually decided without oral argument upon the materials presented by the parties. A motion for release pending determination of the appeal may be filed. The motion may be acted upon by a single judge, but the appeal itself must be submitted to a three judge panel for decision.

9.2 Release after conviction and notice of appeal. After the district court has ruled on a motion for bail or reduction of bail pending appeal, the appellant may renew the motion for release, or for a modification of the conditions of release, before the Court of Appeals without noting an additional appeal. A copy of the district court statement of reasons should accompany the motion. The motion will be submitted to a single circuit judge whose residence is in the state where the appellant was convicted.

9.3. Recalcitrant witnesses. . . .

5th Cir. R. 9. Release in Criminal Cases.

9.1. Release Pending Trial. Upon receipt of a copy of a notice of appeal from the district court from an order respecting release entered prior to a judgment of conviction (FRAP 9(a), or on advice of counsel that a notice of appeal has been or will be filed, the clerk's office will advise counsel by telephone of the requirements of this rule.

A memorandum in four (4) copies must be filed within 7 days of the filing of the notice of appeal, setting forth with particularity the nature and circumstances of the offense charged and why the order respecting release is not supported by the proceedings in the district court.

9.2. Release Pending Appeal. The original and three copies of an application for release pending appeal from a judgment of conviction (FRAP 9(b)) shall be filed with the Clerk of this Court.

The application for release shall contain the name of the appellant; the district court docket number of the case; the offense of which appellant was convicted, and the date and terms of sentence.

The application shall also contain, appropriate to the district court's reasons for denying release or imposing conditions of release pending appeal:

(a) the legal basis for the contention that appellant is not likely to flee or pose a danger to the safety of any other person or the community;

(b) an explanation why the district court's findings with respect to release pending appeal are clearly erroneous;

(c) issues to be raised on appeal that contain substantial questions of law or fact likely to result in reversal or an order for a new trial on all counts of the indictment on which incarceration has been imposed, with pertinent legal argument establishing that the questions are substantial.

9.3. Documents To Be Appended. A copy of the district court's order respecting release pending trial or appeal, containing the written reasons for its ruling, shall be appended to the memorandum to be filed under 9.1 or the application under 9.2 of this rule.

If the appellant questions the factual basis of the order, a transcript of the proceedings had on the motion for release made in the district court shall be lodged with this Court. If the transcript is not lodged with the memorandum or application, the appellant shall attach thereto a certificate of the court reporter verifying that the transcript has been ordered and that satisfactory financial arrangements have been made to pay for it, together with the estimated date of completion of the transcript.

If the appellant is unable to obtain a transcript of the proceedings, the appellant shall state in an affidavit the reasons a transcript has not been obtained.

9.4. Service. A copy of the memorandum under 9.1 or application under 9.2 of this rule shall be hand delivered to government counsel or served by other expeditious method.

9.5. Response. The government shall file a written response to all requests for release within 7 days after service thereof.

7th Cir. R. 9. Motions Concerning Custody Pending Trial or Appeal.

(a) All requests for release from custody pending trial shall be by motion. The defendant shall file a notice of appeal followed by a motion.

(b) All requests to reverse an order granting bail or enlargement pending trial or appeal shall be by motion. The government shall file a notice of appeal followed by a motion.

(c) All requests for release from custody after sentencing and pending the disposition of the appeal shall be by motion in the main case. There is no need for a separate notice of appeal. Counsel shall file the motion as expeditiously as possible. It is not appropriate to raise the request for release as a separate argument heading in the main brief.

(d) Any motion filed under this rule shall be accompanied by a brief or memorandum of law.

9th Cir. R. 9-1. Release in Criminal Cases.

9-1.1. Release Pending Conviction.

(a) Within 14 days of the filing of a notice of appeal from a release or detention order entered before or at the time of a judgment of conviction, the appellant shall file a memorandum of law and facts in support of the appeal. Appellant's memorandum shall be accompanied by a copy of the district court's release or detention order, and if the appellant questions the factual basis of the order, a transcript of the proceeding had on the motion for bail made in the district court. If unable to obtain a transcript of the bail proceedings, the appellant shall state in an affidavit the reasons why the transcript has not been obtained.

(b) The appellee shall file a response to appellant's memorandum within 7 days of receipt thereof. The appeal shall be decided promptly after submission of the appellee's response.

9-1.2. Release Pending Appeal.

(a) A motion for bail pending appeal or for revocation of bail pending appeal, made in this court, shall be accompanied by a copy of the district court's bail order, and, if the movant questions the factual basis of the order, a transcript of the proceedings had on the motion for bail made in the district court. If unable to obtain a transcript of the bail proceedings, the movant shall state in an affidavit the reason why the transcript has not been obtained.

(b) A movant for bail pending appeal shall also attach to the motion a certificate of the court reporter containing the name, address, and telephone number of the reporter who will prepare the transcript on appeal and the reporter's verification that the transcript has been ordered and that satisfactory arrangements have been made to pay for it, together with the estimated date of completion of the transcript. A motion for bail which does not comply with part (b) of this rule will be prima facie evidence that the appeal is taken for the purpose of delay within the meaning of 18 U.S.C. § 3143(b).

(c) The government shall file a written response to all motions for bail pending appeal within 7 days of receipt thereof.

(d) If the appellant is on bail at the time the motion is filed in this court, that bail will remain in effect until the court rules on the motion.

10th Cir. R. 9. Release in Criminal Cases.

9.1. Before Judgment of Conviction. Review of an order of the district court respecting release entered before a judgment of conviction shall be by appeal, whether the review is initiated by the United States or the defendant.

9.2. Pending Appeal from a Judgment of Conviction.

9.2.1. Review Sought by Defendant. Review of an order of the district court respecting release pending appeal from a judgment of conviction, if sought by a defendant, may proceed by separate appeal, see 18 U.S.C. § 3145, or by motion filed with the court of appeals in the direct criminal appeal. See Fed. R. App. P. 9(b). The latter approach is favored.

9.2.2. Review Sought by Government. Review of an order of the district court respecting release pending a defendant's direct criminal appeal, if initiated by the United States, shall be by appeal, see 18 U.S.C. § 3145.

9.3. Expedited Proceedings. All proceedings in this court for review of an order of the district court respecting release shall be expedited. Because the time for briefing and preparation of a record is necessarily limited, a determination of a motion for review or an appeal from an order of the district court respecting release made prior to final disposition of the direct criminal appeal shall not constitute the law of the case.

9.4. Docketing Statement Waived. If review is sought by appeal, the requirement of 10th Cir. R. 3.4. for a docketing statement is waived.

9.5. Procedures and Special Bail Record.

9.5.1. Preliminary Record. Upon the filing of a notice of appeal from an order respecting release, the clerk of the district court shall transmit forthwith to the clerk of the court of appeals the following:

(a) A copy of the notice of appeal;

(b) A copy of the district court's docket entries:

(c) A copy of the order or oral ruling respecting release which contains the reasons (findings and conclusions) given by the district court for the action taken; and

(d) A statement regarding the fee status of the appeal.

9.5.2. Designation of Record.

(a) Immediately upon the filing of the notice of appeal or of the motion for release, the appellant or movant must designate to the clerk of the district court those items to be included in the special bail record.

(b) Within three days of the appellant's or movant's designation of the record, the opposing party may designate additional materials to be included in the special bail record.

9.5.3. Filing Record. Within 10 days after the filing of the notice of appeal or the movant's designation of the record, the clerk of the district court shall assemble and certify the special bail record to the clerk of this court.

9.5.4. Content of Record. The special bail record should include:

(a) A copy of the district court's docket entries.

(b) A copy of the order or oral ruling respecting release which contains the reasons (findings and conclusion) given by the district court for the action taken;

(c) Any motion for release or for revocation or amendment of an order for release or detention filed in the district court, together with relevant memoranda of support or opposition thereto;

(d) Relevant transcripts of any release hearing; and

(e) Such papers, affidavits, portions of the record of the bail proceedings below, and pertinent portions of the trial record, which are available, relevant, and chosen by the parties. These shall include relevant portions of the transcript of testimony given at the bail proceedings or at trial.

Because of the nature of these proceedings, the special bail record must be carefully restricted to those papers that will clearly assist this court in arriving at a disposition. Whenever possible, or if any portion of the special bail record is unavailable within the time prescribed, the parties shall use an agreed statement as a substitute for transcripts or other documents. See Fed. R. App. P. 10(d).

9.5.5 Briefing. Within 15 days after the notice of appeal or motion for relief is filed, the parties shall file simultaneous memorandum briefs. Each party may file a reply within five days of service of the opposing party's opening memorandum. An original and three copies of each memorandum and reply must be filed, together with proof of service on opposing parties. Extensions of time will not be granted except in cases of extreme hardship.

9.5.6. Specification of Grounds for Bail Pending Appeal. All grounds for release pending appeal must be presented in the first instance to the district court in writing, and must specify the questions of law or fact which in the opinion of the appellant are likely to result in reversal or an order for a new trial. Any grounds not presented to the district court will not be considered by the court of appeals or a judge thereof absent a special showing that the interests of justice require such consideration.

9.5.7. Substantiality of Underlying Direct Criminal Appeal. If a convicted party seeks review of a district court finding that the underlying direct criminal appeal does not raise a substantial question of law or fact likely to result in reversal or a new trial, the memorandum briefs shall include a discussion of the substantiality of the question of law and the likelihood of reversal or order for new trial.

9.5.8. Disposition. These appeals and motions will be decided upon the memorandum briefs and special bail record unless the court orders otherwise. The court may, however, upon reasonable notice, defer disposition of a bail appeal or of a motion for release until the underlying direct criminal appeal is fully briefed and a full record on appeal is prepared and transmitted.

9.5.9. Disposition of Underlying Appeal. If upon consideration of all issues raised in the briefs and the record on appeal, the court determines that the defendant has not met the burden of showing that the judgment of conviction appealed from presents a substantial question of law or fact, the court may consolidate the appeal on the merits with the bail issue and summarily dispose of the entire case on the merits.

11th Cir. R. 9-1. Motions.

Motions for release or for modification of the conditions of release must include a copy of the judgment order from which relief is sought and of any opinion or findings of the district court.

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

FROM: Carol Ann Mooney, Reporter

DATE: September 30, 1992

SUBJECT: 91-26, amendment of Rule 28 to require a summary of the argument and inclusion of any claim for attorney fees and the statutory basis therefor

One of the recurring issues raised by the courts of appeals in their responses to the Local Rules Project's Report on Appellate Rules was that the committee should consider amending Fed. R.App. P. 28 to require some of the items the circuits require in their local rules. At the December 1991 meeting the consensus of the committee was that Rule 28 should be amended to require a summary of the argument and, if a party intends to claim attorney fees for the appeal, a statement to that effect with citation to the statutory basis therefor.

Several circuits require briefs to include a summary of the argument; only two circuits require statements regarding attorney fees. The texts of the local rules are appended.

Draft

Rule 28. Briefs

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

* * *

(5) An argument. The argument ~~may~~ must be preceded by a summary. The summary should contain a succinct, clear, and accurate statement of the arguments made in the body of the brief and should not be a mere repetition of the argument headings. The argument must contain the contentions of the appellant on the issues presented, and the reasons therefor, with citations to the authorities, statutes, and parts of the record relied on. The argument must also include for each issue a concise statement of the applicable standard of review; this statement may appear in the discussion of each issue or under a separate heading placed before the discussion of the issues.

(6) A claim for attorney fees. In a civil case, including an administrative agency adjudication, a party who intends to seek attorney fees for the appeal must include a short statement to that effect with citation to the statutory basis therefor.

~~(6)~~ (7) A short conclusion stating the precise relief sought.

(b) *Appellee's Brief.*--The brief of the appellee must conform to the requirements of paragraphs (a)(1)-~~(5)~~ (6) , except that none of the following need appear unless the appellee is dissatisfied with the statement of the appellant:

(1) the jurisdictional statement;

(2) the statement of the issues;

(3) the statement of the case:

(4) the statement of the standard of review.

LOCAL RULES

D.C. Cir. 11(a)(5) Summary of Argument

In each brief, including a reply brief, where argument exceeds fourteen pages of standard typographical printing, or twenty pages if reproduced by any other process, there shall be a summary of argument immediately prior to the argument; the summary of argument shall be separately paragraphed and shall contain a succinct, clear statement of the arguments made in the body of the brief but shall not be a mere repetition of the argument headings.

5th Cir. R. 28.2.2 Summary of Argument

In addition to the requirements of FRAP 28, the opening briefs of the parties shall contain a summary of argument, suitably paragraphed, which should be a succinct, but accurate and clear condensation of the argument actually made in the body of the brief. It should not be a mere repetition of the headings under which the argument is arranged. It should seldom exceed two and never five pages.

8th Cir. R. 28A(i)(6) Summary of Argument

If the argument portion of a party's brief exceed 25 pages, the brief shall contain a summary of the argument. However, any brief may include a summary of the argument. The summary shall not merely repeat the argument headings and shall seldom exceed two and never exceed five pages.

9th Cir. R. 28-2.3. Attorneys Fees

Any party in a civil case, including administrative agency adjudications under 28 U.S.C. § 2412(d)(3), who intends to seek attorneys' fees for the appeal must include a short statement to that effect and must identify the authority under which the attorneys fees will be sought.

11th Cir. R. 28-2(i) Summary of the Argument

The opening briefs of the parties shall also contain a summary of argument, suitably paragraphed, which should be a clear accurate and succinct condensation of the argument actually made in the body of the brief. If should not be a mere repetition of the headings under which the argument is arranged. It should seldom exceed two and never five pages.

Fed. Cir. R. 28. Briefs

(a) Content of briefs; order. Briefs shall contain the following, in the order listed:
* * *

(6) The statement concerning attorney fees (see Fed. Cir. R. 47.7), if applicable:
* * *

(9) The summary of the argument;
* * *

Fed. Cir. R. 47.7. Statement concerning attorney fees

The principal brief of a party shall contain a statement of the statutory basis for any claim for attorney fees being made in the brief.

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

FROM: Carol Ann Mooney, Reporter

DATE: April 13, 1992

SUBJECT: Item 91-27, amendment of the FRAP rules requiring the filing of copies of documents to authorize local local rules that require a different number of copies

At the Advisory Committee's December meeting, the Committee discussed the "number of copies" problem. The Local Rules Project identified several local rules that conflict with the federal rules because the local rules require parties to file numbers of copies of documents that differ from the numbers required by the federal rules.

The Committee discussed two different approaches to the problem. First it considered, but ultimately rejected, the possibility of deleting all numbers from the national rules. An advantage of this approach is that practitioners would know that they always must consult the local rules to ascertain the required number of copies. A disadvantage of this approach is that a circuit that thinks uniformity of practice is important has no focal point from which to work.

The Committee adopted the second approach and decided that it would leave "default" numbers in the rules but authorize local variations. Minutes at 7. The Committee further decided that each of the rules that requires copies to be filed should authorize local options rather than relying upon a single such authorization in Rule 25. Minutes at 8.

I have drafted amendments to each of the rules requiring the filing of copies and the drafts follow. You will note the rules generally set a default number and then authorize the courts of appeals to require a different number by local rule or by order in a particular case. That language is taken from the current language used in Rules 30 and 31. I am uncertain whether it is desirable to include the second half of the authorization, that a court may change the number by order in a particular case. Rule 2 already gives the courts authority to "suspend the requirements or provisions of any of these rules in a particular case." Arguably, the word "suspend" does not include the authority to require a party to do more than the rules require and thus does not authorize the courts to require more copies than the rules require. However, if the authority given in Rule 2 has been more broadly interpreted, is there a danger that the specific authorization to change the number of copies by order will give rise to a negative inference that the courts' ability to otherwise alter the requirements of the rules in particular cases should be narrowly construed?

Rule 3. Appeal as of right - How taken

(a) Filing the notice of appeal. - An appeal permitted by law as of right from a district court to a court of appeals shall be taken by filing a notice of appeal with the clerk of the district court within the time allowed by Rule 4. At the time of filing, the appellant shall furnish the clerk with sufficient copies of the notice of appeal to enable the clerk to comply promptly with the requirements of (d) of this Rule 3. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal. Appeals by permission under 28 U.S.C. § 1292(b) and appeals in bankruptcy shall be taken in the manner prescribed by Rule 5 and Rule 6 respectively.

Committee Note

Subpart (a). The amendment requires that when a party files a notice of appeal, it shall be accompanied by a sufficient number of copies for service on all the other parties.

[Reporter's Note to the Advisory Committee: This rule and Rule 13 do not set a "default" number and then authorize local variation. The number of copies needed will vary with each case, depending upon the number of parties who must be served. Therefore, the rule simply requires parties to files sufficient copies to allow the court to make service.]

Rule 5. Appeals by permission under 28 U.S.C. § 1292(b)

* * *

(c) Form of papers; number of copies. - All papers may be typewritten. Three copies shall be filed with the original~~, but the court may require that additional copies be furnished~~ unless the court requires the filing of a different number by local rule or by order in a particular case.

Committee Note

Subpart (c). The amendment clarifies that a different number of copies may be required by either rule or order in the individual case. The number of copies of any document that a court of appeals needs varies depending upon the way in which that particular court conducts business. The internal operation of the courts of appeals necessarily varies from circuit to circuit because of differences in the number of judges, the geographic area included within the circuit, and other such factors. Uniformity could be achieved only by setting the number of copies artificially high so that parties in all circuits file enough copies to satisfy the needs of the court requiring the greatest number. Rather than do that, the Committee decided to make it clear that local rules generally may require a greater or lesser number of copies and that if the circumstances of a particular case indicate the need for a different number of copies in that case, the court may so order.

Rule 5.1. Appeals by Ppermission Uunder 28 U.S.C.§ 636(c)(5)

(c) Form of Papers; Number of Copies. - All papers may be typewritten. Three copies shall be filed with the original~~, but the court may require that additional copies be furnished~~ unless the court requires the filing of a different number by local rule or by order in a particular case.

Committee Note

Subpart (c). The amendment clarifies that a different number of copies may be required by either rule or order in the individual case. The number of copies of any document that a court of appeals needs varies depending upon the way in which that particular court conducts business. The internal operation of the courts of appeals necessarily varies from circuit to circuit because of differences in the number of judges, the geographic area included within the circuit, and other such factors. Uniformity could be achieved only by setting the number of copies artificially high so that parties in all circuits file enough copies to satisfy the needs of the court requiring the greatest number. Rather than do that, the Committee decided to make it clear that local rules generally may require a greater or lesser number of copies and that if the circumstances of a particular case indicate the need for a different number of copies in that case, the court may so order.

Rule 13. Review of decisions of the Tax Court

(a) How obtained; time for filing notice of appeal. - Review of a decision of the United States Tax Court shall be obtained by filing a notice of appeal with the clerk of the Tax Court within 90 days after the decision of the Tax Court is entered. At the time of filing the appellant shall furnish the clerk with sufficient copies of the notice of appeal to enable the clerk to comply promptly with the requirements of Rule 3(d). If a timely notice of appeal is filed by one party, any other party may take an appeal by filing a notice of appeal within 120 days after the decision of the Tax Court is entered.

. . .

Committee Note

Subpart (a). The amendment requires that when a party files a notice of appeal, it shall be accompanied by a sufficient number of copies for service on all the other parties.

Rule 21. Writs of mandamus and prohibition directed to a judge or judges and other extraordinary writs

* * *

(d) Form of papers; number of copies. - All papers may be typewritten. Three copies shall be filed with the original~~, but the court may direct that additional copies be furnished~~ unless the court requires the filing of a different number by local rule or by order in a particular case.

Committee Note

Subpart (d). The amendment clarifies that a different number of copies may be required by either rule or order in the individual case. The number of copies of any document that a court of appeals needs varies depending upon the way in which that particular court conducts business. The internal operation of the courts of appeals necessarily varies from circuit to circuit because of differences in the number of judges, the geographic area included within the circuit, and other such factors. Uniformity could be achieved only by setting the number of copies artificially high so that parties in all circuits file enough copies to satisfy the needs of the court requiring the greatest number. Rather than do that, the Committee decided to make it clear that local rules generally may require a greater or lesser number of copies and that if the circumstances of a particular case indicate the need for a different number of copies in that case, the court may so order.

Rule 25. Filing and service

* * *

(e) Number of copies. - Whenever these rules require the filing or furnishing of a number of copies, a court may require the filing of a different number by local rule or by order in a particular case.

Committee Note

The number of copies of any document that a court of appeals needs varies depending upon the way in which that particular court conducts business. The internal operation of the courts of appeals necessarily varies from circuit to circuit because of differences in the number of judges, the geographic area included within the circuit, and other such factors. Uniformity could be achieved only by setting the number of copies artificially high so that parties in all circuits file enough copies to satisfy the needs of the court requiring the greatest number. Rather than do that, the Committee decided to make it clear that local rules generally may require a greater or lesser number of copies and that if the circumstances of a particular case indicate the need for a different number of copies in that case, the court may so order.

A party must consult local rules to determine whether the court requires a different number than that specified in the national rules. If a party fails to do so and does not file the required number of copies, the failure does not create a jurisdictional defect. Rule 3(a) states: "Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate . . ."

Rule 26.1 Corporate disclosure statement

Any non-governmental corporate party to a civil or bankruptcy case or agency review proceeding and any non-governmental corporate defendant in a criminal case shall file a statement identifying all parent companies, subsidiaries (except wholly owned subsidiaries), and affiliates that have issued shares to the public. The statement shall be filed with a party's principal brief or upon filing a motion, response, petition or answer in the court of appeals, whichever first occurs, unless a local rule requires earlier filing. Whenever the statement is

filed before a party's principal brief, three copies of the statement shall be filed with the original unless the court requires the filing of a different number by local rule or by order in a particular case. The statement shall be included in the front of the table of contents in a party's principal brief even if the statement was previously filed.

Committee Note

The amendment requires the filing of three copies of the disclosure statement whenever the statement is filed before the party's principal brief. Because the statement is included in each copy of the party's brief, there is no need to require the filing of additional copies at that time. A court of appeals may require the filing of a greater or lesser number of copies by local rule or by order in a particular case.

Rule 27. Motions

* * *

(d) Form of papers; number of copies. - All papers relating to motions may be typewritten. Three copies shall be filed with the original~~, but the court may require the additional copies be furnished~~ unless the court requires the filing of a different number by local rule or by order in a particular case.

Committee Note

Subpart (d). The amendment clarifies that a different number of copies may be required by either rule or order in the individual case. The number of copies of any document that a court of appeals needs varies depending upon the way in which that particular court conducts business. The internal operation of the courts of appeals necessarily varies from circuit to circuit because of differences in the number of judges, the geographic area included within the circuit, and other such

factors. Uniformity could be achieved only by setting the number of copies artificially high so that parties in all circuits file enough copies to satisfy the needs of the court requiring the greatest number. Rather than do that, the Committee decided to make it clear that local rules generally may require a greater or lesser number of copies and that if the circumstances of a particular case indicate the need for a different number of copies in that case, the court may so order.

Rule 30. Appendix to the briefs

(a) Duty of appellant to prepare and file; content of appendix; time for filing; number of copies. - The appellant shall prepare and file an appendix to the briefs which shall contain: (1) the relevant docket entries in the proceeding below; (2) any relevant portions of the pleadings, charge, findings or opinion; (3) the judgment, order or decision in question; and (4) any other parts of the record to which the parties wish to direct the particular attention of the court. Except where they have independent relevance, memoranda of law in the district court should not be included in the appendix. The fact that parts of the record are not included in the appendix shall not prevent the parties or the court from relying on such parts.

Unless filing is to be deferred pursuant to the provisions of subdivision (c) of this rule, the appellant shall serve and file the appendix with the brief. Ten copies of the appendix shall be filed with the clerk, and one copy shall be served on counsel for each party separately represented, unless the court ~~shall~~ requires the

filing or service of a different number by local rule or by order in a particular case ~~direct the filing or service of a lesser number~~.

Committee Note

Subpart (a). The only substantive change is to allow a court to require the filing of a greater number of copies of an appendix as well as a lesser number.

Rule 31. Filing and service of briefs

* * *

(b) Number of copies to be filed and served. - Twenty-five copies of each brief shall be filed with the clerk, ~~unless the court by order in a particular case shall direct a lesser number,~~ and two copies shall be served on counsel for each party separately represented unless the court requires the filing or service of a different number by local rule or by order in a particular case. If a party is allowed to file typwritten ribbon and carbon copies of the brief, the original and three legible copies shall be filed with the clerk, and one copy shall be served on counsel for each party separately represented.

Committee Note

Subpart (b). The amendment allows a court of appeals to require the filing of a greater as well as a lesser number of copies of briefs. The amendment also allows the required number to be prescribed by local rule and well as by order in a particular case.

Rule 35. Determination of causes by the court in banc

* * *

(d) Number of copies. - The number of copies that shall be filed with the original may be prescribed by local rule and may be altered by order in a particular case.

Committee Note

Subpart (d). The amendment authorizes the courts of appeals to prescribe the number of copies of suggestions for hearing or rehearing in banc that must be filed. Because the number of copies needed depends directly upon the number of judges in the circuit, local rules are the best vehicle for setting the required number of copies.

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

FROM: Carol Ann Mooney

DATE: September 30, 1992

SUBJECT: 91-27, Numbers of Copies

At the December 1992 meeting the Advisory Committee discussed the fact that the local rules often require a party to file different numbers of copies than are required by the national rules. The Committee decided that rather than prohibiting local variation it would be better to authorize it and make parties aware that a local rule may alter the number set by a national rule. Mr. Kopp suggested that it might be helpful if a chart identifying the required number of copies of various documents appeared at the beginning of each circuit's local rules.

The Solicitor's Office prepared sample for charts for each of the circuits. They are attached.

CHART: D.C. CIRCUIT FILING REQUIREMENTS
NUMBER OF COPIES

This chart identifies the number of copies of various documents that counsel are required to file and serve in this circuit. Citations to the applicable local rule of this court or to the Federal Rules of Appellate Procedure are provided with respect to each item, except where the number of copies required is set by local practice rather than by written rule.

DOCUMENT(S)	NUMBER OF COPIES	LOCAL RULE(S)
Motions, Petitions, Responses, and Replies	Original & 4	7(b)
Briefs	15, except if a deferred appendix is used, then 7	11(g)(1)
	Persons proceeding in forma pauperis: An original typewritten copy only.	11(g)(2)
Briefs Containing Material Under Seal	15 copies of public brief and 7 copies of sealed brief	11(i)
Memoranda and Replies in Expedited Sentencing Appeals Pursuant to 18 U.S.C. 3742	Original & 14	11(k)
Appendices	7	12(a)(1)
	In forma pauperis cases: None required.	12(c)
Petitions for Rehearing and Suggestions of Rehearing En Banc	Original & 19	15(a)(2)

CHART: FIRST CIRCUIT FILING REQUIREMENTS
NUMBER OF COPIES

This chart identifies the number of copies of various documents that counsel are required to file and serve in this circuit. Citations to the applicable local rule of this court or to the Federal Rules of Appellate Procedure are provided with respect to each item, except where the number of copies required is set by local practice rather than by written rule.

DOCUMENT(S)	NUMBER OF COPIES	LOCAL RULE(S)
Appendices	5	30.2
	In forma pauperis cases: No copies necessary.	30.6
Briefs	10	30.2
Petitions for Rehearing	10	30.2
Designations, Statements of Issues, or Counter-Designations served pursuant to Federal Rule of Appellate Procedure 30(b)	One copy must be simultaneously filed with the clerk.	30.3
Petitions for In Banc Consideration	10	35.1
Motions	Original & 3, but the court may require that additional copies be furnished	FRAP 27(d)

CHART: SECOND CIRCUIT FILING REQUIREMENTS NUMBER OF COPIES

This chart identifies the number of copies of various documents that counsel are required to file and serve in this circuit. Citations to the applicable local rule of this court or to the Federal Rules of Appellate Procedure are provided with respect to each item, except where the number of copies required is set by local practice rather than by written rule.

DOCUMENT(S)	NUMBER OF COPIES	LOCAL RULE(S)
Applications for Equal Access to Justice Act Fees	Original & 4	0.25
Reporter's Transcripts	5	30(2)
Petitions for Rehearing En Banc	25	31(b)
Briefs	Original & 9	Local practice
Motions	Original & 3, but the court may require that additional copies be furnished	FRAP 27(d)
Appendices	10	FRAP 30(a)

CHART: THIRD CIRCUIT FILING REQUIREMENTS
NUMBER OF COPIES

This chart identifies the number of copies of various documents that counsel are required to file and serve in this circuit. Citations to the applicable local rule of this court or to the Federal Rules of Appellate Procedure are provided with respect to each item, except where the number of copies required is set by local practice rather than by written rule.

DOCUMENT(S)	NUMBER OF COPIES	LOCAL RULE(S)
Appendices	If filed by standard typographic process: 10*	10(1)
	If filed by electrostatic or other permitted process: 4	10(1)
	Virgin Islands cases: One additional copy shall be filed with the Clerk of the District Court in the location from which the appeal is taken (St. Thomas or St. Croix).	10(1)
	Cases involving applications for writs of habeas corpus or for relief under 28 U.S.C. 2255, where the appellant has been granted in forma pauperis status: no copies of the appendix need be filed, but three copies must be filed of the order of the district court (if any) and of the order from which the appeal is taken.	10(2)
Briefs	10 copies. Two copies must be served on counsel for each party separately represented.	21(h)

* If decision of the lower court is included in the back of the brief and in the Appendix, four (4) copies may be filed.

(continued on next page)

THIRD CIRCUIT (cont'd)

Motions for Stay of Execution of a State Court Judgment and Motions to Vacate Orders Granting a Stay	4	29(3)(b)
Petitions for Rehearing En Banc	Original & 14	Local practice

CHART: FOURTH CIRCUIT FILING REQUIREMENTS
NUMBER OF COPIES

This chart identifies the number of copies of various documents that counsel are required to file and serve in this circuit. Citations to the applicable local rule of this court or to the Federal Rules of Appellate Procedure are provided with respect to each item, except where the number of copies required is set by local practice rather than by written rule.

DOCUMENT(S)	NUMBER OF COPIES	LOCAL RULE(S)
Docketing Statements and Related Materials	One copy. An additional copy must be served on the opposing parties and provided to the clerk of the district court.	3.2
Petitions for Permission to Appeal an Interlocutory Order	Original & 3	5.1
All Papers Except Briefs and Appendices	Original & 3 Includes any attachments to motions.	25.1(b)
Motions	Original & 3	27.1
Appendices	6	30.1
	Appointed counsel: 5	30.1
	Parties proceeding in forma pauperis without counsel: 4	30.1
	Deferred appendix: see rule.	30.1

(continued on next page)

FOURTH CIRCUIT (cont'd)

Briefs	12	31.3
	Two copies must be served on counsel for each party separately represented.	31.3
	Appointed counsel: 6	31.3
	Parties proceeding in forma pauperis without counsel: 4	31.3
Petitions for Rehearing	15	40.1
	Pro se party who is indigent: original only.	40.1
Motions for Stay of Mandate	Original only.	41.2
Petitions for Rehearing En Banc	25	FRAP 40(b) & 31(b)

CHART: FIFTH CIRCUIT FILING REQUIREMENTS
NUMBER OF COPIES

This chart identifies the number of copies of various documents that counsel are required to file and serve in this circuit. Citations to the applicable local rule of this court or to the Federal Rules of Appellate Procedure are provided with respect to each item, except where the number of copies required is set by local practice rather than by written rule.

DOCUMENT(S)	NUMBER OF COPIES	LOCAL RULE(S)
Applications for Stay of State Court Judgment or a Stay in Appeals Where the District Court has Granted or Denied a Motion for Stay	Four copies of motion for stay, unless time does not permit filing of a written motion.	8.1.1
Releases Pending Trial	A memorandum in four copies.	9.1
Applications for Release Pending Appeal	Original & 3	9.2
Motions	Motions considered by a single judge or by the Clerk: original & one	27.5
	All other motions: original & 3	27.5
Excerpts of Record	4	30.1.2
Supporting Opinions, Findings of Fact, or Conclusions of Law in Review of Agency Proceedings	4	30.2
Briefs	7	31.1

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FIFTH CIRCUIT (cont'd)

Suggestions of Rehearing En Banc	20	35.2
Petitions for Rehearing	4	40
Petitions to Review Under the Equal Access to Justice Act	Original & 3	47.8.2

CHART: SIXTH CIRCUIT FILING REQUIREMENTS
NUMBER OF COPIES

This chart identifies the number of copies of various documents that counsel are required to file and serve in this circuit. Citations to the applicable local rule of this court or to the Federal Rules of Appellate Procedure are provided with respect to each item, except where the number of copies required is set by local practice rather than by written rule.

DOCUMENT(S)	NUMBER OF COPIES	LOCAL RULE(S)
Briefs	Ten copies must be filed with the Court, and two copies served on the opposing party.	10
Joint Appendices	5	11(e)
	Cross appeals: 5	30(c)
	Cases in which appendix not required: 4 legible photocopies of the record.	11(j)(1)
Suggestions of Rehearing En Banc	20	14(a)
Petitions for Leave to Appeal under the Equal Access to Justice Act	4	21(a)(3)
Motions for a Stay of Execution	Original & 4	28(g)
Motions	Original & 3, but the court may require that additional copies be furnished	FRAP 27(d)

CHART: SEVENTH CIRCUIT FILING REQUIREMENTS NUMBER OF COPIES

This chart identifies the number of copies of various documents that counsel are required to file and serve in this circuit. Citations to the applicable local rule of this court or to the Federal Rules of Appellate Procedure are provided with respect to each item, except where the number of copies required is set by local practice rather than by written rule.

DOCUMENT(S)	NUMBER OF COPIES	LOCAL RULE(S)
Opinions Challenged in Habeas Corpus Appeals Involving Petitioners Under a Sentence of Capital Punishment	4 copies, unless a citation can be provided.	22(b)(3)
Motions for Stay of Execution	4	22(j)(2)
Appendices	Judgment or Order under review and any other documents containing reasons for that decision rendered by the trial court or administrative agency must be bound with the brief.	30(a)
	Other documents prescribed by this rule shall be placed in the appendix bound with the brief if these documents when added to the required appendix in (a) do not exceed 50 pages.	30(b)(6)
	If 50 page limit is exceeded, file 10 copies of the separate appendix.	Local practice
Briefs	15	31(b)
Petitions for Rehearing	15	40(b)

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SEVENTH CIRCUIT (cont'd)

Suggestions of Rehearing In Banc	25	40(b)
Motions	Original & 3, but the court may require that additional copies be furnished	FRAP 27(d)

CHART: EIGHTH CIRCUIT FILING REQUIREMENTS
NUMBER OF COPIES

This chart identifies the number of copies of various documents that counsel are required to file and serve in this circuit. Citations to the applicable local rule of this court or to the Federal Rules of Appellate Procedure are provided with respect to each item, except where the number of copies required is set by local practice rather than by written rule.

DOCUMENT(S)	NUMBER OF COPIES	LOCAL RULE
Motions for Stay of Execution and Certificates of Probable Cause	Original & 4	22A(d)
Certificates of Interested Persons	5	26.1A
Motions	Motions the Clerk may grant under Rule 27B(a): original & one	27A(b)
	All other motions: original & 3	27A(b)
Briefs	Pro se briefs: 5	28A(d)
	Parties proceeding in forma pauperis choosing to file typewritten and carbon copies: original & 3	28A(d)
	All other briefs: 10	28A(d)
	Cases heard en banc: 8 additional copies.	28A(d)
	Copies to be served on opposing counsel: 2, except that parties proceeding in forma pauperis may file one copy.	28A(d)

(continued on next page)

EIGHTH CIRCUIT (cont'd)

Agreed Statements as to the Record on Appeal	3	30A(b)(1)
Joint Appendices	3	30A(b)(2)(iii)
Suggestions of Rehearing En Banc	18	35A(c)(1)
Petitions for Rehearing	5	40A(b)(1)

CHART: NINTH CIRCUIT FILING REQUIREMENTS NUMBER OF COPIES

This chart identifies the number of copies of various documents that counsel are required to file and serve in this circuit. Citations to the applicable local rule of this court or to the Federal Rules of Appellate Procedure are provided with respect to each item, except where the number of copies required is set by local practice rather than by written rule.

DOCUMENT(S)	NUMBER OF COPIES	LOCAL RULE(S)
Excerpts of Record	5	17-2; 30-1.1
	An additional 20 copies must be filed if the case is to be reheard en banc.	17-2.6; 31-1
	Supplemental excerpts of record (if any): 5	17-2.5; 30-1.8
Motions, Responses to Motions, and Accompanying Papers	Original & 4	27-1
Presentence Reports (When Mentioned in Brief)	4	30-1.8
Briefs	Original & 15	31-1
	20 extra copies if rehearing in banc is granted.	31-1
Petitions for Rehearing	Original & 3	35-3 n.(2)
Petitions for Rehearing En Banc	Original & 40	35-3 n.(2)

CHART: TENTH CIRCUIT FILING REQUIREMENTS
NUMBER OF COPIES

This chart identifies the number of copies of various documents that counsel are required to file and serve in this circuit. Citations to the applicable local rule of this court or to the Federal Rules of Appellate Procedure are provided with respect to each item, except where the number of copies required is set by local practice rather than by written rule.

DOCUMENT(S)	NUMBER OF COPIES	LOCAL RULE(S)
Docketing Statements	Original & 4. Indigent appellant appearing pro se need only file an original.	3.4 See also 15.1
Appendices	2	10.2.9 nt
Briefs	Original & 7	31.6
	Indigent pro se litigant may file an original & 3 carbon copies.	31.6
Suggestions of Rehearing En Banc	Original & 12	35.4
	Indigent pro se litigant may file an original & 3 carbon copies.	35.4
Petitions for Rehearing	Original & 3, but original plus 12 if the petition is accompanied by a suggestion of rehearing en banc.	40.2
	Indigent pro se litigant may file an original & 3 carbon copies.	40.2
Entries of Appearance	Original & 3	46.1.1
Motions	Original & 3, but the court may require that additional copies be furnished	FRAP 27(d)

CHART: ELEVENTH CIRCUIT FILING REQUIREMENTS NUMBER OF COPIES

This chart identifies the number of copies of various documents that counsel are required to file and serve in this circuit. Citations to the applicable local rule of this court or to the Federal Rules of Appellate Procedure are provided with respect to each item, except where the number of copies required is set by local practice rather than by written rule.

DOCUMENT(S)	NUMBER OF COPIES	LOCAL RULE(S)
Motions for Stay of Execution and Certificates of Probable Cause	Original & 4	22-3(a)(3)
Motions Requiring Panel Action	Original & 3	27-1(a)(2)
Record Excerpts	4	30-1
	Pro se parties proceeding in forma pauperis need only file one copy.	30-1
	Pro se parties who are incarcerated need not file record excerpts.	30-1
	Agency review proceedings: 4	30-2
Briefs	7	31-2
	Pro se parties proceeding in forma pauperis may file four copies.	31-2
Suggestions of En Banc Consideration	15	35-1

(continued on next page)

ELEVENTH CIRCUIT (cont'd)

En Banc Briefs	15	35-9
	Counsel also must file 15 additional copies of each brief previously filed by them.	35-9
Petitions for Rehearing	4	40-1

CHART: FEDERAL CIRCUIT FILING REQUIREMENTS
NUMBER OF COPIES

This chart identifies the number of copies of various documents that counsel are required to file and serve in this circuit. Citations to the applicable local rule of this court or to the Federal Rules of Appellate Procedure are provided with respect to each item, except where the number of copies required is set by local practice rather than by written rule.

DOCUMENT(S)	NUMBER OF COPIES	LOCAL RULE(S)
Petitions for Review and Notices of Appeal	Original & 3	15(a)(4)
Petitions for a Writ of Mandamus or a Writ of Prohibition	Original & 4	21(a)
Motions in Appeals Pending Before the En Banc Court	Original & 15	28(g)
Appendices	12	30(a)(5)
Briefs	12 copies, except in briefs containing material subject to a protective order (see Rule 28(d)).	31(b)
	Two copies must be served on counsel who is the principal attorney for each party, intervenor, and amicus curiae separately represented.	31(b)

(continued on next page)

FEDERAL CIRCUIT (cont'd)

Suggestions for Hearing In Banc and Rehearing In Banc	15 copies. Two copies must be served on each party separately represented.	35(c); 35(d)
	In cases to be reheard in banc, counsel must refile fifteen sets of the briefs that were before the panel that heard the appeal initially.	35(f)
Bills of Costs; Objections to Bill of Costs	Original & 3	39
Petitions for Rehearing	A party appearing without counsel may file an original and three copies of an informal petition for rehearing in letter form.	40
Petitions for Judicial Review Under 5 U.S.C. 7703(d)	Original & 3	47.11(d)
Motions	Original & 3, but the court may require that additional copies be furnished	FRAP 27(d)

Discussion Items

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

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

FROM: Carol Ann Mooney, Reporter

DATE: October 5, 1992

Enclosed are the remaining materials for the October meeting. This packet should include materials for the following items:

1. Item 86-23, regarding the ten day period within which objection to a magistrate's report must be filed and the difficulty prisoners have in meeting that schedule;
2. Item 91-6, regarding allocation of word processing equipment costs between the cost of producing originals and producing copies for purposes of Rule 39;
3. Item 91-17, unpublished opinions;
4. Item 91-28, amendment of Rule 27;
5. Item 92-3, possible conflict between Rule 4(b) and 18 U.S.C. § 3731.
6. Copies of the Eleventh Circuit's reponse to the Local Rules Project's Report on Appellate Practice and Professor Squiers' analysis of the Eleventh Circuit's response.

I look forward to seeing all of you here in South Bend in the near future. If I can be of any assistance, please let me know.

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

FROM: Carol Ann Mooney

DATE: October 5, 1992

SUBJECT: Item 86-23, concerning the difficulty a prisoner may have filing a timely objection to a magistrate's report

This item has been on the table of agenda items for quite some time; the Committee needs to decide if there is something that it can or should be doing.

The agenda item appears to have originated in the summer of 1986 when Judge Sloviter and Judge Lively, who then chaired the Advisory Committee on Appellate Rules, discussed the problem of service on prisoners and the difficulty prisoners have in timely filing objections to a magistrate's report.

Section 636(b)(1) of title 28 states that a party may file an objection to a magistrate's report within ten days after being served with the report. Because prisoners often do not receive their mail as promptly as non-incarcerated persons, they may have difficulty meeting that deadline. Judge Sloviter's opinion in Grandison v. Moore, 786 F.2d 146 (3d Cir. 1986), outlines the problem.

In Grandison, a magistrate's report was mailed on June 17 to the *pro se* prisoner/plaintiff. Service was accomplished by mail; therefore, three days were added to the ten day period for filing objections and objections were due July 1 (since June 30 was a Sunday). The plaintiff-prisoner did not receive the report until June 28, three days before the deadline. He mailed his objections on July 3 and they were filed on July 8, both after the deadline. The district court had entered judgment in favor of the defendants on July 3 and on July 24 dismissed the plaintiff-prisoner's objections as untimely. Upon review, the third circuit held that the failure to object within 10 days was not jurisdictional and that the district court should have considered whether the delayed filing was adequately justified.

The Appellate Rules Committee delayed acting on this item because the Civil Rules Committee was working on amendments to Fed. R. Civ. P. 72. Unfortunately, the amendments are not responsive to this particular concern.

Prisoners are at a distinct disadvantage whenever they must act within a certain time after being served because service may be accomplished by mailing. Prisoners have no control over their whereabouts; transfers can delay their mail delivery. Even without delays caused by transfers, prisoners have no control over when prison officials actually deliver their mail. Amended Civil Rule 72(a) and Rule 72(b) both require a party to file any objections within 10 days after being served with a magistrate's report. Civil Rules 5(b) and 6(e) remain unchanged in that they provide service is complete upon mailing and that whenever service is accomplished

by mailing and a party is required to act within a prescribed period after service, three days are added to the period.

The problem is the converse of the one the Committee addressed with the proposed amendments based upon Houston v. Lack. Those amendments focus upon the fact that an institutionalized person has no control over when an institution actually puts an inmate's outgoing mail in the United States Mail. The amendments provide that a document is filed as soon as an institutionalized person places the document in the institution's internal mail system.

Corollary amendments responsive to the difficulty that prisoners have in receiving mail would require amending the rules so that service on an institutionalized person is not complete until the date of actual delivery to him or her. Even if the Committee is interested in pursuing such a change, amendment of the appellate rules would not cure the specific problem that prompted this suggestion. The trial court service rules would need to be amended.

Or is there another way to address the problem? At least two other circuits have concluded, like third circuit did in Grandison, that the 10 day time limit for objecting to a magistrate's report is not jurisdictional and that a district court has discretionary authority to consider later objections. *See, e.g.*, Cay v. Estelle, 789 F.2d 318, 323 (5th Cir. 1986); Patterson v. Mintzes, 717 F.2d 284. Is statutory amendment desirable?

This item is on the agenda for the meeting as a discussion item.

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

FROM: Carol Ann Mooney, Reporter

DATE: October 3, 1992

SUBJECT: 91-6, regarding allocation of word processing equipment costs between producing originals and producing "copies."

Fed. R. App. P. 39(c) allows a prevailing party to recover the cost of "producing necessary copies of briefs." The cost of producing the "original" is not recoverable, but the cost of producing the copies is. As the opinion in Martin v. United States, 931 F.2d 453 (7th Cir. 1991), points out "[w]ord processing blurs the distinction between original and copy." The opinion suggests that Rule 39 might be amended "to provide for some arbitrary allocation of the costs of word processing equipment between producing the originals and producing the 'copies.'"

Lee MARTIN, Executor of the Estate of Esther S. Martin and Trustee of the Esther S. Martin Living Trust, Plaintiff-Appellee,

v.

UNITED STATES of America, Defendant-Appellant.

Nos. 90-2060, 90-3339.

United States Court of Appeals, Seventh Circuit.

Submitted Jan. 25, 1991.

Decided May 8, 1991.

United States appealed from judgment of the United States District Court for the Northern District of Indiana, Robert L. Miller, Jr., J., entered in favor of taxpayer. The Court of Appeals reversed, 923 F.2d 504. On bill of costs, the Court of Appeals, Easterbrook, Circuit Judge, held that: (1)

6. Perhaps the supervisors did not believe that Gusike's requests violated the no-solicitation rule ...

[2] Let us start with the clearest case. The attorneys compose a brief on their computers and print occasional hard copies to facilitate editing. When they have settled on a text, they send a "final" copy together with a disk to a print shop. The shop transfers the text from the disk to its own equipment and uses the hard copy to verify that the transfer was done correctly. In such a case the costs of the transfer, equivalent to "composition" of type in a traditional process, are recoverable. They are included as part of the cost per page of the completed product. When a law firm possesses dedicated equipment that performs the same function, there is no reason why the expense should be handled differently. If the costs of transferring the image from one machine to another are recoverable when the second machine is owned by an independent firm, then they are recoverable when both machines have common ownership. It would be foolish to promote the farming out of work to print shops when it may well be cheaper—and thus beneficial even to one's adversary—to bring it in house. We read the rules regarding costs to encourage technological progress, *Commercial Credit Equipment Corp. v. Stamps*, 920 F.2d 1361, 1368 (7th Cir.1990), and therefore agree with *Pepsico, Inc. v. Swan, Inc.*, 720 F.2d 746 (2d Cir.1983), that reproduction expenses (including depreciation) comparable to the composition or typesetting charges of a professional printer are taxable as costs. "[E]xpenses of reproduction which are clearly recoverable as costs when a commercial printer is used are also recoverable when incurred through in-house methods." 720 F.2d at 747. Of course the charges for in-house reproduction may not exceed the charges of an outside print shop, but subject to this cap the firm may recover the full costs of reproduction.

Things become more difficult when attorneys use the same equipment to compose the briefs, print drafts for internal circulation, and print copies for filing. Then recovery of the costs of "composition" underwrites the expense of producing the "original" as well as the cost of turning the original into a brief. Two courts of appeals have held that the expense of composing an original may not be recovered indirectly through a charge for "copies". *CTS Corp. v. Piher International Corp.*, 754 F.2d 972 (Fed.Cir.1984); *Intercontinental Apparel, Inc. v. Danik, Inc.*, 777 F.2d 775 (D.C.Cir. 1985).

[3] In the world before word processing, Rule 39 allowed the prevailing party to recover only the marginal cost of turning a typescript into a document that could be filed with the court. It could not recover the expenses of typewriters and secretaries, although it could recover the costs of making photocopies or printing. Word processing yields joint costs, which cannot be allocated in any simple fashion. To decline to apportion these costs may give lawyers an incentive to send their products out for professional printing, even though that is more costly than in-house reproduction. Yet to try to allocate these costs could produce an administrative nightmare. Rule 39 might be amended to provide for some arbitrary allocation of the costs of word processing equipment between producing the originals and producing the "copies", but this change must proceed through the stages of notice and comment. We agree with *CTS* and *Intercontinental Apparel* that under the rules currently in force only the marginal costs of reproduction may be taxed against one's adversary. Under the existing rules a firm may not recover any portion of the costs of providing its lawyers and secretaries with word processors. It may recover only the additional cost of reproduction: the expense of copying, and of dedicated equipment (such as 1200 dpi printer-binders) that makes copies but not originals.

The bill of costs that the Department of Justice submitted in this case seeks $412.20 for "composing and duplicating" the government's briefs and appendix. One attachment to the bill, from the Administrative Officer of the Tax Division, certifies that the "composing charge" is $2.60 per page, for a total of $340.60. A second attachment, from the Director of the Justice Publications Services Facility, certifies that the cost of duplicating the documents

rule distinguishes between nonrecoverable expense of producing original and the taxable cost of producing the copies; (2) reproduction expenses, including the depreciation on machinery used to make copies of briefs, which are comparable to the composition or typesetting charges of a professional printer are taxable costs, so long as they do not exceed the charges of an outside printshop; but (3) costs may not include any portion of cost of providing lawyers and secretaries with word processors.

Ordered accordingly.

1. Federal Civil Procedure ⇐2745

Whether brief is set in type or simply duplicated, rules governing costs on appeal distinguish between nonrecoverable expense of producing original and the taxable cost of producing the copies. F.R.A.P.Rule 39(c), 28 U.S.C.A.

2. Federal Civil Procedure ⇐2745

Reproduction expenses for briefs, including depreciation of equipment, which is comparable to the composition and typesetting charges of a professional printer are taxable as costs, although charges for in-house reproduction may not exceed the charges of an outside printshop; subject to that cap, firms may recover the full costs of reproduction on its own equipment. F.R.A.P.Rule 39(c), 28 U.S.C.A.

3. Federal Civil Procedure ⇐2745

Only the marginal costs of reproduction of copies of briefs may be taxed against one's adversary; firm may not recover any portion of the costs of providing its lawyers and secretaries with word processors and may only recover the initial cost of reproduction, which is the expense of copying and the expense of any dedicated equipment that makes copies but not originals.

Scott A. Brainerd, Chicago, Ill., for plaintiff-appellee.

Mark Winer, Dept. of Justice, Tax Div., Washington, D.C., Andrew B. Baker, Jr., Asst. U.S. Atty., Hammond, Ind., Clifford D. Johnson, Asst. U.S. Atty., South Bend, Ind., Gary R. Allen, Murray S. Horwitz, Kenneth L. Greene, John A. Dudeck, Jr., Dept. of Justice, Tax Div., Appellate Section, Washington, D.C., for the U.S.

Before COFFEY, EASTERBROOK, and RIPPLE, Circuit Judges.

ON BILL OF COSTS

EASTERBROOK, Circuit Judge.

[1] The rules governing the award of costs for the reproduction of briefs were written before word processing and in-house printing became widespread. Fed.R. App.P. 39(c) allows the prevailing party to recover the costs of "producing necessary copies of briefs"; Circuit Rule 39 likewise refers to the costs of "copies". The assumption behind both rules is that a litigant produces an "original" and files "copies". Whether the brief is set in type or simply duplicated, the rules distinguish between the non-recoverable expense of producing the "original" and the taxable cost of producing the "copies".

Word processing blurs the distinction between original and copy. Attorneys compose briefs on a computer. The equipment that produces the drafts and then the original of the final product also makes the copies; the "copies" are "duplicate originals". This is clearly so if the law firm uses the laser printer to generate both drafts and the "copies" filed with the court. It is less clearly so if the laser printer spits out a single original, which the firm duplicates on other equipment. And it is still less clearly so if the firm uses different printers for draft and final versions. Some law firms have equipment that produces a higher-quality image than do the 300 dpi (dots per inch) laser printers that have mushroomed in America's offices. Some of these machines can print and bind the briefs in a single pass. High-resolution (1200 dpi and up) devices and combination printer-binders used to be the sole province of professional print shops. Do these in-house facilities produce only originals, only copies, or some mixture?

is 4¢ per page per copy, for a total of $71.60. The $71.60 is allowable. We cannot tell, however, whether the $2.60 per page represents the cost of using separate equipment comparable to that in a print shop, in which case it is recoverable, or is an attempt to amortize some of the costs of the word processing equipment that the staff of the Tax Division uses to write and edit the brief. The meaning of the "composing charge" is especially murky because the Department seeks to recover the same $2.60 per page for the text of the brief and for the appendix, although the latter is nothing but photo-duplication of documents such as the district court's opinions. An identical charge for every page implies that the cost covers setting up a duplicating machine after hard copy has been produced (taxable as costs), rather than a fee for generating that copy on word processing equipment (not taxable, under the approach we take).

We shall defer acting on the bill of costs until receiving clarification from the Department of Justice about the meaning of the "composing charge".

Bennie BREWER, Appellee,

v.

Dave PARKMAN, et al., Appellant.

No. 89-2980.

United States Court of Appeals, Eighth Circuit.

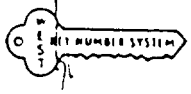
Dec. 28, 1990.

Appeal from the United States District Court for the Eastern District of Arkansas.

Appellant's petition for rehearing with suggestion for rehearing en banc has been considered by the court and is granted. The opinion and judgment of this court filed on November 15, 1990, 918 F.2d 1336 (8th Cir.) are vacated.

The parties are directed to file supplemental briefs not exceeding fifteen (15) pages in length. The supplemental briefs should not duplicate prior briefs and only new cases should be argued. All briefs should be limited to the points raised in the petition for rehearing en banc. Eighteen copies of the supplemental briefs should be filed, simultaneously on or before January 14, 1991.

This case will be argued on Friday, February 1, 1991 in St. Louis, Missouri pending further direction.



Earsel L. JOHNSON, Appellee,

v.

Bill HAY, Appellant.

No. 90-1517.

United States Court of Appeals, Eighth Circuit.

Submitted Nov. 15, 1990.

Decided April 15, 1991.

Prison inmate sued prison pharmacist claiming that pharmacist violated inmate's Eighth Amendment rights by intentionally refusing to fill prescriptions for antiseizure medicines. Pharmacist moved for summary judgment based on qualified immunity and on merits of claim. The United States District Court for the Western District of Missouri, William A. Knox, United States Magistrate Judge, denied motion. Pharmacist appealed. The Court of Appeals, John R. Gibson, Circuit Judge, held that: (1) Court of Appeals had jurisdiction to consider appeal on qualified immunity issue; (2) law was clearly established at time of pharmacist's actions that pharmacist could not intentionally interfere with or fail to carry out treatment prescribed for prisoners; (3) genuine issues of fact existed as to wheth-

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

FROM: Carol Ann Mooney, Reporter

DATE: October 5, 1992

SUBJECT: 91-17, Unpublished Opinions

The Federal Courts Study Committee recommended that the Judicial Conference should appoint an ad hoc committee to review the policy on unpublished court opinions. REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, 130 (1990).

The FCSC seemed more concerned with non-citation rules, than with non-publication policies. One of the reasons for restricting citation to unpublished opinions is that all parties do not have equal access to them. As computer access to opinions increases and the cost of computer searches decreases, that rationale may no longer be as strong. The Committee said that "[u]niversal publication has enough problems of its own that we cannot recommend it now; but inexpensive database access and computerized search technologies may justify revisiting the issue, because these developments may now or soon will provide wide and inexpensive access to all opinions."

The Judicial Conference explicitly disapproved of the FCSC recommendation.

The topic came before the Advisory Committee on Appellate Rules once again as a result of the Local Rules Project. The project recommended that the Advisory Committee consider amending Rule 36 or adding another rule to include a uniform plan for publication of opinions. Several Committee members expressed some interest in further discussion of the question.

To aid the committee in its discussion, I have appended copies of the local rules from the circuits which contain the criteria for determining whether an opinion should be published and those which govern the precedential value of unpublished opinions. The rules reveal a substantial consensus among the circuits concerning the criteria for determining whether an opinion should be published. However, with regard to citation of unpublished opinions, there is less agreement. Some circuits prohibit citation except in related cases; other circuits discourage citation; while some simply permit it.

A bibliography of recent articles is also attached.

I asked my student assistant to review the case law in the circuits for the past several years to see if the cases reveal any problems related to the non-publication and non-citation rules. His research did not disclose any problems. The cases he found generally involved simple application of a circuit's rule concerning the precedential value of an earlier unpublished opinion in that circuit. *See, e.g.,* United States v. Turley 891 F.2d 57 (3rd Cir. 1989); United States v. Don B. Hart Equity Pure Trust, 818 F.2d 1246 (5th Cir. 1987); F.D.I.C. v. Newhart, 892 F.2d 47 (8th Cir. 1989); One case involved the question of whether a party may cite an unpublished opinion from a circuit that treats unpublished opinions as precedent; it concluded that citation was appropriate. Finkbohner v. United States, 788 F.2d 723 (11th Cir. 1986).

D.C. Cir. R. 14. Opinions of the Court.

(a) Policy. It is the policy of this Court to publish opinions and explanatory memoranda founds to have general public interest.

(b) Published Opinions. An opinion, memorandum, or other statement explaining the basis for this Court's action in issuing an order or judgment shall be published if it meets one or more of the following criteria:

(1) with regard to a substantial issue it resolves, it is a case of first impression or the first case to present the issue in this Court;

(2) it alters, modifies, or significantly clarifies a rule of law previously announced by the Court;

(3) it calls attention to an existing rule of law that appears to have been generally overlooked;

(4) it criticizes or questions existing law;

(5) it resolves an apparent conflict in decisions within the circuit or creates a conflict with another circuit;

(6) it reverses a published agency or district court decision, or affirms a decision of the district court upon grounds different from those set forth in the district court's published opinion; or

(7) it warrants publication in light of other factors that give it general public interest.

All published opinions of this Court shall be printed, unless otherwise ordered, and shall be rendered by being filed with the clerk.

1st Cir. R. 36.2. Publication of Opinions.

(a) Statement of Policy. In general, the court thinks it desirable that opinions be published and thus be available for citation. The policy may be overcome in some situations where an opinion does not articulate a new rule of law, modify an established rule, apply an established rule to novel facts or serve otherwise as a significant guide to future litigants. (Most opinions dealing with claims for benefits under the Social Security Act, 42 U.S.C. § 205(g), will clearly fall within the exception.

2d Cir. R. 0.23. Dispositions in open court or by summary order.

The demands of an expanding caseload require the court to be ever conscious of the need to utilize judicial time effectively. Accordingly, in those cases in which decision is unanimous and each judge of the panel believes that no jurisprudential purpose would be served by a written opinion, disposition will be made in open court or by summary order.

Where a decision is rendered from the bench, the court may deliver a brief oral statement, the record of which is available to counsel upon request and payment of transcription charges. Where disposition is by summary order, the court may append a brief written statement to that order. Since these statements do not constitute formal opinions of the court and are unreported and not uniformly available to all parties, they shall not be cited or otherwise used in unrelated cases before this or any other court.

3rd Cir. I.O.P.

5.5.1. Publication of Opinions. An opinion is published when it has precedential or institutional value. An opinion which appears to have value only to the trial court or the parties is ordinarily not published. The decision as to publication lies with the majority of the panel, unless a majority of the active judges of the court decides otherwise.

4th Cir. I.O.P.

36.4. Publication of decisions. Opinions delivered by the Court will be published only if the opinion satisfies one or more of the standards for publication:

i. It establishes, alters, modifies, clarifies, or explains a rule of law within this Circuit; or

ii. It involves a legal issue of continuing public interest; or

iii. It criticizes existing law; or

iv. It contains an historical review of a legal rule that is not duplicative; or

v. It resolves a conflict between panels of this Court, or creates a conflict with a decision in another circuit.

The court will publish opinions only in cases that have been fully briefed and presented at oral argument. Opinions in such cases will be published if the author or a majority of the joining judges believe the opinion satisfies one or more of the standards for publication, and all members of the court have acknowledged in writing their receipt of the proposed opinion. A judge may file a published opinion without obtaining all acknowledgments only if the opinion has been in circulation for ten days.

5th Cir. R. 47.5. Publication of Opinions.

47.5.1. Criteria for Publication. The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession. However, opinions that may in any way interest persons other than the parties to a case should be published. Therefore, an opinion will be published if it:

> establishes a new rule of law, alters, or modifies an existing rule of law, or calls attention to an existing rule of law that appears to have been generally overlooked;
>
> applies an established rule of law to facts significantly different from those in previous published opinions applying the rule;
>
> explains, criticizes, or reviews the history of existing decisional or enacted law;
>
> creates or resolves a conflict of authority either within the circuit or between this circuit and another;
>
> concerns or discusses a factual or legal issue of significant public interest;
>
> is rendered in a case that has previously been reviewed and its merits addressed by an opinion of the United States Supreme Court.

An opinion may also be published it if:

> is accompanied by a concurring or dissenting opinion; reverses the decision below or affirms it upon different grounds.

47.4.2. Publication Decision. An opinion shall be published unless each member of the panel deciding the case determines that its publication is neither required nor justified under the criteria for publication. The panel shall reconsider its decision not to publish an opinion upon the request of any judge of the court or any party to the case. The opinion shall then be published if, upon reconsideration, each member of the panel determines that it meets one or more of the criteria for publication or should be published for any other good reason.

6th Cir. R. 24. Publication of Decisions.

(a) Criteria for publication. The following criteria shall be considered by panels in determining whether decisions will be designated for publication in the Federal Reporter:

i) whether it establishes a new rule of law, or alters or modifies an existing rule of law, or applies an established rule to a novel fact situation;

ii) whether it creates or resolves a conflict or authority either within the circuit or between this circuit and another;

iii) whether it discusses a legal or factual issue of continuing public interest;

iv) whether it is accompanied by a concurring or dissenting opinion;

v) whether it reverses the decision below, unless:

(a) the reversal is caused by an intervening change in law or fact, or,

(b) the reversal is a remand (without further comment) to the district court of a case reversed or remanded by the Supreme Court;

vi) whether it addresses a lower court or administrative agency decision that has been published; or,

vii) whether it is a decision which has been reviewed by the United States Supreme Court.

(b) Designation for publication. There shall be a presumption in favor of publication of signed and per curiam opinions. A signed opinion is one in which the author's name appears at the beginning of the opinion. Such opinions shall be designated for publication unless a majority of the panel deciding the case determines otherwise upon consideration of the foregoing criteria. An order shall not be designated for publication unless a member of the panel so requests.

7th Cir. R. 53. Plan for Publication of Opinions of the Seventh Circuit Promulgated Pursuant to Resolution of the Judicial Conference of the United States.

(a) Policy. It is the policy of this circuit to reduce the proliferation of published opinions.

(b) Publication. The court may dispose of an appeal by an order or by an opinion, which may be signed or per curiam. Orders shall not be published and opinions shall be published.

* * *

(c) Guidelines for Method of Disposition.

(1) Published opinions.

A published opinion will be filed when the decision

(i) establishes a new, or changes an existing rule of law:

(ii) involves an issue of continuing public interest;

(iii) criticizes or questions existing law;

(iv) constitutes a significant and non-duplicative contribution to legal literature

(A) by a historical review of law,

(B) by describing legislative history, or

(C) by resolving or creating a conflict in the law;

(v) reverses a judgment or denies enforcement of an order when the lower court or agency has published an opinion supporting the judgment or order; or

(vi) is pursuant to an order of remand from the Supreme Court and is not rendered merely in ministerial obedience to specific directions of that Court.

8th Cir. Plan for Publication of Opinions

The Judicial Council of the Eighth Circuit, pursuant to a resolution of the Judicial Conference of the United States, hereby adopts the following plan for the preparation and publication of opinions of the United States Court of Appeals for the Eighth Circuit.

1. It is unnecessary for the Court to write an opinion in every case or to publish every opinion written. The disposition without opinion or the nonpublication of an opinion does not mean that the case is considered unimportant. It does mean that an opinion in the case will not add to the body of law and will not have value as precedent.

* * *

3. The Court or a panel will determine which of its opinions are to be published, except that a judge may make any of his opinions available for publication. The decision on publication of an opinion will ordinarily be made prior to its preparation. The direction as to publication will appear on the face of the opinion. Unpublished opinions, since they are unreported and not uniformly available to all parties, may not be cited or otherwise used in any proceedings before this court or any district court in this circuit except when the cases are related by virtue of an identity between the parties or the causes of action.

4. An opinion should be published when the case or opinion:

(a) establishes a new rule of law or questions or changes an existing rule of law in this Circuit,

(b) is a new interpretation of or conflicts with a decision of a federal or state appellate court,

(c) applies an established rule of law to a factual situation significantly different from that in published opinions,

(d) involves a legal or factual issue of continuing or unusual public or legal interest,

(e) does not accept the rationale of a previously published opinion in that case, or

(f) is a significant contribution to legal literature through historical review or resolution of an apparent conflict.

9th Cir. R. 36-2. Disposition by Opinion.

A written, reasoned disposition shall be designated as an OPINION only if it:
(a) Establishes, alters, modifies or clarifies a rule of law, or
(b) Calls attention to a rule of law which appears to have been generally overlooked, or
(c) Criticizes existing law, or
(d) Involves a legal or factual issue of unique interest or substantial public importance,
(e) Is a disposition of a case in which there is a published opinion by a lower court or administrative agency, unless the panel determines that publication is unnecessary for clarifying the panel's disposition of the case, or
(f) Is a disposition of a case following a reversal or remand by the United States Supreme Court, or
(g) Is accompanied by a separate concurring or dissenting expression, and the author of such separate expression requests publication of the disposition of the court and the separate expression.

10th Cir. R. 36. Entry of Judgment (Opinions/Orders and Judgments).

36.1. Orders and Judgments. It is unnecessary for the court to write opinions in every case. The court may, in its discretion and without written opinion, enter either an order, "Affirmed", or an order and judgment disposing of the appeal or petition. Disposition without opinion does not mean that the case is considered unimportant. It does mean that the panel believes the case involves application of no new points of law that would make the decision of value as a precedent.

36.2. Publication. When an opinion has been previously published by a district court, an administrative agency, or the United States Tax Court, this court will ordinarily designated its disposition for publication. If a panel has written an order and judgment which would ordinarily not be published, the court will designate for publication only the result of the appeal.

11th Cir. I.O.P. 36. Opinions.

* * *

3. Publication of Opinions. The policy of the court is: The unlimited proliferation of published opinions is undesirable because it tends to impair the development of the cohesive body of law. To meet this serious problem it is declared to be the basic policy of this court to exercise imaginative and innovative resourcefulness in fashioning new methods to increase judicial efficiency and reduce the volume of published opinions. Judges of this court will exercise appropriate discipline to reduce the length of opinions by the use of those techniques which result in brevity without sacrifice of quality.

Opinions that the panel believes to have no precedential value are not published. All non-published opinions and affirmances without opinion under 11th Cir. R. 36-1 are printed in table form in the Federal Reporter. (See for example 791 F.2d 170). Although unpublished opinions may be cited as persuasive authority, they are not considered binding precedent. Reliance on unpublished opinions is not favored by the court.

Fed. Cir. R. 47.8. Opinions and orders of the court

(a) Dispositions of appeals, petitions and motions. Dispositions of appeals, petitions and motions may be announced in an opinion or order. Every disposition may be cited as precedent of the court except those which are issued bearing a legend thereon specifically stating that the disposition may not be cited as precedent.

(b) Nonprecedential opinions and orders. Opinions and orders which are designated as not citable as precedent are those unanimously determined by the panel at the time of their issuance as not adding significantly to the body of law. Opinions and orders so designated shall not be employed or cited as precedent.

This rule does not preclude assertions of issues of claim preclusion, issue preclusion, judicial estoppel, law of the case or the like based on a decision of the court rendered in a nonprecedential opinion or order.

D.C. Cir. Rule 11. Briefs.

* * *

(c) Citations to Unpublished Dispositions. Unpublished orders or judgments, including explanatory memoranda, of this Court are not to be cited as precedents. The same rule applies to unpublished dispositions of other courts, unless the court in question accords precedential weight to such dispositions. Counsel may refer to an unpublished disposition, however, when the binding or preclusive effect of the disposition, rather than its quality as precedent, is relevant. In that event, counsel shall include in an appropriately labeled addendum to the brief a copy of each unpublished disposition cited therein. The addendum may be bound together with the brief; if bound separately, it shall be filed and served concurrently with, and in the same number of copies as, the brief itself.

1st Cir. R. 36.2. Publication of Opinions.

* * *

(b)

6. Unpublished opinions may be cited only in related cases. Only published opinions may be cited otherwise.

2d Cir. R. 0.23. Disposition in open court or by summary order.

. . . Since these statements do not constitute formal opinions of the court and are unreported and not uniformly available to all parties, they shall not be cited or otherwise used in unrelated cases before this or any other court.

3d Cir. R. 21. Briefs, the appendix, motions and other papers.

(1) Contents of briefs. . . .

* * *

(i) An argument. . . . Citations to federal decisions which have not been formally reported should identify the court, docket number and date. . . .

3d Cir. I.O.P.

5.6. Citations. Because only published opinions have precedential value, the court does not cite to its unpublished opinions as authority.

4th Cir. I.O.P.

36.6. Citation of unpublished dispositions. In the absence of unusual circumstances, this court will not cite an unpublished disposition in any of its published opinions or unpublished dispositions. Citation of this Court's unpublished dispositions in briefs and oral arguments in this Court and in the district courts within this Circuit is disfavored, except for the purpose or establishing res judicata, estoppel,or the law of the case.

If counsel believes, nevertheless, that an unpublished disposition of any court has precedential value in relation to a material issue in a case and that there is no published opinion that would serve as well, such disposition may be cited if counsel serves a copy thereof on all other parties in the case and on the Court. Such service may be accomplished by including a copy of the disposition in an attachment or addendum to the brief pursuant to the procedures set forth in Local Rule 28(b).

5th Cir. Rule 47

47.5.3. Unpublished Opinions. Unpublished opinions are precedent. However, because every opinion believed to have precedential value is published, an unpublished opinion should normally be cited only when it (1) establishes the law of the case, (2) is relied upon as a basis for res judicata or collateral estoppel, or (3) involves related facts. If an unpublished opinion is cited, a copy shall be attached to each copy of the brief.

6th Cir. R. 24

(c) Citation of unpublished decisions. Citation of unpublished decisions by counsel in briefs and oral arguments in this court and in the district courts within this circuit is disfavored, except for the purpose of establishing res judicata, estoppel, or the law of the case.

If counsel believes, nevertheless, that an unpublished disposition has precedential value in relation to a material issue in a case and that there is no published opinion that would serve as well, such decision may be cited if counsel serves a copy thereof on all other parties in the case and on the court. Such service may be accomplished by including a copy of the decision in an addendum to the brief.

7th Cir. R. 53. Plan for Publication of Opinions of the Seventh Circuit Promulgated Pursuant to Resolution of the Judicial Conference of the United States

* * *

(b) Publication. . . .

* * *

(2) Unpublished order:

* * *

(iv) Except to support a claim of res judicata, collateral estoppel or law of the case, shall not be cited or used as precedent

(a) in any federal court within the circuit in any written document or in oral argument; or

(b) by any such court for any purpose.

8th Cir. R. 28A. Briefs.

(k) Citation of Unpublished Opinion. No party may cite a federal or state court opinion not intended for publication, except when the cases are related by identity between the parties or the causes of action. . . .

8th Cir. Plan for Publication of Opinions

* * *

3. . . . Unpublished opinions, since they are unreported and not uniformly available to all parties, may not be cited or otherwise used in any proceedings before this court or any district court in this circuit except when the cases are related by virtue of an identity between the parties or the causes of action.

9th Cir. R. 36-3. Other Dispositions.

Any disposition that is not an opinion or an order designated for publication under Circuit Rule 36-5 shall not be regarded as precedent and shall not be cited to or by this court or any district court in the Ninth Circuit, either in briefs, oral argument, opinions, memoranda, or orders, except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel.

10th Cir. R. 36. Entry of Judgment (Opinions/Orders and Judgments.)

36.3. Citation of Unpublished Opinions/Orders and Judgments. Unpublished opinions and orders and judgments of this court have no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. A dissent from this rule by Chief Judge Holloway, Judges Barrett and Baldock, appears at U.S. Court of Appeals, 10th Circuit, Rules, App. III, 28 U.S.C.A. (West Supp. 1988).

[Reporter's Note: the dissenting opinion is printed in 955 F.2d 36. A copy is attached to this memorandum.]

11th Cir. R. 36-2. Unpublished Opinions.

Unpublished opinions are not considered binding precedent. They may be cited as persuasive authority, provided that a copy of the unpublished opinion is attached to or incorporated within the brief, petition, motion or response in which such citation is made. A majority of the panel must agree to publish an opinion which was initially issued as an unpublished opinion.

Fed. Cir. R. 47.8. Opinions and orders of the court.

* * *

(b) Nonprecedential opinions and orders. Opinions and orders which are designated as not citable as precedent are those unanimously determined by the panel at the time of their issuance as not adding significantly to the body of law. Opinions and orders so designated shall not be employed or cited as precedent. This rule does not preclude assertion of issues of claim preclusion, issue preclusion, judicial estoppel, law of the case or the like based on a decision of the court rendered in a nonprecedential opinion or order.

Re RULES OF the UNITED STATES COURT OF APPEALS FOR the TENTH CIRCUIT, ADOPTED NOVEMBER 18, 1986.

United States Court of Appeals,
Tenth Circuit.

Feb. 14, 1992.

ORDER

Before McKAY, Chief Judge, HOLLOWAY, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY and EBEL, Circuit Judges.

On November 18, 1986, the court adopted 10th Cir.R. 36.3 providing that "unpublished opinions and orders and judgments of this court have no precedential value and shall not be cited, or used by any other court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel." Circuit Judge Holloway (then Chief Judge) filed an unpublished dissent to that rule. Circuit Judges Barrett and Baldock joined in the dissent. The court is presently revising its rules. 10th Cir.R. 36.3 will not be revised, but will continue to include a reference to the dissent.

Accordingly, it is ordered that the dissent be published so that an appropriate citation thereto may appear in the revised rules.

DISSENT TO ADOPTION
OF 10TH CIR.R. 36.3

November 18, 1986

HOLLOWAY, Chief Judge, with whom BARRETT and BALDOCK, Circuit Judges, join, concurring and dissenting:

The revision of the Rules of the Tenth Circuit is highly commendable and it represents a monumental effort by several judges of the court and its staff. With appreciation, I join in the adoption of the Rules in all respects, except the provision

has power to review whether the government acted arbitrarily or in bad faith when it refused to move for downward departure pursuant to section 5K1.1.

in Rule 36.3 prohibiting the citation of unpublished opinions and orders and judgments, which is limited to citation for the purpose of demonstrating the law of the case, res judicata, or collateral estoppel.

The most important reasons for permitting citation of published precedents are just as cogent to me in the case of unpublished rulings. Each ruling, published or unpublished, involves the facts of a particular case and the application of law—to the case. Therefore all rulings of this court are precedents, like it or not, and we cannot consign any of them to oblivion by merely banning their citation. *See Jones v. Superintendent, Virginia State Farm*, 465 F.2d 1091, 1094 (4th Cir.1972) ("... any decision is by definition a precedent ..."). No matter how insignificant a prior ruling might appear to us, any litigant who can point to a prior decision of the court and demonstrate that he is entitled to prevail under it should be able to do so as a matter of essential justice and fundamental fairness. To deny a litigant this right may well have overtones of a constitutional infringement because of the arbitrariness, irrationality, and unequal treatment of the rule.[1]

Moreover, what will this court do if we know of a prior ruling which is controlling, although it was unpublished? We would clearly have the duty as a matter of basic justice to apply it, and in so doing logic would demand citing the earlier ruling. *See* Reynolds & Richman, *The Non-Precedential Precedent*, 78 Col.L.Rev. at 1196–99.

The opposing considerations that may be said to justify the no-citation rule do not persuade me. First, a common reason given for the rule is that not all litigants or counsel have equal access to unpublished rulings.[2] Arguably such irregularity gives an unfair advantage to federal and state governmental litigants and other large organizations which are frequent litigants with the means to maintain a filing system for such rulings. The argument fails, however, because we can implement some reasonable measures to adjust for such an imbalance, as we did earlier by similar measures. We can make the rulings, together with a simple index, available at our circuit library and can distribute the rulings to the clerks of the district courts, to the state bar associations, and to other depositories at law schools, without an undue burden.

1. The Supreme Court has had two opportunities to rule on the constitutionality of the Seventh Circuit's no-citation rule, *see* 7th Cir.R. 35, but has not done so. In *Do-Right Auto Sales v. United States Court of Appeals for the Seventh Circuit*, 429 U.S. 917, 97 S.Ct. 341, 50 L.Ed.2d 302 (1976), the Court, in a single sentence disposition, denied leave for the petitioners to file petitions for writs of mandamus and prohibition after the Seventh Circuit struck the petitioners' citation of an unpublished decision. In *Bowder v. Director, Department of Corrections of Illinois*, 434 U.S. 257, 98 S.Ct. 556, 54 L.Ed.2d 521 (1978), *rev'g.* 534 F.2d 331 (1976), the Court did not mention the no-citation question, although it had granted certiorari on the issue. *See* Reynolds & Richman, *The Non-Precedential Precedent—Limited Publication and No Citation Rules in the United States Courts of Appeals*, 78 Col.L.Rev. 1167, 1180 n. 74 (1978) (discussing *Do-Right* and *Bowder*).

In *Jones v. Superintendent, Virginia State Farm*, 465 F.2d at 1094, the Fourth Circuit expressed the view that its procedure for screening and disposing of cases by unpublished decisions "accords with due process" and the court's "duty as Article 3 judges." However, although the court said it would not treat its unpublished decisions as precedent and said it prefers they not be cited, it acknowledged that it *"cannot deny litigants and the bar the right to urge upon us what we have previously done."* 465 F.2d at 1094 (emphasis added).

In addition, at least one commentator has expressed concern over the due process and equal protection implications of no-citation rules adopted in the federal courts. Note, *Unreported Decisions in the United States Courts of Appeals*, 63 Cornell L.Rev. 128, 141–145 (1977).

2. *See, e.g., United States v. Joly*, 493 F.2d 672, 676 (2d Cir.1974); *Jones v. Superintendent, Virginia State Farm*, 465 F.2d 1091, 1094 (4th Cir. 1972).

Commentators have argued that the no-citation rule may work to increase rather than decrease the unfairness to the uninitiated lawyer. "If ... the sophisticated attorney uses arguments or language drawn from the unreported case without citing it, his uninitiated opponent is unlikely to learn of its existence.... In sum, if unreported opinions are cited, the uninitiated lawyer can remedy his deficiency; if they cannot be cited, he may not even know a deficiency exists." Reynolds & Richman, *The Non-Precedential Precedent*, 78 Col.L.Rev. at 1199.

Making the rulings available in such places, with a rudimentary index, will afford the public, and bar and the district judges reasonable access to our unpublished rulings.

Second, proponents of the no-citation rule argue that many of the court's rulings are not significant precedents and are in fact essentially decisions on factual issues only, or are merely applications of clearly established legal principles not meriting publication or citation. This suggestion is wholly unpersuasive to me. If this were truly the case, considerations of efficiency and economy would lead counsel to rely on published decisions, rather than dig for unpublished rulings, and we would not need a no-citation rule. *See* Kanner, *The Unpublished Appellate Opinion: Friend or Foe?*, 48 Cal.St.B.J. 386, 446 n. 75 ("[W]hy would any lawyer in his right mind go to the trouble of finding and citing unpublished opinions which merely reiterate rules and rely on precedents already larding the *published* reports") (emphasis in original). Furthermore, when we make our *ad hoc* determination that a ruling is not significant enough for publication, we are not in as informed a position as we might believe. Future developments may well reveal that the ruling is significant indeed. As we know, we are frequently changing our views on publication of decisions, deciding later to publish them on motions of the parties or on our own motion. The classifications are too fine in many instances and we cannot confidently say, in deciding whether to publish, that we are not working an injustice on parties in later cases.

Third, it may be suggested that in the rush of our business, we must prepare orders and judgments which are not written in the form of polished discourses which we wish to serve as citable opinions. This is the most untenable of the notions suggested for the no-citation rule. In light of our caseload, we are obviously driven to entering orders which are not the literary models that we would like to produce as opinions. Nevertheless, the basic purpose for stating reasons within an opinion or order should never be forgotten—that the decision must be able to withstand the scrutiny of analysis, against the record evidence, as to its soundness under the Constitution and the statutory and decisional law we must follow, and as to its consistency with our precedents. Our orders and judgments, like our published opinions, should never be shielded from searching examination.[3]

I respectfully dissent from the adoption of the provision in the Rules barring citation of our unpublished rulings.[4]

3. For a detailed discussion of how limited publication and citation negatively affect the quality of judicial decisionmaking, *see, e.g.*, Reynolds & Richman, *An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform*, 48 U.Chi.L.Rev. 573, 598–626 (1981); Reynolds & Richman, *The Non-Precedential Precedent*, 78 Col.L.Rev. 1167 at 1199–1204.

4. I am mindful of the fact that a majority of the Circuits have similar provisions barring citation of unpublished rulings. *See* D.C.Cir.R. 8(f); 1st Cir.R. 14, 2d Cir.R. 0.23; 5th Cir.R. 47.5.3 ("an unpublished opinion should normally be cited only when it (1) establishes the law of the case, (2) is relied upon as a basis for res judicata or collateral estoppel, or (3) involves related facts"), 7th Cir.R. 35(b)(2)(iv), 8th Cir.R. 8(i), 9th Cir.R. 21(c). Other Circuits permit such citation. *See* 4th Cir.I.O.P 36.5 (permitted but disfavored), 6th Cir.R. 24(b) (permitted but disfavored). The Third and Eleventh Circuits do not have specific rules governing the citation of unpublished authority, but the Third Circuit apparently permits it without restriction while the Eleventh apparently permits it if there is no better precedent available. *See* D. Stienstra, *Unpublished Dispositions: Problems of Access and Use in the Courts of Appeals* 51–52 (Federal Judicial Center 1985). Despite the policy in the majority of the Circuits, I remain convinced of the unsoundness of the no-citation rule.

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

FROM: Carol Ann Mooney, Reporter

DATE: October 5, 1992

SUBJECT: 91-28, updating Rule 27

At the December 1991 meeting Mr. Kopp suggested that Rule 27 needs updating. Judge Ripple asked Mr. Kopp to put forward a proposal. The attached memorandum was prepared by Mr. Kopp.

MEMORANDUM CONCERNING
FEDERAL RULE OF APPELLATE PROCEDURE 27

Federal Rule of Appellate Procedure 27 concerns the filing of motions in the courts of appeals. The Rule addresses matters that are common to all motions, such as the service and filing of motions, the right to file a response, determination of motions for procedural orders, and the power of a single judge to decide motions. Otherwise, the Rule does not set forth any requirements for specific types of motions that may be filed, such as motions for an extension of time or motions for summary affirmance.

Each of the circuit courts of appeals has supplemented FRAP 27 with its own rules concerning motions practice. See attached copies. Some of the circuits have adopted extensive rules that regulate motions practice in substantial detail. Other circuits have added little to FRAP 27, while other circuits regulate their motions practice by unwritten rules.

Given the extensive local supplementation of FRAP 27 and the fact that Rule 27 is obsolete on its face in certain respects, it is time to consider a rather thorough amendment of the Rule. For example, FRAP 27 contemplates that motions may be supported by the filing of "briefs". That is not the current practice in any of the circuits. Similarly, FRAP 27 is silent about many issues that concern the format of motions and responses, such as maximum page limits and the types of print and binding that are required. This memorandum will address each of the areas that FRAP 27 could cover, and propose amendments in several of those areas.

A. Form of Motions.

The circuit rules state a number of different requirements with respect to the form of motions. Some of those requirements also can be found in FRAP 27, although FRAP 27 uses different terminology.

1. In Writing.

The D.C. Circuit's rules state that "[e]xcept where otherwise specifically provided by the Federal Rules of Appellate Procedure or by these Rules, and except for motions made in open court when opposing counsel is present, every motion or petition shall be in writing and signed by counsel of record or by the movant if not represented by counsel." D.C. Cir. Rule 7(a)(1). See also 11th Cir. Rule 27(a)(1) ("Motions must be made in writing with proof of service on all parties").

FRAP 27 does not expressly state whether motions must be filed in writing. The Rule implies such a requirement, however, by stating that "[u]nless another form is elsewhere prescribed by these rules, an application for an order or other relief shall be made by filing a motion for such order or relief with proof of service on all other parties."

FRAP 27 should be amended to state explicitly whether, and if so when, motions must be made in writing. The D.C. Circuit's rule provides a sound model to achieve this end, except that the D.C. Circuit rule should be amended to require service on all parties.

The D.C. Circuit rule also is sound in specifying that motions may be made orally in open court when opposing counsel is present. The rules should allow courts the flexibility to hear oral motions under such circumstances, and nothing in the D.C. Circuit rule prevents the panel from requiring an oral motion to be reduced to writing if it desires a written motion. Thus, we recommend adopting the D.C. Circuit's practice on this point, as modified to require proof of service.

2. Page Limits.

FRAP 27 does not establish page limits for motions and responses. The D.C. Circuit's rules limit motions to 20 pages and responses to motions to 10 pages, "except by permission or direction of the Court." D.C. Cir. Rule 7(a)(2). The Federal Circuit and the Second Circuit limit motions and responses to 10 double-spaced pages. See Fed. Cir. Rule 27(b); 2d Cir. Rule 27(a)(2)(b).

It seems anomalous that the FRAP sets page limitations for briefs (see FRAP 28) but not motions. A uniform FRAP concerning this subject also would eliminate the confusion of having to look to circuit rules for guidance concerning page limitations. Ten pages is too strict a rule, particularly when one considers that some motions, such as motions for a stay, can require substantial discussion of a case's merits. Twenty pages appears reasonable to us. Twenty pages should be the limit for a response as well, for the same reasons that responsive briefs have the same page limits as opening briefs under FRAP 28.

3. Format.

FRAP 27(d) states that "[a]ll papers relating to motions may be typewritten." The rules of several circuits are more specific in certain ways. D.C. Circuit Rule 7(a)(3) is the most elaborate of the circuit rules concerning this subject. It provides:

> **(3) Format.** Motions and petitions, responses thereto, and replies to responses shall be typewritten in pica non-proportional type so as to produce a clear black image on a single side of white, 8 1/2 x 11 inch paper. These submissions shall be double spaced, each page beginning not less than 1 1/4 inches from the top, with side margins of not less than 1 1/2 inches on each side. They shall be fastened at the top-left corner and shall not be backed.

The other circuit rules concerning this subject are generally consistent with the D.C. Circuit's rule, but less comprehensive. 2d Cir. Rule 27(a)(2)(b); 4th Cir. IOP 27.1; 5th Cir. IOP 27.5; 8th Cir. Rule 28A(c); Fed. Cir. Rule 27(a)(2).[1]

The D.C. Circuit rule is sound. For example, we see no justification for requiring backing on a motion. Therefore, the Committee should consider adopting the D.C. Circuit rule. The other circuit rules that address these issues are generally consistent with the D.C. Circuit rule, and a uniform rule would standardize practice in this area.

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1 The D.C. Circuit is considering amending its Rule 7(a)(3) to delete the requirement that motions be typewritten "in pica nonproportional type" and to state that side margins must be not less than 1 inch (rather than 1 1/2 inch).

4. Proposed Order.

FRAP 27 states that a motion must "set forth the order or relief sought." This provision raises the question whether the moving party must provide a proposed order along with a motion, and the FRAP rule does not provide a clear answer.

The two circuits that have addressed this subject both have adopted rules which explicitly state that moving parties need not provide a proposed order. See 4th Cir. IOP 27.4; 9th Cir. Rule 27-1. This seems to be the correct position on this issue, since there is no apparent need for a proposed order in federal motions practice, and since such a requirement would be anomalous in that area of practice. The Committee should consider amending FRAP 27 to reflect this change.

The confusion in the existing Rule is created by the statement that the movant must "set forth the order or relief sought." Especially in the context of the sentence in which it is used in FRAP 27, the phrase "set forth" can be read to mean "provide," as in provide a proposed order. Thus, one suggestion would be merely to delete the words "set forth" and to make other conforming changes. As revised, the relevant phrase in the Rule would read: "The motion * * * shall state with particularity the grounds on which it is based and the relief sought."

5. Number of Copies.

FRAP 27(d) states that "[t]hree copies shall be filed with the original, but the court may require that additional copies be furnished."

Several of the circuits have adopted rules concerning the number of copies of motions and responses that must be filed. Two circuits require an original plus four copies. D.C. Cir. Rule 7(b); 9th Cir. Rule 27-1. Two other circuits require an original plus three copies for all motions to be decided by the court, and an original plus one copy for motions to be considered by a single judge or by the Clerk. 5th Cir. IOP 27.5; 11th Cir. Rule 27-1(a)(2). One circuit requires an original plus one copy for all motions to be decided by the clerk, and an original plus three copies of all other motions. 8th Cir. Rule 27A(b).

The Committee could rather easily standardize the practice among the circuits in this area by amending FRAP 27 to require an original plus four copies for all motions. Requiring four copies would meet the most demanding circuit rules as they now exist and would not substantially inconvenience the parties or the courts.

We recommend requiring an original plus four copies for all motions, including those that may be disposed of by the clerk or by a single judge. The clerk can easily dispose of extra copies of motions that are assigned for disposition by the clerk or by a single judge, and we believe the benefit of having a single rule outweighs the burden of having to file copies that turn out to be unnecessary. Our proposal also would aid in the disposition of motions which the movant believes should be assigned to the clerk or a single judge, but which the court assigns to a panel. Under our proposal, the panel would have the number of copies necessary to decide the motion in hand when the motion is filed.

6. Supporting Papers.

FRAP 27 states that "[t]he motion shall contain or be accompanied by any matter required by a specific provision of these rules governing such a motion," and that "[i]f a motion is supported by briefs, affidavits or other papers, they shall be served and filed with the motion."

The Second Circuit's rules add to Rule 27 by specifying that affidavits should contain factual information only; that exhibits attached should be only those necessary for the determination of the motion, and that the moving party shall include a copy of the lower court opinion or agency decision as a separately identified exhibit in all motions for substantive relief. See 2d Cir. Rule 27(a)(2).

Although the Second Circuit's additions seem self-evident, we recommend including them in FRAP 27 because there is no strong reason not to do so, and because they will help guide the parties in deciding which materials to provide in support of motions and how to prepare those documents. If the Committee decides to the contrary, however, it also should consider preempting the Second Circuit's additions in order to achieve uniformity.

7. Briefs.

FRAP 27 states that "[i]f a motion is supported by briefs, affidavits or other papers, they shall be served and filed with the motion." This language appears to contemplate that parties may file briefs to support motions. That is not the practice in any of the circuits, and it would be a very bad idea indeed. So,

the rule should be amended to delete the word briefs. Such an amendment would continue to allow the parties to submit briefs that were filed below as exhibits, since such filings could come under the term "other papers."

8. Miscellaneous Form Requirements.

Several of the circuits have adopted additional requirements of form for motions that do not appear to merit consideration for inclusion in FRAP. Some of the requirements are as follows:

- The D.C. Circuit requires the movant to state whether oral argument has been scheduled in the case and, if so, to identify when. D.C. Cir. Rule 7(a)(4).

- The Eleventh Circuit requires that a motion "contain a brief recitation of prior actions of this or any other court or judge to which the motion, or a substantially similar or related application for relief, has been made." 11th Cir. Rule 27-1(a)(1).

- Two Circuits require the submission of a certificate of interested persons. See 11th Cir. Rule 27(a)(1); Fed. Cir. Rule 27(a).

- Two Circuits require all motions to state whether all opposing counsel have been informed of the intended filing of the motion and whether opposing counsel consent to the motion. 4th Cir. Rule 27(b); Fed. Cir. Rule 27(a)(1).

- The Second Circuit requires the moving party to file a notice of motion form, in which the moving party must supply information about the motion and the case. See 2d Cir. Rule 27(a) & appendix (sample form).

Since these miscellaneous items are required by only a small minority of the circuits, we have recommended against including them in FRAP 27. If the Committee decides there is substantial need for one or more of the requirements, however, the Committee should consider including the requirement in FRAP 27 in order to standardize the practice among the circuits.

B. Response to a Motion.

FRAP 27 states that "[a]ny party may file a response in opposition to a motion other than one for a procedural order [for which see subdivision (b)] within 7 days after service of the motion, but motions authorized by Rules 8, 9, 18 and 41 may be acted upon after reasonable notice, and the court may shorten or extend the time for responding to any motion."

The D.C. Circuit's rules specify additionally that a response which seeks affirmative relief must so state, and that such a response may be filed in one document. D.C. Circuit Rule 7(d). The D.C. Circuit's addition seems reasonable, and the Committee should consider adopting it.

In the Fourth Circuit, parties need not file a response to a motion until requested to do so by the Court. 4th Cir. IOP 27.2. This practice is consistent with FRAP 27, since the Federal Rule permits, but does not require, a response to a motion. Thus, the Committee could consider adopting this clarification, or it could reasonably decide that FRAP 27 is clear enough as it exists.

C. Reply to a Response.

FRAP 27 does not state whether parties may file a reply to a response to a motion. The D.C. Circuit's rule concerning replies states:

> (e) Reply to Response. Any reply to a response to a motion or petition, unless the court enlarges or shortens the time, must be filed within three days after service of the response, except when the response includes a motion for affirmative relief; in the latter case, the reply may be joined in the same pleading with a response to the motion for affirmative relief and that pleading may be filed within seven days of service of the motion for affirmative relief.

> The caption of this pleading shall denote clearly that both the reply to the response and the response to the affirmative motion are included in that pleading. A reply shall not reargue propositions presented in the motion or petition, or present matters which are not strictly in reply to the response. After a party files a reply, no further pleading pertaining to the motion or petition may be filed by that party except upon leave of this Court.

D.C. Cir. Rule 7(e). The Fourth Circuit rules state that:

> Any party filing a motion may file a reply to the opposing party's response without seeking leave of Court. No standard time period has been set by the Court for filing a reply, but if counsel wishes to file a reply it should do so as soon as practicable after the filing of the response. The Court will not ordinarily await the filing of a reply before reviewing a motion and response.

4th Cir. IOP 27.3. The Federal Circuit requires the parties to file a motion for leave to file a reply. Fed. Cir. Prac. Note.

The Committee should amend FRAP 27 to provide for the filing of a reply to a motion, for the same reasons FRAP 28 provides for the filing of a reply brief. Moreover, such an amendment would reflect the reality that lawyers will inevitably file replies to responses to motions, whether specified in the rules or not. The D.C. Circuit's rule is comprehensive, and provides a sound model.

D. Preemption of Local Rules.

Given the multiplicity of local rules that now exist concerning the format of motions, the Committee should consider amending FRAP 27 by specifically providing that the Rule preempts local rules concerning the subject. Without such a provision, it will remain unclear whether the circuits are permitted to enforce format rules that are different than what FRAP 27 provides.

E. Oral Argument.

FRAP 27 does not state whether the parties have a right to oral argument with respect to motions. The seven circuits which have addressed this matter in their rules are unanimous that oral argument of motions will not be held unless the court orders it. 1st Cir. Rule 27; 3d Cir. Rule 11; 4th Cir. Rule 27(a); 5th Cir. Rule 27.3; 7th Cir. Rule 27; 9th Cir. Rule 27-6; 11th Cir. Rule 27(e). This is a useful clarification, and the Committee should consider amending FRAP 27 to so provide.

F. Clerk and Single Judge Motions.

FRAP 27(b) states that, pursuant to court rule, procedural orders may be disposed of by the clerk; FRAP 27(c) states that a single judge may dispose of any motion. A number of the circuits have elaborated on these rules by specifying the types of motions that may be disposed of by the clerk or by a single judge. There is no apparent need for a uniform federal rule in this area, and these matters seem to be the type that are best left to the local circuits.

Rule 27. Motions

(a) **Form and Content of Motions.**

(1) **In Writing.** Except where otherwise specifically provided by these Rules, and except for motions made in open court when opposing counsel is present, every motion shall be in writing and signed by counsel of record or by the movant if not represented by counsel, with proof of service on all parties.

(2) **Accompanying Documents.** The motion shall contain or be accompanied by any matter required by any relevant provision of these rules, and shall state with particularity the grounds upon which the motion is based and the relief sought. If a motion is supported by affidavits or other papers, they shall be served and filed with the motion.

(a) Affidavits should contain factual information only. Affidavits containing legal argument will be treated as memoranda of law.

(b) A copy of the lower court opinion or agency decision shall be included as a separately identified exhibit by a moving party seeking substantive relief.

(c) Exhibits attached should be only those necessary for the determination of the motion.

(3) **Page Limits.** Except by permission or direction of the court, motions and responses to motions shall not exceed twenty pages. A reply to a response shall not exceed seven pages.

(4) Format. Motions, responses thereto, and replies to responses shall be typewritten in pica non-proportional type so as to produce a clear black image on a single side of white, 8 1/2 by 11 inch paper. These submissions shall be double-spaced, each page beginning not less than 1 1/4 inches from the top, with side margins of not less than 1 1/4 inches on each side. They shall be fastened at the top-left corner and shall not be backed.

(5) Response. Any party may file a response in opposition to a motion other than one for a procedural order [for which see subdivision (b)] within 7 days after service of the motion, but the court may shorten or extend the time for responding to any motion, and motions authorized by Rules 8, 9, 18, and 41 may be acted upon after reasonable notice. When a party opposing a motion also seeks affirmative relief, that party shall submit with the response a motion so stating. The response and motion for affirmative relief may be included within the same pleading; the caption of that pleading, however, shall denote clearly that the response includes the motion.

(6) Reply to Response. The moving party may file a reply to a response. A reply must be filed within 3 days after service of the response, unless the court shortens or extends the time, and unless the response includes a motion for affirmative relief. In the latter case, the reply may be joined in the same pleading with a response to the motion for affirmative relief and that pleading may be filed within 7 days of service of the motion for affirmative relief. The caption of that pleading shall denote

clearly that both the reply to the response and the response to the affirmative motion are included in that pleading. A reply shall not reargue propositions presented in the motion or present matters which are not strictly in reply to the response.

(b) **Determination of Motions for Procedural Orders.** Notwithstanding the provisions of (a) of this Rule 27 as to motions generally, motions for procedural orders, including any motion under Rule 26(b), may be acted upon at any time, without awaiting a response thereto, and pursuant to rule or order of the court, motions for specified types of procedural orders may be disposed of by the clerk. Any party adversely affected by such action may, by application to the court, request reconsideration, vacation or modification of such action. A timely opposition to a motion that is filed after the motion is granted in whole or in part shall be treated as a motion to vacate the order granting the motion, unless the opposition is withdrawn.

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

(d) **Number of Copies.** Four copies of every motion, response, and reply shall be filed with the original. The number of copies may be increased or decreased by order but not by rule, practice, or internal operating procedure.

(e) **Oral Argument.** All motions will be decided without oral argument unless the court orders otherwise.

(f) **Preemption of Local Rules.** These requirements of this Rule concerning the form and content of motions, the filing of responses and replies, the number of copies that must be filed, and oral argument may not be supplemented, subtracted from, or altered by local rule, practice, or internal operating procedure. No circuit may require any additional filing or supporting paper (such as a notice of motion) beyond what this Rule requires.

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

FROM: Carol Ann Mooney, Reporter

DATE: October 5, 1992

SUBJECT: 92-3, conflict between Rule 4(b) and 18 U.S.C. § 3731

At the April 1992 meeting Judge Logan noted that there is a conflict between Rule 4(b) and 18 U.S.C. § 3731.

Section 3731 governs appeals by the United States in criminal cases. It provides in pertinent part:

> The appeal in all such cases shall be taken within thirty days after the decision, judgment or order has been rendered and shall be diligently prosecuted.

Rule 4(b) states:

> . . . When an appeal by the government is authorized by statute, the notice of appeal shall be filed in the district court within 30 days after the entry of (i) the judgment or order appealed from or (ii) a notice of appeal by any defendant.

The provision allowing the government to file a notice of appeal within 30 days after a notice of appeal is filed by a defendant extends the time for the government to file beyond the 30 day limit set by section 3731.

Amendment of the statute to conform to the rule may not be necessary. 28 U.S.C. § 2072(b) provides:

> Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

However, amendment could avoid confusion and needless litigation.

United States Court of Appeals
Eleventh Judicial Circuit

Gerald Bard Tjoflat
Chief Judge
Jacksonville, Florida 32201

December 18, 1991

The Honorable Kenneth F. Ripple
Chairman of Advisory Committee on Appellate Rules
208 U.S. Courthouse
204 South Main Street
South Bend, Indiana 46601

Dear Judge Ripple:

Re: Preliminary Comments to the Report on the Local Rules of Appellate Practice

Enclosed are preliminary comments to the Report on the Local Rules of Appellate Practice. As requested in your letter of April 19, 1991, I indicate my views regarding the Eleventh Circuit rules that have been identified as possibly inconsistent with the Federal Rules of Appellate Procedure, comment on aspects of the Report with which we disagree, and recommend subjects for further study. As you are probably aware, this Circuit last amended its Rules effective April 1, 1991, subsequent to the completion of the Local Rules Project Report. My comments also indicate whether a particular Rule was amended in April 1991, and my responses are based upon the Rule as it currently exists.

In addition to the attached comments, I offer two general observations. First, I agree that a Federal Rule of Appellate Procedure addressing a specific matter preempts a conflicting circuit rule, and this is specifically provided for in Fed.R.App.P. 47. Likewise, I believe that Rule 47 permits circuit rules to supplement (or clarify) aspects of practice when the federal rules are silent or when they address a subject generally. The benefit of such circuit rules is that they provide detailed guidance to counsel and parties which is sometimes absent from the Federal Rules of Appellate Procedure, and they allow circuit courts to tailor procedures to local needs and circumstances and to become laboratories for experimentation to discover more effective and efficient procedures.

Second, there is sometimes value in limited repetition or duplication in local rules of important concepts, both because this emphasizes critical elements and because it sometimes pulls diverse elements together into a complete and comprehensible whole. Internal Operating Procedures, in particular, sometimes perform these two roles for readers who are unfamiliar with procedures of appellate practice (either generally or specifically) within this circuit.

I appreciate this opportunity to offer preliminary comments on the Report.

Sincerely,

GBT/db

Enclosure

Preliminary Comments to the Report on the Local Rules of Appellate Procedure

1. I.O.P. 12 (accompanying Fed.R.App.P. 12):

We will amend the I.O.P. to more accurately reflect the Federal Rules of Appellate Procedure.

2. I.O.P. 26 (accompanying Fed.R.App.P. 26):

This I.O.P. describes for counsel the manner in which "good cause" may be demonstrated to the satisfaction of this Court. We believe that it provides more guidance than the Federal Rules of Appellate Procedure and is not a more stringent standard.

3. I.O.P. 28 (accompanying Fed.R.App.P. 28):

The Court has determined that the Clerk ought to be permitted to review papers tendered for filing and reject those that do not comply with either the Federal Rules of Appellate Procedure or local circuit rules. This is an important aspect of determining whether papers are in fact "required or permitted to be filed in a court of appeals" (Fed.R.App.P. 25(a)) and of whether the tendered paper constitutes a "proper paper" (Fed.R.App.P. 45(a)). We suggest that when a circuit by local rule defines the procedure to be employed by the Clerk when "improper" papers are tendered, and defines the conditions upon which the Clerk shall dismiss an appeal, such rules establish "such action as the court of appeals deems appropriate, which may include dismissal of the appeal." (Fed.R.App.P. 3(a)).

4. I.O.P. 29 (accompanying Fed.R.App.P. 29):

This I.O.P. was amended in April 1991. Our response to this item is explained in comments concerning I.O.P. 28, supra, at Item No. 3.

5. 11th Cir. Rule 9-1:

The Court has determined that the specified papers are essential portions of the record to permit determination of an application for release.

6. 11th Cir. R. 18-1:

The Circuit Rule identifies the "parts of the record" which this Court considers "relevant to the relief sought." We believe that it is more descriptive than the Federal Rules of Appellate Procedure.

7. 11th Cir. R. 21-1:

We agree that this subject should be reviewed by the Advisory Committee, and suggest that the Federal Rules of Appellate Procedure be amended to reflect the position adopted by nine of the circuit courts.

8. 11th Cir. R. 25-1:

The Circuit Rule reflects this circuit's case law (see, e.g., Palazzo v. Gulf Oil Corp., 764 F. 2d 1381 (11th Cir., 1985). It is important to the proper operation of the court and to an effective decision-making process.

9. 11th Cir. R. 28-2:

Subsection (e) was added in April 1991. The language in subsection (f) was not amended in April 1991. That subsection was, however, renumbered (it was formerly subsection (e)). Each requirement is important to the Court's functioning and is discussed separately below.

> 11th Cir. Rule 28-2(c): The Circuit Rule appears consistent with Fed.R.App.P 34(a) by including a statement regarding oral argument in the brief.
>
> 11th Cir. Rule 28-2(e): The Circuit Rule appears consistent with Fed.R.App.P. 28(i) by requiring that such a statement be included in a particular and identifiable section of the brief.
>
> 11th Cir. Rule 28-2(f): Pursuant to amendments to the Federal Rules which took effect on December 1, 1991, a "statement of subject matter and appellate jurisdiction" is required to be included in appellant's brief. Our Rule anticipated this change.

10. 11th Cir. Rule 30-1:

This Rule was amended in April 1991. Fed.R.App.P. 30(f) provides that "A court of appeals may by rule applicable to all cases...dispense with the requirement of an appendix and permit appeals to be heard on the original record, **with such copies of the record, or relevant portions thereof, as the court may require."** (emphasis added). Record excerpts consist of such relevant portions of the record.

11. 11th Cir. Rule 30-2:

This Rule was amended in April 1991. Our response to this item is explained in comments concerning 11th Cir. Rule 30-1, supra, at Item No. 10.

12. 11th Cir. Rule 31-1:

The Rule was renumbered in April 1991 and is now designated as 11th Cir. R. 31-2. We agree with the recommendation by the Local Rules Project to authorize local rulemaking on this subject.

13. 11th Cir. Rule 32-2:

Our response to this item is explained in comments concerning I.O.P. 28, supra, at Item No. 3.

14. 11th Cir. Rule 32-3:

Our Rule clarifies the interpretation of the Rule given by this Court.

15. 11th Cir. Rule 32-3:

Our response to this item is explained in comments concerning I.O.P. 28, supra, at Item No. 3.

16. 11th Cir. Rule 35-1:

This Rule was amended in April 1991. We agree with the recommendation that Fed.R.App.P. 35 should be amended to authorize local rulemaking on this subject.

17. 11th Cir. Rule 35-8:

This Rule was amended in April 1991. We agree with the Project's recommendation, and further suggest that Fed.R.App.P. 35 be amended to authorize local rulemaking on the subject of page limitations for suggestions of en banc rehearing (similar to that provided for in Fed.R.App.P. 40(b) with respect to petitions for rehearing).

18. 11th Cir. Rule 40-1:

We agree with the Project's conclusion that a lesser number of petitions are appropriate and that each circuit should be permitted to regulate this by local rule.

19. 11th Cir. Rule 42-1:

Our response to this item is explained in comments concerning I.O.P. 28, supra, at Item No. 3.

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

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EDWARD LEAVY
BANKRUPTCY RULES

Memorandum

TO: Kenneth F. Ripple, Circuit Judge

FROM: Mary P. Squiers

RE: Eleventh Circuit Preliminary Comments on the Local Rules of Appellate Practice

DATE: April 9, 1992

The Preliminary Comments from the Court of Appeals for the Eleventh Circuit is from Gerald Tjoflat, Chief Judge. He notes that the rules were amended effective April 1, 1991; he explains that his written comments indicate whether a particular rule was amended in April 1991 and are based on the rules as they currently read.

Numbering System

The local rules for the Eleventh Circuit are already numbered in conformance with the national rules.

Possible Local Rule Inconsistencies

Chief Judge Tjoflat indicates at the outset that, while he agrees that an Appellate Rule "addressing a specific matter preempts a conflicting circuit rule," he believes that a supplementation and clarification of the Appellate Rules by the circuit rules is permitted by Appellate Rule 47. Cover letter to Preliminary Comments, p. 1 (emphasis in original). He explains:

> The benefit of such circuit rules is that they provide detailed guidelines to counsel and parties which is sometimes absent from the Federal Rules of Appellate Procedure, and they allow circuit courts to tailor procedures to local needs and circumstances and to become laboratories for experimentation to discover more effective and efficient procedures. *Id.*

What follows is a brief discussion of issues set forth in the court's Preliminary Comments with which the Project disagrees, using the numbering of the court's Rules and Internal Operating Procedures (hereinafter IOPs).

IOP 26: This directive requires that papers be filed in a timely fashion "except upon submission of documentary evidence of extraordinary circumstances (*e.g.*, court dockets or calendars which establish insoluble conflicts, medical evidence of illness)." Prior to April 1991 this IOP read: "[The court requires timely filing] except ... where it is shown to be impossible to file the necessary document on time." Appellate Rule 26(b) states that a motion to enlarge time may be granted "for good cause shown." Fed. R. App. P. 26(b). It is the court's view that its standard provides more guidelines than the Appellate Rule and "is not a more stringent standard." Preliminary Comments. To the extent this standard is equivalent to the "good cause" standard in Rule 26(b), it simply repeats that Rule and is unnecessary. To the extent, however, that the directive applies a different standard, it is inconsistent with the Appellate Rule. *See also* discussion in Report on the Local Rules of Appellate Practice (hereinafter Report).

IOP 28: This directive permits the clerk to reject for filing non-conforming documents. The Preliminary Comments indicate that the Eleventh Circuit believes this directive defines the clerk's actions sufficiently such that it is an appropriate supplement to the Appellate Rules. It is the Project's position that rules that permit the clerk to return or refuse to file certain documents if the clerk determines that they fail to comply with the Federal Rules of Appellate Procedure and the court's respective local rules are inconsistent with the Appellate Rules. Report, pp. 83-84; *see e.g.*, Fed. R. App. P. 25(a), 45(a), 21(a), 38. In fact, Appellate Rule 45, outlining the duties of the clerk, does not give the clerk any authority to exercise discretion on any issue. *See* Fed. R. App. P. 45. This local directive still gives the clerk discretion to determine whether a document is in compliance with existing rules and is, accordingly, still in conflict with the Appellate Rules. The Project suggested that, because seven circuit courts in addition to the Eleventh Circuit, have such a directive, the Advisory Committee on Appellate Rules consider amending Appellate Rule 45 to state clearly that the clerk does not have this authority. *See* Report, p. 84.

Another portion of this directive was found by the Project to be inconsistent with a portion of Appellate Rule 28; this portion remains intact and was not discussed in the Preliminary Comments. It states that

> an attorney representing more than one party in an appeal may only file one principle brief ... which will include argument as to all of the parties represented by that attorney in that appeal.

This IOP conflicts with subsection (i) of Appellate Rule 28 which states that multiple appellants or appellees "either may join in a single brief ... or ... may adopt by reference any part of the brief of another." Fed. R. App. P. 28(i); Report, p. 48.

IOP 29: *See* discussion of IOP 28, *supra*, concerning the clerk's refusal to accept documents for filing.

Local Rule 9-1: Local Rule 9-1 requires that motions for release or for modification of the conditions of release include specific supporting documents. The Eleventh Circuit indicates that these papers are "essential portions of the record to permit determination of an application for release."

Preliminary Comments. It is the Project's position that this directive is inconsistent with both subsections (a) and (b) of Appellate Rule 9. *See* Report, pp. 16-17; Fed. R. App. P. 9(a) ("heard without the necessity of briefs ... upon such papers, affidavits, and portions of the record as the parties shall present."), 9(b) ("determined ... upon such papers, affidavits, and portions of the record as the parties shall present.").

Local Rule 18-1: This rule identifies the parts of the record, specifically a copy of the decision or order and any opinion or finding of the agency, that must be included with motions for stays or injunctions pending review. The Eleventh Circuit states that this rule is more descriptive than the Federal Rules of Appellate Procedure. The Project maintained that this directive was inconsistent with Appellate Rule 18 which sets forth the documents needed with the motion. Report, p. 29; Fed. R. App. P. 18. If, in fact, this directive only restates, albeit with different words, the content of Appellate Rule 18, then it is repetitious and should be rescinded.

Local Rule 32-2: *See* discussion of IOP 28, *supra*, concerning the clerk's refusal to accept documents for filing.

Local Rule 32-3: This rule contains a detailed discussion on the size of type and the number of lines per page allowed in briefs.. To the extent this directive only intends to repeat Appellate Rule 32(a), it is superfluous. To the extent, however, that it intends to change or add to the requirements of that Rule, it is inconsistent and should be rescinded. Report, p. 59.

See also discussion of IOP 28, *supra*, concerning the clerk's refusal to accept documents for filing.

Local Rule 42-1: *See* discussion of IOP 28, *supra*, concerning the clerk's refusal to accept documents for filing.

In addition, there were four other local rules of the Eleventh Circuit that the Project believed to be inconsistent with existing law. Local Rules 21-1, 31-1, 35-1, 40-1. Judge Tjoflat indicated that these rules still exist but that he favored amendment through the Advisory Committee process of the respective Appellate Rules to authorize local rules on these subjects.

Judge Tjoflat discussed Appellate Rule 35, respecting en banc determinations and agreed with the Project's recommendation that local rules be authorized concerning the particular number of copies of suggestions for rehearing that need be filed. He went on to suggest "that Fed. R. App. P. 35 be amended to authorize local rulemaking on the subject of page limitations for suggestions of en banc rehearing (similar to that provided for in Fed. R. App. P. 40(b) with respect to petitions for rehearing)."

Possible Local Rule Repetitions

Judge Tjoflat did not agree that repetition of Appellate Rules and other federal law in IOPs and local rules was problematic:

> [T]here is sometimes value in limited repetition or duplication in local rules of important concepts, both because this

> emphasizes critical elements and because it sometimes pulls diverse elements together into a complete and comprehensible whole. Internal Operating Procedures, in particular, sometimes perform these two roles for readers who are unfamiliar with procedures or appellate practice (either generally or specifically) within this circuit.
> Cover Letter to Preliminary Comments.

The Preliminary Comments from the Eleventh Circuit do not indicate that any attempt was made to reduce the number of repetitions in existing local rules. A quick tally by me of those rules and Internal Operating Procedures that were originally reviewed by the Project and that still exist indicate that there are approximately twenty Internal Operating Procedures that repeat, in some measure, existing rules and twenty-four local rules that also repeat existing law.

Local Rule 28-2 is a good example of this Circuit's view toward repetition. This local rule requires each brief to contain "a concise statement of the statutory or other basis of the jurisdiction of this court." As Judge Tjoflat explains:

> Pursuant to amendments to the Federal Rules which took effect on December 1, 1991, a 'statement of subject matter and appellate jurisdiction' is required to be included in appellant's brief. Our Rule anticipated this change.

New Provisions in the Current Rules

What follows is a very brief discussion of those rules and Internal Operating Procedures that were added to the local rules of the Eleventh Circuit in April 1991. These rules were not evaluated with the other rules of the court. The assessment is brief and intended, generally, to refer you to the place in the Report where similar rules were discussed.

Local Rule 5-2: This rule requires that a Certificate of Interested Persons and Corporate Disclosure Statement accompany the petition and answer when appealing pursuant to 28 U.S.C. §1292(b). This directive is appropriately the subject of local rulemaking. *See* Report, pp. 42-44.

Local Rule 5.1-1: This rule requires that a Certificate of Interested Persons and Corporate Disclosure Statement accompany the petition and answer when appealing pursuant to 28 U.S.C. §636(c)(5). This directive is appropriately the subject of local rulemaking. *See* Report, pp. 42-44.

Local Rule 15-2: This rule requires that each petition or application have attached a copy of the order sought to be enforced or reviewed. Appellate Rule 15 does not mandate that any additional documents be submitted with either the petition for review or the application for enforcement. *See* Fed. R. App. P. 15(a) and (b). There are requirements, however, in both subsections for identifying the order and its content:

> The petition shall specify the parties seeking review and shall designate the respondent and the order or part thereof to be reviewed....
>
> The application shall contain a concise statement of the proceedings in which the order was entered, the facts upon which venue is based, and the relief prayed.
> *Id.*

In addition, Form 3 in the Appendix of Forms, which is a sample petition for review, has no notation of any attachments. *Id.* at Appendix. A local rule mandating that particular additional documents be filed with the petition is inconsistent with Appellate Rule 15 in requiring more than that Rule contemplated and with other Appellate Rules which recognize that indicating an intention to appeal should be relatively easy. *See* Fed. R. App. P. 3(a), 4(a), 5, 5.1, 6(a).

Local Rule 15-3: Each of the two sentence in this local rule is inconsistent with existing law. The first sentence reads:

> an answer to an application for enforcement may be served on the petitioner and filed with the clerk within 21 days after the application is filed.

Appellate Rule 15(b) on this subject reads:

> Within 20 days after the application is filed, the respondent shall serve on the petitioner and file with the clerk an answer to the application.
> Fed. R. App. P. 15(b).

The second sentence of the local rule reads:

> A motion for leave to intervene or other notice of intervention authorized by applicable statute may be filed within 35 days of the date on which the petition for review is filed.

Appellate Rule 15(d) reads:

> A motion for leave to intervene or other notice of intervention authorized by an applicable statute shall be filed within 30 days of the date on which the petition for review is filed.
> Fed. R. App. P. 15(d).

Local Rule 17-2: This local rule provides that the agency may file the record

> within 42 days after service upon it of the petition ... unless a different time is provided by the statute authorizing review.

This directive is inconsistent with Appellate Rule 17 which reads, in relevant part:

> The agency shall file the record ... within 40 days after service ... unless a different time is provided by the statute authorizing review.
> Fed. R. App. P. 17(a).

Local Rule 24-2: This local rule requires that a motion for leave to proceed on appeal *in forma pauperis* be filed within 35 days after service of the notice of the district court denying leave to proceed. This is inconsistent with Appellate Rule 24 which mandates a 30 day appeal period. *See* Fed. R. App. P. 24(a).

IOP 25: The third paragraph of this Internal Operating Procedure, setting forth the hours and activities of the clerk's office, is appropriate as an Internal Operating Procedure. *See* Report, pp. 76-77.

IOP 26: The second paragraph of this Internal Operating Procedure, setting forth the procedure for filing in the event of inclement weather or other extraordinary circumstances which render the clerk's office inaccessible, is appropriate as an Internal Operating Procedure. *See* Report, pp. 76-77.

Local Rule 26.1-1: This directive describes the content of the Certificate of Interested Persons and Corporate Disclosure Statement. As such, it is appropriate as a local rule. *See* Report, pp. 42-44.

Local Rule 26.1-2: This directive describes when the Certificate of Interested Persons and Corporate Disclosure Statement should be filed. The time for filing is appropriate as a local rule.

The last sentence of this directive, however, is problematic. It states that the clerk

> is not authorized to file and submit to the court any brief ... which does not contain the certificate, but may receive and retain the papers unfiled pending supplementation of the papers with the required certificate.

This issue of whether the clerk is authorized to use discretion in refusing to file documents arose in other Eleventh Circuit rules *See* discussion under IOP 28, *supra*. It is the Project's position that the clerk does not have such discretion. *See* Report, pp. 83-84.

Local Rule 26.1-3: This directive explains the form of the certificate and its location in the brief. The first sentence of this rule repeats Appellate Rule 26.1, that the statement be included in front of the table of contents, and is unnecessary. The remainder of this rule explains that the persons and entities on the certificate must be listed alphabetically, in one column, on double spaced pages, on sequentially numbered pages, and with a particular heading at the top of each page. While this directive is probably permitted by Appellate Rule 26.1, the Advisory Committee Notes on that rule may suggest caution in making cumbersome rules:

> If a Court of Appeals wishes to require additional information, a court is free to do so by local rule. However, the committee

> requests the courts to consider the desirability of uniformity and the burden that varying circuit rules creates on attorneys who practice in many circuits.
> Fed.R.App.P. 26.1 Advisory Committee Notes.

IOP 28: Two portions of this Internal Operating Procedure are recent amendments. The first states that the adoption by reference of a party of a brief by another pursuant to Appellate Rule 28(i)

> does not fulfill the obligation of a party to file a separate brief which conforms to 11th Cir.R. 28-2, except upon written motion granted by the court.

The second provides that, in consolidated cases, the party who filed the first notice of appeal is considered the appellant unless the parties otherwise agree or the court orders otherwise. Both of these directives are appropriate as local rules.

IOP 30: This provision requires the use of indexing tabs on record excerpts. This seems to be an appropriate subject for a local rule. It is difficult to understand, however, why it is an Internal Operating Procedure. It certainly regulates attorney practice since they are the people charged with using the indexing tabs. Calling this an Internal Operating Procedure may cause an attorney to think it outlines an activity taken by the clerk's office.

Local Rule 31-1: This rule sets forth time limits for submission of briefs which are inconsistent with, or repetitious of, those in Appellate Rule 31: 1. Appellant shall file within 42 days after the date on which the record is filed (Fed. R. App. P. 31(a): 40 days); 2. Appellee shall file within 35 days after service of appellants brief (Fed. R. App. P. 31(a): 30 days); and, 3. Appellant may file a reply brief within 14 days after service of the brief (Fed. R. App. P. 31(a): 14 days "but, except for good cause shown, a reply brief must be filed at least 3 days before argument.") This rule should be rescinded.

Local Rule 36-2: This rule, which discusses the use of unpublished opinions, is appropriate as a local rule. *See* Report, pp. 66-68.

Local Rule 41-2: This rule, explaining that the order of dismissal will be used rather than a mandate when an appeal is dismissed for lack of jurisdiction, is appropriate as a local rule.

IOP 41: These directives, concerning the return of the original record and exhibits to the district court or agency with the mandate, is appropriate as an Internal Operating Procedure.

Local Rule 47-6: This local rule explains that "no employee of the court shall engage in the practice of law." Although this may be acceptable as a local directive, it seems more appropriate as an Internal Operating Procedure.

United States Court of Appeals
for the Third Circuit

Dolores K. Sloviter
Chief Judge

18614 United States Courthouse
Philadelphia, PA 19106

October 15, 1992

Honorable Kenneth F. Ripple
United States Court of Appeals
for the Seventh Circuit
208 United States Courthouse
204 South Main Street
South Bend, Indiana 46601

Dear Ken:

I regret that I am unable to attend the meeting of the Advisory Committee on Appellate Rules, October 20-21, in South Bend, Indiana. I must be in Philadelphia to prepare for the investiture of a new colleague later that week and that entails a number of administrative matters requiring my presence.

Although I am only a liaison member, I have some comments on the action items which I set forth herewith for whatever purpose they may serve:

Item 91-4: If the purpose of the changes is to insure that the parties have an opportunity to present equal amounts of material to the court, would there be any advantage in framing the rule to allow any style of type as long as no more than a specified number of words per page (including footnotes) are presented? This could eliminate much of the ongoing supervision of detail that the proposed amendments may entail.

Item 91-11: I recognize that I am a fish swimming upstream on this rule, particularly in light of the amendment of Civil Rule 5(e). It seems to me that Rule 5(e) as well as the proposed amendment of Rule 45 will impose a great burden on judges. Why should we not simply require that all material proffered for filing be date stamped and then delegate to the Clerk giving notice of the non-conformance to counsel and the parties and requiring conformance by a date certain?

Could we not then put on the parties the burden of filing a motion to compel the filing of non-conforming papers if the papers ultimately proffered fail to conform?

Item 91-13: Our court has been operating under the assumption that a stay of mandate is not a condition precedent to the filing for or the grant of a writ of certiorari, and therefore it need only be granted to forestall the effect of the decision when appropriate, such as an injunction or the payment of a judgment. Although we have no applicable local rule, we deny a motion for a stay of mandate on the form attached.

Item 91-22: For some reason our court's local rule on appeals of orders relating to release or detention, and release pending appeal is not included in your material. The current rule is local Rule 11(3) and I enclose a copy of proposed Rule 9, the newly numbered rule that is out for public comment.

As to the discussion items, I merely note with respect to Item 91-17, that our court does not preclude citation to our unpublished opinions, but they have no precedential value. That has not presented any problems.

I should be available by telephone if you have any question about our practice or procedure.

Sincerely,

Dolores K. Sloviter

DKS/dla
Enclosures

cc: Carol Ann Mooney
Judy Krivit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

It is O R D E R E D that the motion for stay of mandate is DENIED because no substantive right of the applicant will be affected by failure to grant the stay of mandate. This is without prejudice to the applicant's right to file a timely petition for writ of certiorari.

_____
Circuit Judge

Dated:

9.0 RELEASE IN CRIMINAL CASES

9.1 Appeals of Orders Relating to Release or Detention; Release Pending Appeal

(a) Appeals of Orders Relating Exclusively to Release or Detention: An appeal from an order granting or denying release from custody with or without bail or for detention of a defendant pending trial, sentencing, or appeal shall be by motion filed either concurrently with or promptly after filing a notice of appeal. The movant shall file with the motion, or no later than five (5) days thereafter, a memorandum setting forth the applicable facts and law and a copy of the reasons given by the district court for its order. The appellee may file a responsive memorandum within three (3) days after service of the movant's memorandum, unless the Court directs that the time shall be shortened or extended.

(b) Release Pending Appeal: Requests for release from custody or for detention of a defendant pending disposition of the appeal shall be by motion filed expeditiously in the case on appeal. The time periods set forth in 3rd Cir. LAR 9.1(a) are applicable to such motions.

Source: 1988 Court Rules 11.3, 11.4

Cross-references: FRAP 9, 27; 3rd Cir. LAR 27.0

Committee Comments: No substantive change is intended from prior Court Rule 11.3.

U.S. Department of Justice

By Fax

Washington, D.C. 20530

October 16, 1992

MEMORANDUM

TO: Members of the Advisory Committee on Appellate Rules

FROM: Robert E. Kopp REK
Director, Appellate Staff
Civil Division, Department of Justice

SUBJECT: Materials for October 20-21, 1992 Meeting

Attached please find copies of two letters that the Solicitor General sent to Judge Ripple and Dean Mooney yesterday afternoon by fax. The letters concern two items on the agenda for the Committee's October 20-21 meeting.

U.S. Department of Justice

Office of the Solicitor General

The Solicitor General *Washington, DC 20530*

October 15, 1992

Honorable Kenneth F. Ripple
208 Federal Building
204 South Main Street
South Bend, Indiana 46601

Re: Response to Request for Department of Justice's Views Concerning Fed. R. App. P. 4(b) and 18 U.S.C. § 3731

Dear Judge Ripple:

At the Appellate Rules Committee's April 1992 meeting, the Committee raised the question of whether there is a conflict between Fed. R. App. P. 4(b) and 18 U.S.C. § 3731 which requires that Rule 4(b) be amended.[1] Section 3731 requires the government to appeal within thirty days of a court's judgment in certain circumstances.[2] Rule 4(b), by contrast, permits the government to appeal not only within thirty days of the court's judgment or order, but also within thirty days of the filing of a notice of appeal by any defendant. Congress has also provided by statute that "laws in conflict with such rules shall be of no further

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[1] Section 3731 reads, in relevant part: "The appeal in all such cases shall be taken within thirty days after the decision, judgment or order has been rendered * * *."

Rule 4(b) provides that "[w]hen an appeal by the government is authorized by statute, the notice of appeal shall be filed in the district court within 30 days after the entry of (i) the judgment or order appealed from or (ii) a notice of appeal by any defendant."

[2] Section 3731 pertains to a ruling by a court in a criminal case (i) dismissing an indictment or information, (ii) granting a new trial after verdict or judgment as to any one or more counts, (iii) suppressing or excluding evidence, (iv) requiring the return of seized property prior to a verdict, (v) releasing a person charged with or convicted of an offense, or (vi) denying a motion for revocation of, or modification of the conditions of, a decision or order granting release.

force or effect," and that the Federal Rules shall not affect "any substantive right." 28 U.S.C § 2072(b).[3]

The Committee also discussed a possible amendment to Rule 4(b) that would limit the Rule to appeals from final judgments (as opposed to interlocutory orders).[4]

The Committee deferred consideration of these matters and requested the Department of Justice's views. In response to that request, I have consulted the Department of Justice's Criminal Division and other interested offices. For the reasons outlined below, my recommendation is that the Committee take no immediate action on this subject.

The Tenth Circuit recently addressed the relationship between 18 U.S.C. § 3731, Rule 4(b), and 28 U.S.C. § 2072(b) in United States v. Sasser, 971 F.2d 470 (10th Cir. Nos. 91-6066, 91-6111, July 13, 1992). The court ruled that it lacked jurisdiction over the government's cross-appeal of the district court's dismissal of one count of the indictment, where the notice of appeal was filed more than thirty days after the dismissal but within thirty days of the defendant's notice of appeal. Section 3731's thirty day notice of appeal period, the court held, is a mandatory prerequisite to the existence of the government's appeal authority. Relying on Fed. R. App. P. 1(b),[5] the court observed that "in case of a conflict between a jurisdictional statute and the Rules of Appellate Procedure, the statute controls." Slip op. at 6. I decided not to seek further review in Sasser.

The question of when and to what extent the Federal Rules of Appellate Procedure may preempt time limits prescribed by statute is a difficult and intricate problem, with good arguments to be made on both sides. The issue implicates the age-old debate over

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[3] 28 U.S.C. § 2072(b) reads: "Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect."

[4] The proposal would insert "after entry of judgment" following "When an appeal by the government." The revised rule would read: "When an appeal by the government after entry of judgment is authorized by statute, the notice of appeal shall be filed in the district court within 30 days after the entry of (i) the judgment or order appealed from or (ii) a notice of appeal by any defendant."

[5] Rule 1(b) provides: "These rules shall not be construed to extend or limit the jurisdiction of the courts of appeals as established by law."

when rules qualify as procedural and when they affect substantive rights and the subject matter jurisdiction of the courts. Compare 28 U.S.C. § 2072(a), 28 U.S.C. § 2072(b), and Fed. R. App. P. 1(b). In addition to Sasser, see generally Hanna v. Plumer, 380 U.S. 460 (1965); Stoot v. Fluor Drilling Servs., Inc., 851 F.2d 1514, 1517 (5th Cir. 1988) ("the time limits set by Fed.R.App.Pro. 4(a)(1) have superceded the periods fixed by [28 U.S.C.] § 2107").

Although we thus recognize that the relationship between section 3731, Rule 4(b), and 28 U.S.C. § 2072(b) is intricate, we recommend that the Committee not address the issue at the present time.

First, it is the general practice of the United States to file notices of appeal authorized by section 3731 within thirty days of the judgment or order, and not to rely upon the extended time frame offered by Rule 4(b). Consequently, the Sasser question will recur infrequently and only in the unusual case of an unintentional misstep by government counsel. Thus, there is little practical need for the Committee to address this issue.

Second, the Department of Justice believes that the Committee's deliberations in this area would be more fully informed if it awaits further percolation of this issue in the courts (assuming that the Sasser issue ever arises again).

If the Committee disagrees with our recommendation and decides to address the Sasser issue by rule, we suggest that the Committee follow one of two courses of action. First, the Committee could amend Rule 4(b) by adding ", unless a shorter time for appeal is set by the authorizing statute" after "* * * (ii) a notice of appeal by any defendant." Such language would expressly recognize section 3731's primacy, while retaining Rule 4(b)'s time limitations for those appeals where the statute is silent on the time in which to file an appeal (such as sentencing appeals, 18 U.S.C. § 3742).

Second, the Committee could leave the language of Rule 4(b) unchanged and just add a note to the commentary indicating that the matter has been litigated and alerting counsel to the Sasser decision.

Thank you for the opportunity to comment on this matter.

Sincerely,

KENNETH W. STARR
Solicitor General

U.S. Department of Justice

Office of the Solicitor General

The Solicitor General *Washington, DC 20530*

October 15, 1992

Professor Carol Ann Mooney
Notre Dame Law School
103-A Law School
South Bend, Indiana 46556

Dear Professor Mooney:

At the Committee's April 1992 meeting, Judge Ripple requested that, if the Department of Justice has knowledge of techniques used by the circuits to prevent inter-circuit conflicts and reflections upon the efficacy of those practices, we communicate them to you or be prepared to offer them at the October, 1992 meeting. See Letter of September 17, 1992 from Judge Ripple to Mr. Kopp (copy attached).

We are grateful for the opportunity to respond to Judge Ripple's request. As the following discussion will show, many of the circuits already have in place certain procedures that apply at various stages of the appeal process and that help prevent inter-circuit conflicts from being created unintentionally. Most of the circuits, however, do not have in place a formal procedure that applies at the final stage of the appeal process, that singles out as significant matters inter-circuit conflicts which may have been created intentionally, and that allows briefing by counsel concerning whether an inter-circuit conflict exists.

1. Procedures at the Briefing Stage.

We have identified several existing procedures at the briefing stage of a case that assist the circuits in preventing inter-circuit conflicts.

a. Federal Rule of Appellate Procedure 28(a)(4).

Rule 28 regulates the contents of appellate briefs. Rule 28(a)(4) provides that the argument section of the brief of the appellant "shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on." Rule 28(b) imposes the same requirement on the brief of the appellee.

Obviously, one way of forestalling unnecessary inter-circuit conflicts is to encourage the parties to identify contrary authority from other circuits in the briefs. Rule 28 helps achieve this end by requiring the parties to cite relevant authorities in the briefs.

b. Statement of Related Cases Requirement.

Several circuits have rules that require the parties to include a statement of related cases in their briefs. See D.C. Circuit Rule 11(a)(1)(C); 3d Cir. Rule 21(1)(A)(g); 9th Cir. Rule 28-2.6; 10th Cir. Rule 28.2(a); Fed. Cir. Rule 47.5.

The Third Circuit's rule requires the parties to disclose the existance of past or pending related cases in other circuits. The Third Circuit's rule states that counsel must disclose "any other case or proceeding which is in any way related, completed, pending, or about to be presented before this court or any other court or agency, state or federal." 3d Cir. Rule 21(1)(A)(g).[1]

The Third Circuit's rule may help prevent inter-circuit conflicts by focusing the panel's attention on conflicting cases in other circuits. On the other hand, good lawyers obviously identify inter-circuit conflicts in the body of their briefs, and provide text that explains the conflict. Moreover, the concept of what is a "related" case is vague, and we doubt that a "related case" requirement will be understood by the bar as a request for conflicting authorities from other circuits. Thus, requiring parties to identify related authority from other circuits in a statement of related cases probably does not reduce the number of inter-circuit conflicts significantly.

c. Federal Rule of Appellate Procedure 28(j).

FRAP 28(j) states that "[w]hen pertinent and significant authorities come to the attention of a party after the party's brief has been filed, or after oral argument but before decision, a party may promptly advise the clerk of the court, by letter, with a copy to all counsel, setting forth the citations."

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[1] D.C. Circuit Rule 11(a)(1)(C) requires the parties to reveal cases that involve "substantially the same parties" and the "same or similar issues." Ninth Circuit Rule 28-2.6 states that the parties must reveal "any known related case pending in this court." Tenth Circuit Rule 28.2(a) requires a "list of all prior or related appeals." Federal Circuit Rule 47.5 states that the parties must reveal "any pending case in this or any other court that will directly affect or be directly affected by this court's decision in the pending appeal."

Consequently, Rule 28(j) quite clearly is an important tool in helping to prevent inter-circuit conflicts, by bringing to the court's attention newly decided cases from other circuits relating to the issue at hand.

2. Procedures After the Briefing Stage.

Several circuits have certain rules that help prevent inter-circuit conflicts, and that apply after the briefing is completed before the panel.

a. Circulation of Panel Opinions.

An article by Professor Leo Levin points out one way that the existing rules of some circuits can help to prevent inter-circuit conflicts: by requiring circulation of panel opinions to the full court before publication. A. Leo Levin, Uniformity of Federal Law, The Federal Appellate Judiciary in the Twenty-First Century (Harrison & Wheeler, eds., 1989).

A survey of the published local rules in 28 U.S.C. reveals that three circuits currently have rules or internal operating procedures that require the general circulation of panel opinions to all members of the court before publication. See 3d Circuit IOP 5.3.4;[2] 4th Circuit IOP 36.4;[3] 6th Cir. IOP 22.3.[4] Some of

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[2] The Third Circuit IOP 5.3.4 provides as follows, in pertinent part:

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

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

(continued...)

the other circuits appear to follow somewhat similar procedures by informal, unpublished rule or practice. See "Mini" In Banc Proceedings: A Survey of Circuit Practices, 34 Clev. St. L. Rev. 530 (1986).

Two circuits do not formally require general circulation of panel opinions, but require circulation only if panel opinions create an inter-circuit conflict. See 5th Cir. Rule 47.5.3;[5] 7th Cir. Rule 40(f).[6]

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[3](...continued)
[3] Fourth Circuit IOP 36.2 states, in pertinent part:

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

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

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

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

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

> (f) Rehearing Sua Sponte Before Decision. A proposed opinion approved by a panel of this court adopting a position which would overrule a prior decision of this court or create a conflict between or among circuits shall not be published unless it is first circulated among the active members of this court and a majority of them do not vote to rehear in banc the issue of whether the position should be adopted. In the discretion of the panel, a proposed opinion which would establish a new rule or procedure may be similarly circulated before it is issued. When the position
>
> (continued...)

The Eleventh Circuit does not normally circulate opinions except that in special cases panel members may circulate proposed opinions. See 11th Cir. IOP to Rule 36-2.[7]

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

b. Rehearing in Banc.

Four circuits currently have operating procedures or rules that expressly make the existence of an inter-circuit conflict a ground for seeking rehearing in banc. See 4th Cir. IOP 40(c); 7th Cir. Rule 40(c); 9th Cir. Rule 35-1; D.C. Cir. Rule 14. See also 5th Cir. Rule 47, IOP -- Processing of Opinions, supra.

Also, Rule 35 implicitly suggests that the existence of an inter-circuit conflict can provide grounds for rehearing in banc. Rule 35 states, in part, that rehearing in banc is available when "the proceeding involves a question of exceptional importance." A party will frequently be able to characterize an issue about which the circuits are divided as one of "exceptional importance" within the meaning of this Rule.

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[6](...continued)
is adopted by the panel after compliance with this procedure, the opinion, when published, shall contain a footnote worded, depending on the circumstances, in substance as follows:

> This opinion has been circulated among all judges of this court in regular active service. (No judge favored, or a majority did not favor) a rehearing in banc on the question of (e.g., overruling Doe v. Roe.)

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

II. Evaluation of Existing Procedures to Prevent Inter-Circuit Conflicts.

A. Procedures at the Briefing Stage.

The procedures discussed above that apply at the briefing stage of a case help prevent the unintentional creation of inter-circuit conflicts by encouraging, or requiring, the parties to bring the existence of contrary precedent from other circuits to the panel's attention. None of those procedures, however, would prevent a panel from creating an inter-circuit conflict knowingly and where the full court would vote otherwise.

Moreover, the procedures that apply at the briefing stage are ineffective to prevent inter-circuit conflicts which become visible only after a panel has analyzed a problem and written an opinion. As we all know, a judicial opinion can give a case an entirely new twist. Similarly, a panel decision can shift the focus of a case entirely. In that circumstance, the parties' efforts to identify relevant precedents from outside the circuit in their briefs may be off-target.

B. Procedures After the Briefing Stage.

Circuit rules requiring the circulation of panel opinions prior to publication can help prevent inter-circuit conflicts by bringing such conflicts to the attention of the full court. Such rules would appear to have the greatest chance for success when, like the Seventh Circuit's rule, they require the panel to make a focused decision concerning when an inter-circuit conflict is being created, and do not submerge the opinions which are circulated to the non-panel judges because they create an inter-circuit conflict in the general circulation of large numbers of other opinions.

The principal shortcoming of the circulation procedure in preventing inter-circuit conflicts is that it does not involve briefing by counsel concerning the possible existence of such a conflict. For one reason or another, a panel may wrongly believe it has successfully distinguished precedents from another circuit that are cited by a party in the briefs. Similarly, a panel may wrongly believe that precedents from another circuit need not be addressed at all because they are not relevant. In either event, argument by a party can help to show that the panel's decision in fact creates a conflict. Obviously, a petition for rehearing in banc is the form in which the full court can receive briefing concerning the possible existence of an inter-circuit conflict.

The Department of Justice is currently in the process of conducting a study of the use of rehearing in banc by the courts of appeals as a method of preventing inter-circuit conflicts. We plan to complete our study in the near future, and to submit it at that time to the subcommittee that was appointed at the last meeting to look into this matter. (That subcommittee consists of Judge Logan, Judge Williams, and me.)

Thank you for the opportunity to respond to this matter.

Sincerely,

Kenneth W. Starr
Solicitor General

Enclosures

cc: Judge Ripple

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

September 17, 1992

Robert E. Kopp, Esquire
United States Department of Justice
Washington, D.C. 20530

Re: FRAP Items
92-13, Conflict between Rule 4(b) and 18 U.S.C. § 3731, and
92-4, in banc hearings and intercircuit conflicts

Dear Mr. Kopp:

At our April meeting, Judge Logan noted the conflicting language in Rule 4(b) and 18 U.S.C. § 3731 and suggested that the committee address the problem. I have placed that item on the agenda for our October meeting.

At the April meeting I asked you to obtain the Solicitor General's view concerning the extent, if any, of the problem caused by the conflicting language and the need for action. If you will be attending the meeting on behalf of the Solicitor General, I assume that you will be prepared to offer the Solicitor's viewpoint during the committee's discussion. If you will be unable to attend, I would appreciate it if you would send me a summary of the Solicitor's comments.

At the April meeting, the committee briefly discussed the Solicitor General's suggestion that intercircuit conflict serve as a ground for convening a circuit in banc. The committee expressed a desire to know what the circuits currently do to avoid intercircuit conflict. Because the Department of Justice has a uniquely national perspective, I requested that, if you have knowledge of different techniques used by the circuits to prevent intercircuit conflict and have reflections upon the efficacy of those practices, you either communicate them to Professor Mooney or be prepared to offer them as part of the committee's discussion at the October meeting.

Thank you for your assistance.

Warm regards,

Kenneth F. Ripple

KFR:tw

92-8

PUBLIC CITIZEN LITIGATION GROUP
SUITE 700
2000 P STREET N W
WASHINGTON, D C 20036
(202) 833-3000

July 17, 1992

Joseph Spaniol, Secretary
Standing Committee on Practice
& Procedure
Judicial Conference of the
United States
Suite 626, 1120 Vermont Avenue, N.W.
Washington, D.C. 20544

Re: Rule 38 Federal Rules of Appellate Procedure

Dear Mr. Spaniol:

I am writing to urge the Appellate Rules Committee to examine the operation of Rule 38, in a similar manner to that which the Civil Rules Committee did for Rule 11.

As you may know, Rule 38 is a rough analogue to Rule 11, with some substantial differences, both before and after the proposed amendments to Rule 11 that are now pending. Like Rule 11, Rule 38 was largely dormant until recent years, but the courts of appeals have become increasingly active in imposing not simply double costs, but attorneys' fees under that Rule. Several areas are of particular significance. First, the courts have not done a very good job of defining when an appeal is frivolous and hence subject to the rule. In most instances, the courts simply use other adjectives to describe frivolous and adopt a "I know it when I see it" test. Obviously, that approach is not helpful to litigants, nor is it possible to assure consistency within a court or among the courts of appeals under that approach.

Second, there is the issue of the relative responsibility of counsel and client for what are essentially serious misjudgments about the validity of legal theories. While there are a few appeals for which sanctions are imposed because they are taken for an improper purpose such as delay or harassment, most of the cases involve arguments that the courts find to be without any legal merit whatsoever. Assuming that the test can be made less subjective, the question remains as to whether clients, especially lay persons, should be required to pay attorneys' fees when it is their lawyers who are making the judgments about whether the appeal is viable. Although it may be sound policy to require the client to pay double costs, the imposition of attorneys' fees is quite a different matter, and yet many courts seem to automatically equate

the obligation of the lawyer and the client to pay fees in this circumstance. By contrast, the proposal to amend Rule 11 would preclude the client from being held responsible when it is the lawyer who has failed to make a reasonable inquiry into the law, which is similar to, but not identical to the test of frivolousness under Rule 38. In light of that proposal, the issue about client responsibility at least deserves reconsideration by the Appellate Rules Committee.

Our office has recently filed a Rule 38 cert. petition, a copy of which I am enclosing. The first question presented deals with the obligation to state reasons which, while it is not ordinarily a significant problem, was in this case. That issue is also specifically taken care of by the proposed Rule 11, which requires that where sanctions are awarded, the district court must explain the basis for doing so. The second question deals both with the necessity for standards for deciding frivolousness and the question of whether clients, as well as attorneys should be required to pay fees if an appeal is found to be frivolous. The petition is not an exhaustive treatment of any of these subjects, but may be of some use to the Committee.

Fortunately, our office has not had any cases in which Rule 38 motions have been made against us, but we are seeing increasing numbers of these cases. In light of the problems raised and substantially ameliorated under Rule 11 by the recent proposed amendment, it would seem an appropriate opportunity for the Appellate Rules Committee to take a look at Rule 38. If there is any further information that we can provide, please do not hesitate to contact me.

Sincerely,

Alan B. Morrison

ABM/ms
Enclosures

OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

T- 5/14/92

ROBERT E. KEETON
CHAIRMAN

JOSEPH F SPANIOL JR
SECRETARY

CHAIRMEN OF ADVISORY COMMITTEE
KENNETH F RIPPLE
APPELLATE RULES

SAM C POINTER, JR
CIVIL RULES

WILLIAM TERRELL HODGES
CRIMINAL RULES

EDWARD LEAVY
BANKRUPTCY RULES

May 14, 1992

To: Members of the Advisory Committee on the Federal Appellate Rules

Re: Item No. 92-2; Amendment permitting technical amendments without full procedures

Dear Colleagues:

Because of our work with the Style Committee's submission we did not get to this matter until late in the day. Many members of the Committee had left. Accordingly, may I request that you consider the matter and advise me of your views. I must report on the matter at the upcoming Standing Committee meeting.

I am attaching Professor Mooney's memorandum (Attachment A) and the drafts, prepared by the Style Committee, with which we worked at the meeting (Attachment B). In the brief discussion at the meeting, we focused on the Style Committee's "proposed appellate draft." Therefore, in this exchange, may I suggest we use this version as our "baseline." Please note that on line 5, the word "technical" was added during the meeting discussion.

May I share with you my own thinking on this matter. At our brief discussion at the meeting, I acquiesced in this "proposed appellate draft." Upon reflection, I have serious reservations and cannot endorse it. The Rules Enabling Act represents a delicate balance between congressional and judicial authority in the rule-making process. This proposed rule, which would have the force of law if approved, would produce an alteration in that balance. Although it purports to deal with only "technical" and "conforming" amendments, it requires quite an act of faith on the part of Congress to accept the proposition that all such technical or stylistic changes will not alter the meaning of the rules. Our recent experience with matters of "Style" demonstrates quite graphically that the line between "technical" matters and matters of consequence is indeed an indistinct one.

We must also remember that the alterations that legitimately would fall within the ambit of this rule are neither numerous nor frequent. Nor is speed in effecting the change often a factor. Indeed, many of these problems (spelling, grammar, cross-references) can be reduced by better "in-house" procedures before promulgation. Indeed, just recently, we pointed out to the Standing Committee that typographical errors often occur in the stages of transmittal after the drafts have been approved by the Standing Committee. We suggested that this problem could be solved by permitting the Advisory Committee Reporter to review the proofs for accuracy. This sort of tightening seems a great deal more effective than asking Congress to delegate additional authority.

Over my almost fifteen years with the rules process, I have come to appreciate the delicate partnership between Congress and the Judiciary in the rules-making area. I do not believe that the sound administration of the rules process requires that we risk upsetting that equilibrium.

May I have your views in this matter at your earliest convenience.

The best,

Kenneth F. Ripple

KFR:tw
Attachments

cc: Honorable Robert E. Keeton
Honorable Dolores K. Sloviter
Professor Carol Ann Mooney
Joseph F. Spaniol, Jr., Esquire

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

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EDWARD LEAVY
BANKRUPTCY RULES

June 3, 1992

The Honorable Robert E. Keeton
District Judge, United States District
Court, Massachusetts, Room 306
Chairman, Committee on Rules of
Practice and Procedure
John W. McCormack Post Office & Courthouse
Boston, Massachusetts 02109

Dear Bob:

I have your memorandum of May 27, 1992. In light of that memorandum and our earlier telephone conversation, it appears premature for the Advisory Committee on the Federal Appellate Rules to forward, in any formal manner, a proposed rule dealing with technical amendments to the rules.

As you will recall, at our April meeting, our discussion of the matter was pretermitted by the necessity of dealing with the belated suggestions of the Style Committee. Nevertheless, my colleagues and I have examined the matter by written exchange of views and I think you should know that, at this point, we are not of one mind on the advisability of such a rule. I think it is fair to say that there is a general reluctance to endorse a rule that would allow, or that would be perceived as allowing, substantive change by the Judicial Conference without the consent of the Supreme Court or the Congress. Some of the members would approve a modified version of the model suggested by the Standing Committee; others believe any short-cut would be imprudent.

The other subject covered in your memorandum of May 27 also demonstrates the need for further consideration by the Advisory Committee. The matter of technical amendments is apparently now considered part of a broader project dealing with substantive integration of the rules. The Standing Committee previously had tasked our Advisory Committee with forwarding a recommendation on numerical integration of the rules for the December 1992 Standing Committee Meeting. It now appears that the Standing Committee plans to address both substantive and numerical integration of the rules. I trust that, in due course, we shall receive a further elaboration of what this "substantive integration" might entail. Certainly, if the proposed "technical amendments" provision is to be used as a vehicle for "substantive integration" of all federal

court rules, that issue ought to be evaluated by the advisory committees.

I trust that, in due course, the advisory committees will be consulted on this matter and permitted to fulfill their responsibilities in what could certainly be a most significant alteration of the present rules structure. It is not clear from your memorandum how these committees will be integrated into the decision-making process. The subcommittee of liaison members is hardly an appropriate substitute for our normal decision-making processes.

I look forward to seeing you in Washington.

Warm regards,

Kenneth F. Ripple

cc: Advisory Committee on the
Federal Appellate Rules
Chief Judge Pratt
Chief Judge Sloviter
Judge Leavy
Chief Judge Pointer
Judge Hodges
Professor Mooney
Joseph E. Spaniol, Jr., Esquire

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
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May 27, 1992

MEMORANDUM TO THE MEMBERS OF THE STANDING COMMITTEE:

SUBJECT: Substantive and Numerical Integration of Federal Rules of Procedure

I have asked Judge Pratt to chair a new Subcommittee on Substantive and Numerical Integration of Federal Rules of Procedure. I am asking each of our Liaison Members to serve as a member of this Subcommittee (i.e., Judge Sloviter - Appellate, Judge Ellis - Bankruptcy, Judge Bertelsman - Civil, Mr. Wilson - Criminal, Mr. Perry - Evidence, and Professor Baker - Long Range Planning).

Two developments have led me to the decision to create this Subcommittee and ask it to proceed expeditiously to give us a preliminary report of its thinking on June 18, 1992 and its recommendations at the December 1992 meeting.

The first development is a tentative plan (to be considered at our June 1992 meeting) for development (by the Subcommittee on Style and the Advisory Committee on Civil Rules) of a recommendation to the Standing Committee in December 1992 regarding amendments of style for the entire set of Federal Rules of Civil Procedure. The Subcommittee on Style will be making its recommendations to the Advisory Committee on Civil Rules for their consideration at their November 1992 meeting. (I will invite discussion at our June meeting of coordinating this expedited consideration of the style of the Rules of Civil Procedure with consideration of the style of each of the other sets of rules if the Advisory Committees in Appellate, Criminal, and Bankruptcy are interested in such a plan.)

The second development is that our consultations about proposed amendments of provisions in the several separate sets of

rules on the subject of "Technical and Conforming Amendments" has underscored, for me at least and I understand for many others, the advantages of having a single rule on this subject, rather than four or five separate rules of identical (or even worse, disparate) text. We could better accomplish this substantive integration if we sent it out for public comment simultaneously with a proposal for numerical integration.

If you have a special interest or a view you wish considered by the new Subcommittee, I encourage you to call or write to Judge Pratt promptly.

Robert E. Keeton

OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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July 23, 1992

Honorable Dolores K. Sloviter
Chief Judge
United States Court of Appeals
for the Third Circuit
18614 United States Courthouse
Philadelphia, PA 19106

Dear Dolores:

I write to reply to your kind letter of July 13.

It is thoughtful of you to "keep me in the loop" with respect to the Standing Committee's Subcommittee on Substantive and Numerical Integration. It is indeed sad that the normal collegial working relationship between the Advisory Committee and the Standing Committee has been by-passed on this matter.

First, I agree that I am aware of no decision by the Standing Committee that either numerical or substantive integration is feasible or desirable. Numerical integration is, I certainly suspect, not an end in itself but simply a "segue" to substantive integration. The impact of substantive integration on the entire rules structure would be significant and ought to be undertaken only after the broadest consultation process within the rules committee structure.

Second, I am pleased that, at least for the present, the technical amendment issue has been divorced somewhat from the integration project. Only time will tell whether this is a true divorce or a temporary separation. As I noted at the meeting, any attempt to achieve rules integration under the guise of a technical amendment will bring well-deserved criticism from not only the bench and bar but also Congress.

Third, <u>if</u> I were forced to choose between the numerical integration plans appended to your letter, I suppose the letter prefix is the least intrusive. Please note that this is a personal opinion and ought not be considered a substitute for proper committee review and consultation.

It was good of you to write. I hope you are able to escape your duties long enough to enjoy the summer.

Warm regards,

Kenneth F. Ripple

KFR:tw

cc: Professor Carol Ann Mooney

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

After giving appropriate public notice and opportunity for comment, ~~E~~ each court of appeals by action of a majority of the circuit judges in regular active service may ~~from time to time~~ make and amend rules governing its practice ~~not in~~ - that are consistent with, but not duplicative of, ~~these~~ rules adopted under 28 U.S.C. § 2072. ~~In all cases not provided for by rule, the courts of appeals may regulate their practice in any manner not inconsistent with these rules.~~ All generally applicable directions to parties or their lawyers regarding practice before a court must be in local rules rather than internal operating procedures or standing orders. Any local rule that relates to a topic covered by the Federal Rules of Appellate Procedure must be numbered to correspond to the related federal rule. ~~Copies of all rules made by a court of appeals shall upon their promulgation be furnished to the Administrative Office of the United States Courts.~~ The clerk of each court of appeals shall send the Administrative Office of the United States Courts a copy of each local rule and internal operating procedure when it is promulgated or amended. In all matters not provided for by rule, a court of appeals may regulate its practice in any manner consistent with rules adopted under 28 U.S.C. § 2072 and under this rule.

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

After giving appropriate public notice and opportunity for comment, ~~E~~ each court of appeals by action of a majority of the circuit judges in regular active service may ~~from time to time~~ make and amend rules governing its practice ~~not in~~ - that are consistent with, but not repetitive of, these ~~rules~~ Federal Rules of Appellate Procedure. ~~In all cases not provided for by rule, the courts of appeals may regulate their practice in any manner not inconsistent with these rules.~~ All generally applicable directions to parties or their lawyers regarding practice before a court must be in local rules rather than internal operating procedures or standing orders. Any local rule that relates to a topic covered by the Federal Rules of Appellate Procedure must be numbered to correspond to the related federal rule. ~~Copies of all rules made by a court of appeals shall upon their promulgation be furnished to the Administrative Office of the United States Courts.~~ The clerk of each court of appeals must send the Administrative Office of the United States Courts a copy of each local rule and internal operating procedure when it is promulgated or amended. In all cases not provided for by rule, a court of appeals may regulate its practice in any manner not inconsistent with these federal rules.

Committee Note

The primary purpose of these amendments is to make local rules more accessible. The amendments make three basic changes. First, the rule mandates a uniform numbering system under which local rules are keyed to the national rule. For example, Rule 27 or these rules governs motions; if a court of appeals prescribes a rule governing motions, the court of appeals must number the rule in a manner that indicates that the local rule relates to motions, such as Circuit Rule 27 or Local Rule 27.1. If a local rule on a topic covered by the federal rules uses the same number, notice of the existence of the local rule and accessibility to it are improved. In addition, tying the number of a local rule to the corresponding national rule should eliminate the perceived need to repeat language from the national rules in the local rules.

Second, the rule also requires courts of appeals to delete from their local rules all language that merely repeats the national rules. Repeating the requirements of a national rule in a local rule obscures the local variation. Eliminating the repetition will leave only the local variation and the existence of a local rule will signal a special local requirement. In addition, the restriction prevents the interpretation difficulties that arise when there are minor variations in the wording of a national and a local rule.

Third, the rule requires a court of appeal to observe the distinction between a rule and an internal operating procedure. An internal operating procedure should not contain a directive to a lawyer or a party; an internal operating procedure should deal only with how a court conducts its internal business. Placing a practice oriented provision in the internal operating procedures may cause a practitioner, especially one from another circuit, to overlook the provision.

The opening phrase of the rule regarding publication and a period for comment before adoption of a rule simply reflects procedures mandates by the 1988 amendment of 28 U.S.C. § 2071.

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Oct. 15, 1992

Dear Carol:

Attached are materials relating to proposed amendments to Federal Rule of Evidence 412. The draft was prepared by Steve Saltzburg yesterday, based on discussions at the Criminal Rules Committee meeting held earlier this week in Seattle. Please note that the Committee has not yet seen the draft Committee Note. Judge Keeton asked that a copy be sent to the Appellate Rules committee for its information.

Please note that under similar amendments in the Violence Against Women Act, an amendment to existing Rule 412 would provide for an interlocutory appeal by the government or the victim. Our draft does not.

The current plan is to present this proposed amendment to the Standing Committee in December with a view toward an accelerated comment period. If you have any questions, please call.

Dave Schlueter

DRAFT

Rule 412. Victim's Past Sexual Behavior of Predisposition

(a) Evidence of past sexual behavior or predisposition of an alleged victim of sexual misconduct is not admissible in any civil or criminal proceeding except as provided in subdivision (b).

(b) Evidence of the past sexual behavior or predisposition of an alleged victim of sexual misconduct may be admitted under the following circumstances:

(1) evidence of specific instances of sexual behavior with persons other than the person whose sexual misconduct is alleged if offered to prove that another person was the source of semen or injury;

(2) evidence of specific instances of sexual behavior with the person whose sexual misconduct is alleged if offered to prove consent;

(3) evidence of specific instances of sexual behavior if offered under circumstances in which exclusion would violate the constitutional rights of a defendant in a criminal case or in a civil case would deprive the trier of fact of evidence which is essential to a fair and accurate determination of a claim or defense; or

(4) evidence of reputation or opinion evidence in a civil case in which exclusion would deprive the trier of fact of evidence which is essential to a fair and accurate determination of a claim or defense.

(c) Evidence covered by this rule may not be admitted

unless the party offering it files a motion under seal, not less than 15 days prior to trial or at such other time as the court may direct, seeking leave to offer the evidence at trial. The motion must describe with particularity the evidence and the purposes for which it is offered. The court shall permit any other party as well as the victim to be heard in camera on the motion and shall determine whether the evidence will be admitted, the conditions of admissibility and the form in which the evidence may be admitted. The court may permit a motion to be made under seal during trial for good cause shown. The motion and the record of any in camera proceeding must remain under seal during the course of all further proceedings both in the trial and appellate courts.

Advisory Committee's Note

The Advisory Committee proposes several changes in Rule 412 which are intended to diminish some of the confusion engendered by the rule in its current form and expand the protection afforded to all persons who claim to be victims of sexual misconduct. The expanded rule would exclude evidence of an alleged victim's sexual history in civil as well as criminal cases except in circumstances in which the probative value of the evidence is sufficiently great to outweigh the invasion of privacy and potential embarrassment which always is associated with public exposure of intimate details of sexual history.

(a) The amendment eliminates three parts of existing subdivision (a): the confusing introductory phrase,

"[n]otwithstanding any other provision of law;" the limitation on the rule to "a criminal case in which a person is accused of an offense under chapter 109A of title 18, United States Code;" and the absolute statement that "reputation or opinion evidence of the past sexual behavior of an alleged victim of such offense is not admissible." The Advisory Committee believes that these eliminations will promote clarity without reducing unnecessarily the protection afforded to alleged victims.

The introductory phrase was unclear because it contained no explicit reference to the other provisions of law that were intended to be overridden. The legislative history of the provision provided little guidance as to the purpose of the phrase. In eliminating it, the Advisory Committee intends that Rule 412 shall apply and govern in any case, civil or criminal, in which it is alleged that a person was the victim of sexual misconduct and a litigant offers evidence concerning the past sexual behavior or predisposition of the alleged victim. Rule 412 applies irrespective of whether the evidence concerning the alleged victim is ostensibly offered as substantive evidence or for impeachment purposes. Thus, evidence, which might otherwise be admissible under Rules 404 (b), 405, 607, 608, 609, or some other evidence rule, must be excluded if Rule 412 so requires and such evidence is concerns the past sexual behavior or predisposition of a person who is alleged to be the victim of sexual misconduct.

The reason for extending the rule to all criminal cases is obvious. If a defendant is charged with kidnapping, and evidence

criminal cases to which the rule applies unless the Constitution requires admission, the evidence relates to sexual behavior with persons other than the accused and is offered to show the source of semen or injury, or the evidence relates to sexual behavior with the accused and is offered to show consent. As amended, Rule 412 will be virtually unchanged in criminal cases, but will provide protection to any person alleged to be a victim of sexual misconduct regardless of the charge actually brought against an accused. The amended rule provides for the first time protection in civil cases and sets forth two categories of evidence that are admissible in civil but not criminal cases.

It should be noted that the amended rule provides that certain categories of evidence may be admitted, but does not require admission. In some cases, evidence offered under one of the subdivisions may be irrelevant and therefore excluded under Rule 402.

(b)(1). The exception for evidence of specific instances of sexual behavior with persons other than the person whose sexual misconduct is alleged is admissible if it is offered to prove that another person was the source of semen or injury. Although the language of the amended rule is slightly different from the language found in existing ((b)(2)(A), the difference is explicable by the extension of the rule to civil cases. Evidence offered for the specific purpose identified in this subdivision is likely to have high probative value, and the probative value is likely to be the same in civil and criminal cases where the evidence is

relevant.

(b)(2). The exception for evidence of specific instances of sexual behavior with the person whose sexual misconduct is alleged is admissible if offered to prove consent. Although the language of the amended rule is slightly different from the language found in existing ((b)(2)(B), the difference is explicable by the extension of the rule to civil cases. Evidence offered for the specific purpose identified in this subdivision is likely to have high probative value, and the probative value is likely to be the same in civil and criminal cases where the evidence is relevant.

(b)(3). Evidence may not be excluded if the result would be to deny a criminal defendant the protections afforded by the Constitution. Recognition of this basic principle is found in existing subdivision (b)(1), and is carried forward in subdivision (b)(3) of the amended rule. The treatment of criminal defendants remains unchanged. The United States Supreme Court has recognized that in various circumstances a defendant may have a right to introduce evidence otherwise precluded by an evidence rule under the Confrontation Clause, the Compulsory Process Clause or the Due Process Clause. See, e.g., Olden v. Kentucky, 488 U.S. 227 (1988) (defendant in rape case had right to inquire into alleged victim's cohabitation with another man to show bias).

It is not nearly as clear in civil cases as it is in criminal cases to what extent the Constitution provides protection to civil litigants against exclusion of evidence that arguably has sufficient probative value that exclusion would undermine

confidence in the accuracy of a judgment against the person whose evidence is excluded. The Advisory Committee concluded that exclusion of evidence that is essential to a fair determination of a claim or defense is undesirable and thus provided in subdivision (b)(3) of the amended rule that evidence otherwise excluded by the rule would be admissible when exclusion "would deprive the trier of fact of evidence which is essential to a fair and accurate determination of a claim or defense." This amendment provides a civil litigant with protection akin to that provided to a criminal defendant, but recognizes that some specific constitutional provisions may require admission of evidence in a criminal case that would not be admitted under the amended Rule 412.

(b)(4). This subdivision recognizes a limited class of civil cases in which exclusion of evidence of reputation or opinion would deprive the trier of fact of evidence which is essential to a fair and accurate determination of a claim or defense. An example is a diversity case in which a plaintiff alleges that a news story was defamatory and seeks damages for injury to reputation. It would be difficult in such a case to deny the defendant the opportunity to show that the plaintiff suffered no reputational injury.

(c). Amended subdivision (c) is more concise and understandable than the existing subdivision. The requirement of a motion 15 days before trial is continued in the amended rule, as is the provision that a late motion may be permitted for good cause shown. The amended rule requires that any motion be filed under seal and that it must remain under seal during the course of trial

provided adequate protection for all persons claiming to be the victims of sexual misconduct, and that it was inadvisable to continue to include a provision in the rule that has been confusing and that raises substantial constitutional issues.

L. RALPH MECHAM
DIRECTOR

JAMES E. MACKLIN, JR.
DEPUTY DIRECTOR

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
CHIEF, RULES COMMITTEE
SUPPORT OFFICE

July 8, 1992

MEMORANDUM TO KAREN KREMER, COUNSEL, LEGISLATIVE AND PUBLIC AFFAIRS OFFICE

SUBJECT: Status Report on Advisory Criminal Rule Committee's Action on Rule 412 of the Federal Rules of Evidence

I am writing to provide you with a status report on the actions of the Advisory Committee on Criminal Rules involving changes to the rules of evidence that are now under consideration by the Congress.

Rule 412 of the Federal Rules of Evidence

Subtitle E of S. 15, the Violence Against Women Act of 1991, would add two rules to the Federal Rules of Evidence similar to existing Rule 412 (commonly referred to as the rape-shield law). Rule 412 excludes the admission of evidence of a victim's past sexual behavior in a criminal case for sexual abuse offenses prosecuted under chapter 109A of title 18, United States Code. The proposed rules would expand the applicability of this exclusionary rule to other types of cases, including civil cases involving sexual misconduct and in criminal cases involving offenses not included under chapter 109A of title 18.

The Advisory Committee on Criminal Rules appointed a special subcommittee to review the legislative proposals at its May 1991 meeting. In October 1991 the committee considered a report of the subcommittee which raised several problems with the legislative proposal. The subcommittee was instructed to draft alternative language, which was reviewed by the advisory committee at its April 1992 meeting. The committee agreed in principle with the subcommittee's suggested draft and instructed it to continue refining the language in light of the comments and suggestions made at the meeting.

Problems with Existing Rule 412

The rule revisions proposed in S. 15 are patterned on the existing Rule 412, which applies only to sexual abuse criminal cases. Rule 412 was based on state models and has been criticized as confusing and overly-complex.

In cases other than those covered specifically by Rule 412, the admissibility of evidence of character is determined under Rule 404 and depends on whether the case is criminal or civil, and whether character is an essential element of a charge, claim, or defense. If evidence of character is admissible, Rule 405 specifies two methods of proving it: (1) reputation or opinion evidence; and (2) specific instances of conduct. Both, either, or neither method of proving character is allowed depending upon the type of case and a determination that evidence of character is admissible under Rule 404.

Rule 412 is particularly complicated, because it establishes a set of evidence standards in criminal sexual abuse cases different from the rules governing admission of character or reputation evidence that apply in all other cases. Understanding the appropriate standards under all the potential permutations created by the interplay of the different types of cases, the variety of claims and defenses, and the methods of proving character poses challenges both to laymen and attorneys.

In addition to the complexity caused by multiple standards, the language of Rule 412 has raised many interpretational problems. A thorough examination of Rule 412 is set forth in the Wright & Graham treatise on the Federal Rules of Evidence.[1] They have severely criticized several provisions of Rule 412 and supported their conclusions by copious caselaw citations.

For example, the authors note that the scope of the opening line of Rule 412, "Notwithstanding any other provision of law," is unclear. The authors have cited numerous cases in which the courts have wrestled with its meaning in determining whether it applies to other rules of evidence or to provisions of substantive law.[2] Another example pertains to the uncertainty created by the reference in Rule 412 to past sexual behavior. Courts have considered, for instance, whether a victim's

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[1] 23 C. Wright & K. Graham, Federal Practice and Procedure §§ 5381-5393 (1980).

[2] Id. at § 5383.

"disposition" or inclination towards sexual behavior falls under the definition of past sexual behavior.[3]

Other questions concern the Rule's reference to reputation and whether it is meant to cover general reputation or only reputation limited to past sexual conduct.[4] Rule 412 also contains a caveat for constitutional exceptions that has been troublesome in some cases.[5] The authors contend that the constitutional caveat has given the judges more, rather than less, discretion to admit sexual history under particular circumstances.

In sum, the existing language of Rule 412 is defective, and its ambiguities have caused significant litigation. It should not serve as a model for new rules.

Subcommittee's Proposal

The subcommittee of the advisory committee concluded that the evidence excluded in Rule 412 should be excluded in all civil and criminal cases. In lieu of a proposal to create an additional two new rules that could create needless confusion and uncertainty, the committee recommended that Rule 412 be clarified, simplified, and expanded to cover the admissibility of a victim's past sexual behavior in all civil and criminal cases.

The committee considered the subcommittee's proposal at its April 1992 meeting. Although the committee believed that the proposal was a definite improvement over the existing language and other proposals that were patterned on Rule 412, several questions and concerns were raised which needed further clarification and examination.

The subcommittee's proposed Rule 412, which was considered by the committee at its April meeting, is set forth below:

Rule 412. Victim's Past Sexual Behavior or Predisposition

(a) Evidence of a victim's past sexual behavior or predisposition is not admissible in any civil or criminal proceeding except as provided in subdivision (b).

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[3]Id. at § 5385.

[4]Id.

[5]Id. at § 5387.

(b) Evidence of a victim's past sexual behavior or predisposition may be admitted under the following circumstances:

(1) evidence of specific instances of sexual behavior with persons other than the person whose sexual misconduct is alleged if offered to prove that another person was the source of semen or injury;

(2) evidence of specific instances of sexual behavior with the person whose sexual misconduct is alleged if offered to prove consent;

(3) evidence of specific instances of sexual behavior if offered under circumstances in which exclusion would deny the person whose sexual misconduct is alleged a fair trial;

(4) evidence of reputation or opinion evidence when character is an element of a claim or defense.

(c) No evidence covered by this rule shall be admitted unless the party offering it files a motion under seal, not less than 15 days prior to trial or at such other time as the court may direct, seeking leave to offer the evidence at trial. The motion must describe with particularity the evidence and the purposes for which it is offered. The court shall permit any other party as well as the victim to be heard in camera on the motion and shall determine whether the evidence will be admitted, the conditions of admissibility and the form in which the evidence may be admitted. The court may permit a motion to be made under seal during trial if a party claims good cause for not making a pretrial motion, and the court may consider the motion if it finds good cause shown. The motion and the record of any in camera proceeding shall remain under seal during the course of all further proceedings both in the trial and appellate courts.

The subcommittee's proposal has several advantages over other proposals that are patterned on the existing language of Rule 412.

First, the subcommittee's proposal simplifies the rules and establishes one set of standards governing the admission of evidence of a victim's past sexual behavior. It also expands its applicability to all cases. It would not create separate standards of admissibility for civil cases and criminal cases which were not covered under Rule 412. Nor would it limit application in civil cases to only those in which a defendant is accused of sexual misconduct.

Second, the subcommittee's proposal rectifies many of the defects in Rule 412, which were described in the Wright & Graham

treatise. It would not perpetuate these problems. (The "notwithstanding any other provision of law" language is deleted, all evidence of a victim's past sexual behavior is excluded rather than reputation evidence, a fair trial requirement has been substituted for the constitutional caveat, a victim's past sexual behavior has been expanded to cover predisposition, and safeguards have been added requiring that a motion to determine relevancy be filed under seal and any proceeding on the motion be held in camera.)

Third, the subcommittee's proposal recognizes that in cases where character is an element of a crime, claim, or defense, evidence of reputation or opinion evidence may be admissible, e.g., proving character as part of defense in a libel action. In such cases, the evidence is clearly relevant as stated in the 1972 advisory committee notes to Rule 404. Proposals based on the existing language of Rule 412 fail to account for this possibility and would assuredly cause future litigation.

Fourth, the subcommittee's proposal would permit admission of evidence of specific instances of a victim's sexual behavior under only three very limited circumstances. Proposals based on Rule 412 appear to be less restrictive and would permit admission of this evidence in cases where the probative value outweighs the danger of unfair prejudice. This standard is similar to, but more limited, than the general standard of admissibility in Rule 403, which excludes the admission of relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice...."

Conclusions

Generally, the committee disfavors the proliferation of evidence rules, which have been kept to a minimum and have worked reasonably well. The committee recognizes, however, that the undertaking to revise and expand the rape-shield rule is worthwhile. Nonetheless, accomplishing the task poses very challenging and difficult draftsmanship problems. Patterning any new rule or rules on the language of the existing rule would be a mistake. It would increase, rather than clarify, the confusion in this area.

The committee believes that adherence to the rule-making process is very important. Under the formal rule-making process, any proposed amendment to the rules receives intensive and widespread scrutiny. Initial drafts are frequently revised and significantly improved after the committee has reviewed the comments and suggestions submitted by the bench, bar, and public. Although the process is time-consuming, it imposes a quality control that ensures a superior work-product.

Abiding by the established procedures is critical in this case because of the complexity of the problem and the potential mischief that may be caused by prematurely promulgating a rule of evidence that has not been subjected to the appropriate degree of scrutiny. Promulgating a flawed rule would be particularly unfortunate, since the Federal Rules of Evidence serve as models for state evidence codes.

John K. Rabiej

cc: Honorable Robert E. Keeton, Chairman, Committee on Rules of Practice and Procedure
Honorable William Terrell Hodges, Chairman, Advisory Committee on Criminal Rules
Professor David A. Schlueter, Reporter, Advisory Committee on Criminal Rules

102D CONGRESS
1ST SESSION

S. 15

To combat violence and crimes against women on the streets and in homes.

IN THE SENATE OF THE UNITED STATES

JANUARY 14 (legislative day, JANUARY 3), 1991

Mr. BIDEN (for himself, Mr. COHEN, Mr. DECONCINI, Mr. DODD, Mr. INOUYE, Mr. COATS, Mr. SIMON, Mr. LIEBERMAN, Mr. EXON, Mr. SARBANES, Mr. REID, Mr. HARKIN, Mr. BRYAN, Mr. AKAKA, Mr. RIEGLE, Mr. PELL, Mr. ADAMS, Mr. PACKWOOD, Mr. SHELBY, Mr. KERRY, Ms. MIKULSKI, Mr. LEVIN, Mr. CRANSTON, Mr. MCCONNELL, Mr. BOREN, and Mr. ROCKEFELLER) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To combat violence and crimes against women on the streets and in homes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Violence Against Women Act of 1991".

SEC. 2. TABLE OF CONTENTS.

(d) MAILS.—The Commission may use the United States mails in the same manner and under the same conditions as other departments and agencies of the United States.

SEC. 147. AUTHORIZATIONS OF APPROPRIATIONS.

There is authorized to be appropriated for fiscal year 1992, $500,000 to carry out the purposes of this subtitle.

SEC. 148. TERMINATION.

The Commission shall cease to exist 30 days after the date on which its final report is submitted under section 144. The President may extend the life of the Commission for a period of not to exceed one year.

Subtitle E—New Evidentiary Rules

SEC. 151. SEXUAL HISTORY IN ALL CRIMINAL CASES.

The Federal Rules of Evidence are amended by inserting after rule 412 the following:

"Rule 412A. Evidence of victim's past behavior in other criminal cases

"(a) REPUTATION AND OPINION EVIDENCE EXCLUDED.—Nothwithstanding any other provision of law, in a criminal case, other than a sex offense case governed by rule 412, reputation or opinion evidence of the past sexual behavior of an alleged victim is not admissible.

"(b) ADMISSIBILITY.—Notwithstanding any other provision of law, in a criminal case, other than a sex offense case governed by rule 412, evidence of an alleged victim's past

sexual behavior (other than reputation and opinion evidence) may be admissible if—

"(1) the evidence is admitted in accordance with the procedures specified in subdivision (c); and

"(2) the probative value of the evidence outweighs the danger of unfair prejudice.

"(c) PROCEDURES.—(1) If the defendant intends to offer evidence of specific instances of the alleged victim's past sexual behavior, the defendant shall make a written motion to offer such evidence not later than 15 days before the date on which the trial in which such evidence is to be offered is scheduled to begin, except that the court may allow the motion to be made at a later date, including during trial, if the court determines either that the evidence is newly discovered and could not have been obtained earlier through the exercise of due diligence or that the issue to which such evidence relates has newly arisen in the case. Any motion made under this paragraph shall be served on all other parties and on the alleged victim.

"(2) The motion described in paragraph (1) shall be accompanied by a written offer of proof. If necessary, the court shall order a hearing in chambers to determine if such evidence is admissible. At such hearing, the parties may call witnesses, including the alleged victim and offer relevant evidence. Notwithstanding subdivision (b) of rule 104, if the rel-

evancy of the evidence which the defendant seeks to offer in the trial depends upon the fulfillment of a condition of fact, the court, at the hearing in chambers or at a subsequent hearing in chambers scheduled for such purpose, shall accept evidence on the issue of whether such condition of fact is fulfilled and shall determine such issue.

"(3) If the court determines on the basis of the hearing described in paragraph (2) that the evidence that the defendant seeks to offer is relevant and that the probative value of such evidence outweighs the danger of unfair prejudice such evidence shall be admissible in the trial to the extent an order made by the court specifies the evidence which may be offered and areas with respect to which the alleged victim may be examined or cross-examined. In its order, the court should consider (A) the chain of reasoning leading to its finding of relevance, and (B) why the probative value of the evidence outweighs the danger of unfair prejudice given the potential of the evidence to humiliate and embarrass the alleged victim and to result in unfair or biased jury inferences.".

SEC. 152. SEXUAL HISTORY IN CIVIL CASES.

The Federal Rules of Evidence, as amended by section 151 of this Act, are amended by adding after rule 412A the following:

"**Rule 412B. Evidence of past sexual behavior in civil cases**

"(a) REPUTATION AND OPINION EVIDENCE EXCLUDED.—Notwithstanding any other provision of law, in a civil case in which a defendant is accused of actionable sexual misconduct, as defined in subdivision (d), reputation or opinion evidence of the plaintiff's past sexual behavior is not admissible.

"(b) ADMISSIBLE EVIDENCE.—Notwithstanding any other provision of law, in a civil case in which a defendant is accused of actionable sexual misconduct, as defined in subdivision (d), evidence of a plaintiff's past sexual behavior other than reputation or opinion evidence may be admissible if—

"(1) admitted in accordance with the procedures specified in subdivision (c); and

"(2) the probative value of such evidence outweighs the danger of unfair prejudice.

"(c) PROCEDURES.—(1) If the defendant intends to offer evidence of specific instances of the plaintiff's past sexual behavior, the defendant shall make a written motion to offer such evidence not later than 15 days before the date on which the trial in which such evidence is to be offered is scheduled to begin, except that the court may allow the motion to be made at a later date, including during trial, if the court determines either that the evidence is newly discovered and could not have been obtained earlier through the

[redacted]cise of due diligence or that the issue to which such evi-
[redacted]ence relates has newly arisen in the case. Any motion made
[redacted] under this paragraph shall be served on all other parties and
on the plaintiff.

"(2) The motion described in paragraph (1) shall be accompanied by a written offer of proof. If necessary, the court shall order a hearing in chambers to determine if such evidence is admissible. At such hearing, the parties may call witnesses, including the plaintiff and offer relevant evidence. Notwithstanding subdivision (b) of rule 104, if the relevancy of the evidence which the defendant seeks to offer in the trial depends upon the fulfillment of a condition of fact, the court, at the hearing in chambers or at a subsequent hearing in chambers scheduled for such purpose, shall accept evidence on the issue of whether such condition of fact is fulfilled and shall determine such issue.

"(3) If the court determines on the basis of the hearing described in paragraph (2) that the evidence that the defendant seeks to offer is relevant and that the probative value of such evidence outweighs the danger of unfair prejudice, such evidence shall be admissible in the trial to the extent an order made by the court specifies evidence which may be offered and areas with respect to which the plaintiff may be examined or cross-examined. In its order, the court should consider (A) the chain of reasoning leading to its finding of rel-

evance, and (B) why the probative value of the evidence outweighs the danger of unfair prejudice given the potential of the evidence to humiliate and embarrass the alleged victim and to result in unfair or biased jury inferences.

"(d) DEFINITIONS.—For purposes of this rule, a case involving a claim of actionable sexual misconduct, includes, but is not limited to, sex harassment or discrimination claims brought pursuant to title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000(e)) and gender bias claims brought pursuant to title III of the Violence Against Women Act of 1991.".

SEC. 153. AMENDMENTS TO RAPE SHIELD LAW.

Rule 412 of the Federal Rules of Evidence is amended—

(1) by adding at the end thereof the following:

"(e) INTERLOCUTORY APPEAL.—Notwithstanding any other provision of law, any evidentiary rulings made pursuant to this rule are subject to interlocutory appeal by the government or by the alleged victim.

"(f) RULE OF RELEVANCE AND PRIVILEGE.— If the prosecution seeks to offer evidence of prior sexual history, the provisions of this rule may be waived by the alleged victim."; and

(2) by adding at the end of subdivision (c)(3) the following: "In its order, the court should consider (A) the chain of reasoning leading to its finding of rel-

evance; and (B) why the probative value of the evidence outweighs the danger of unfair prejudice given the potential of the evidence to humiliate and embarrass the alleged victim and to result in unfair or biased jury inferences.".

SEC. 154. EVIDENCE OF CLOTHING.

The Federal Rules of Evidence are amended by adding after rule 412 the following:

"Rule 413. Evidence of victim's clothing as inciting violence

"Notwithstanding any other provision of law, in a criminal case in which a person is accused of an offense under chapter 109A of title 18, United States Code, evidence of an alleged victim's clothing is not admissible to show that the alleged victim incited or invited the offense charged.".

Subtitle F—Assistance to Victims of Sexual Assault

SEC. 161. EDUCATION AND PREVENTION GRANTS TO REDUCE SEXUAL ASSAULTS AGAINST WOMEN.

Part A of title XIX of the Public Health and Health Services Act (42 U.S.C. 300w et seq.) is amended as follows:

(1) by adding at the end thereof the following new section:

RULE 49. Technical Amendments

The Judicial Conference of the United States may amend these rules or the explanatory notes to correct errors in grammar, spelling, cross-references, or typography, and to make other similar technical changes of form or style.

Style Committee Draft Considered at Last Meeting

RULE 49. Technical and Conforming Amendments

The Judicial Conference of the United States may amend these rules to correct errors or inconsistencies in grammar, spelling, cross-references, typography, or style, to make changes essential to conforming these rules with statutory amendments, or to make other similar technical or conforming changes.