AGENDA
ADVISORY COMMITTEE ON APPELLATE RULES
MEETING - APRIL 15 & 16, 1996

I. Approval of Minutes of October 1995 Meeting

II. ACTION ITEMS

A. Review of comments re: Rules published September 1995

1. Rule 26.1

2. Rule 29

3. Rule 35

4. Rule 41

B. Item 96-1, proposed amendment to Form 4

III. DISCUSSION ITEMS

A. Restylized Rules

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DRAFT

MINUTES OF THE MEETING OF THE ADVISORY COMMITTEE ON APPELLATE RULES OCTOBER 19, 20, & 21, 1995

Judge James K. Logan called the meeting to order on October 19, 1995, at 8:30 a.m. in the Judicial Conference Center of the Thurgood Marshall Federal Judiciary Building in Washington, D.C. In addition to Judge Logan, the Advisory Committee Chair, the following committee members were present: Judge Will L. Garwood, Judge Alex Kozinski, Mr. Michael Meehan, Mr. Luther Munford, Mr. John Charles Thomas, and Judge Stephen Williams. Mr. Robert Kopp attended the meeting on behalf of Solicitor General Days. Judge Alicemarie Stotler, the Chair of the Standing Rules Committee, and Judge Frank Easterbrook, the liaison member from the Standing Committee, were both present. Mr. Patrick Fisher, the Clerk for the Tenth Circuit attended on behalf of the clerks. Mr. George Pratt, a member of the Standing Committee's subcommittee on style, and Mr. Bryan Garner and Mr. Joseph Spaniol, consultants to the Standing Committee were in attendance. Mr. John Rabiej and Mr. Mark Shapiro, both of the Rules Committee Support Office, were present. Chief Justice Pascal Calogero, a member of the Advisory Committee; Ms. Judith McKenna, of the Federal Judicial Center; and Professor Dan Coquillette, the Reporter for the Standing Committee, joined the meeting later.

Judge Logan began by introducing Judge Frank Easterbrook and Judge George Pratt. Judge Easterbrook is a United States Circuit Judge for the Seventh Circuit and the liaison from the Standing Committee to the Advisory Committee. Judge Pratt recently resigned as a United States Circuit Judge for the Second Circuit. He was a member of the Standing Committee and of its subcommittee on style. Because he had been an integral member of the team that initially worked on the restyling of the appellate rules, he attended the meeting to aid in discussion of the rules under consideration. Judge Logan welcomed Judge Easterbrook and Judge Pratt.

The minutes of the April 1995 meeting were approved as submitted.

Judge Logan announced that discussion of the self-study prepared by the Long Range Planning Subcommittee of the Standing Committee would be discussed the next morning. Judge Stotler distributed a questionnaire about the self-study to the members of the Advisory Committee. She requested that the members complete the questionnaire by the next day so that it might serve as the basis for the discussion.

I. Liaisons from the Advisory Committee to the Circuits

Judge Logan noted that the 1987 Judicial Conference Committee Procedures require that each judicial conference committee appoint a liaison for each circuit so that there is someone to whom concerns can be addressed. Chief Judge Gilbert Merritt, Chair of the Executive Committee of the Judicial Conference of the United States, had recently written to the chair of each judicial conference committee requesting that the liaison members be designated. Judge Logan assigned the following members of the Advisory Committee to act as liaisons to the circuits:

Judge Garwood - 3rd, 5th, and 6th circuits;
Judge Kozinski - 7th, 8th, and 9th circuits;
Judge Logan - 1st, 2nd, 10th, and 11th circuits; and
Judge Williams - 4th, District of Columbia, and Federal circuits.

II. Style Project

The committee discussion turned next to the restyled rules. Most of the discussion for the remainder of the following two and a half days focused upon specific word changes in the entire set of rules. Whenever the committee believed that a word choice had substantive consequences, it requested that the choice be discussed in the Committee Notes that will accompany the rules. These minutes will not reiterate the discussions that have been incorporated in the Committee Notes or attempt to recount the detailed grammar and word-choice discussions that occupied most of the meeting time.

In attempting to improve the language of the rules, existing ambiguities were unmasked and questions about the meaning of rules arose. In order to complete a new draft, the Advisory Committee ordinarily had to resolve an ambiguity by choosing one of the competing interpretations. Those choices are discussed in the Committee Notes. Some of the questions about the operation of the rules were sufficiently complex that the Advisory Committee decided that it was unnecessary to resolve them as part of this project, but requested that the questions be added to the committee's table of agenda items for future consideration. In addition, review of the rules gave rise to new ideas for substantively improving them. These ideas were also deferred for future consideration.

The committee asked that the following items be added to the agenda for future consideration:

A. Rule 3(d) requires the district clerk to serve a copy of a notice of appeal on all other parties. Similarly, Rule 15(c) generally requires the circuit

clerk to serve a copy of a petition for review of an agency decision on each respondent. The Advisory Committee will discuss amending both rules to require that the appellant, or petitioner serve the copies rather than the clerk.

B. Rule 4(a)(5) permits a court to extend the time to file a notice of appeal if a party files a motion for an extension within 30 days after expiration of the time prescribed for filing by Rule 4(a). The rule requires the party to show excusable neglect or good cause. Some courts have taken the position that a "good cause" extension is not available after expiration of the original appeal period. A member of the committee wants to discuss whether a showing of "good cause" should be sufficient when the motion for extension is filed after expiration of the original time to file a notice of appeal.

C. Rule 4(a)(7) says that a judgment or order is entered when it is entered in compliance with Rules 58 and 79(a) of the civil rules.

- Rule 58 requires that "[e]very judgment shall be set forth on a separate document" and is "effective only when so set forth. . . ."
- Rule 79(a) requires the district clerk to keep a docket. All "orders, verdicts, and judgments shall be entered chronologically in the civil docket on the folio assigned to the action . . . These entries shall be brief but shall show the . . . substance of each order or judgment . . . . The entry of an order or judgment shall show the date the entry is made. . . ."

Can Rule 4(a)(7), in conjunction with Civil Rules 58 and 79(a), be read to repeal the collateral order doctrine?

D. The time for preparing a transcript and the record on appeal derive from the date of filing the notice of appeal. Under Rule 5 (dealing with interlocutory appeals under § 1292(b)) and Rule 5.1 (dealing with discretionary appeals after an appeal as of right to a district court from a decision entered upon direction of a magistrate judge) no notice of appeal is filed. Should Rules 5 and 5.1 be amended to provide that the time for ordering the transcript, etc., runs from the date of entry of the order granting permission to appeal?

E. Rule 4(a)(4) has been amended to preserve an appeal that is filed before disposition of one of the posttrial tolling motions. In contrast a petition for review of an agency action that is filed before the agency disposes of a petition for reconsideration, rehearing, or reopening is still treated, in some circuits, as premature and null. The committee will consider whether Rule 15 should be amended to provide that a petition for judicial review of agency action should be held in abeyance until resolution of the

administrative motion, at which time the petition would ripen into a valid petition.

After adjourning Thursday evening at 5:45, the meeting reconvened Friday morning, October 20, at 8:30 a.m.

III. Self-Study

Judge Logan turned the floor over to Judge Stotler for discussion of the self-study. She explained that the questionnaire she had distributed the preceding day contained the 18 recommendations made in the report of the self-study subcommittee. She noted that several of the members had already returned their questionnaires to her and many of them contained annotations.

She said that recommendation five was generally received as noncontroversial to the extent that it urges use of electronic means of communication to disseminate committee proposals. There has been objection, however, to the second part of the proposal - that comments on the proposals could be submitted to the committee electronically. She invited comments on this item and whether submission of comments via e-mail would create problems with the committee's obligation to respond to all comments.

Judge Stotler said that she did not need to elicit comments on any particular part of the self-study but was willing to hear general comments or simply work with the written responses to the questionnaire.

A very brief discussion followed at the conclusion of which Judge Stotler requested that those who have not already done so, submit their completed questionnaires to her.

IV. Marketing the Restyled Rules

Judge Stotler also led discussion concerning the "marketing" of the redrafted rules. She explained that the memorandum she prepared last spring was intended simply to capture a number of ideas that had surfaced about paving the way for introduction of the style project. The one question that she wanted to raise with the Advisory Committee concerned the possibility of previewing the redrafted rules with the Judicial Conference at its March 1996 meeting. If the entire set of appellate rules is ready and presented to the Standing Committee in January and approved by it for publication, Judge Stotler asked whether the Advisory Committee would object to an informal presentation of the packet to the Judicial Conference prior to publication. Although proposed amendments

ordinarily are not submitted to the Judicial Conference prior to publication, it was suggested that given the nature of this undertaking it might be better to consult the chief judges prior to publication and have their blessing on the project, however tentative that might be.

V. Committee Notes

Judge Stotler also asked the Advisory Committee to discuss the problem that arises when a Committee Note, drafted by the Advisory Committee to explain its proposed amendments, no longer "fits" the rule because the Standing Committee makes substantial changes in it. This particular question is really a subpart of the larger question — whose note is it? Judge Stotler expressed her personal preference that the note be, to the extent possible, the principal responsibility of the Advisory Committee.

After brief discussion, the consensus of the Advisory Committee was that the note should be treated as an Advisory Committee Note. A motion was made to delegate to the chair and the reporter authority to make whatever amendments to a Committee Note are made necessary by Standing Committee changes to the proposed rule. The understanding was that if controversial changes were made the chair and reporter would attempt to consult with the Advisory Committee. The motion passed unanimously.

VI. Uniform Numbering of Local Rules

Amendments to FRAP 47 took effect on December 1, 1995. The amendments state that all local circuit rules "must conform to any uniform numbering system prescribed by the Judicial Conference." Similar amendments took effect in the Bankruptcy, Civil, and Criminal Rules. The Standing Committee asked each Advisory Committee to submit a recommendation concerning uniform numbering. With regard to the local rules adopted by the courts of appeals this appears to be a relatively easy task. All but one circuit has followed the recommendation of the Local Rules Project and renumbered the circuit rules to correspond to the FRAP numbering system.

The Local Rules Project recommended that a local circuit rule be preceded by L.A.R. (standing for local appellate rule), that the rule be numbered to correspond with FRAP, and that it be followed by a decimal after which each local rule having to do with the same national rule be consecutively numbered. For example the first local rule relating to FRAP 28 would be L.A.R. 28.1, the second would be L.A.R. 28.2. The Advisory Committee disagreed with both the L.A.R. and decimal recommendations. Several circuits identify the local rules

with the number of the circuit and "Cir. R.", e.g. 7th Cir. R., or 10th Cir. R. The committee believes that such designations are appropriate. The decimal system will pose difficulties because some of the FRAP rules themselves have a decimal, e.g. Fed. R. App. P. 26.1.

A motion was made to recommend only that the local rules have a number that corresponds with the national rule, and that prefixes, decimal points, dashes, etc. should be left to local option. The motion passed unanimously.

VII. Sanctions

After the April 1995 meeting, Judge Logan asked Judge Kozinski and Mr. Munford to report on developments under Rule 38. Mr. Munford's subcommittee report summarized the committee's recent treatment of the issue. Over the past 10 years, the committee has considered a number of Rule 38 issues. The questions raised have included, among other things, whether Rule 38 should be revised to include a specific notice requirement, whether it should be revised to conform to Fed. R. Civ. P. 11, and whether attorneys should be specifically listed as persons potentially liable for Rule 38 sanctions.

At the Advisory Committee's December 1991 meeting, the committee voted to revise Rule 38, but to limit the revision to a change that would require notice and opportunity to respond before a court imposes Rule 38 sanctions. By reports dated April 19, 1993, and May 11, 1994, a subcommittee headed by Judge Danny J. Boggs endorsed the notice and comment revision, but concluded that while other new language in the rule might have benefits, "it was not clear that there would be a net benefit to going to a new set of words and abandoning the ones [with] which the participants had become familiar." The notice and comment requirement was added to the rule and became effective on December 1, 1994.

Mr. Munford reported that Mr. Alan B. Morrison, of the Public Citizen Litigation Group, had written the committee short letters on July 17, 1992, and October 13, 1994, urging that Rule 38 be revised to establish more specific standards and to make it more difficult for an appellate court to award sanctions. Mr. Morrison was advised that the committee would continue to monitor Rule 38 developments in light of the adoption of the notice and comment provision and would discuss the matter at its fall 1995 meeting.

A survey of cases dealing with Rule 38 since December 1, 1994, indicates that the courts appear to be applying the procedural requirements faithfully and the recited standards for imposing sanctions are those traditionally reflected in the case law. Mr. Munford's subcommittee report suggested that "[g]iven the

committee's extended prior discussion of Rule 38, the recency of the amendment, and the seeming lack of controversy in its current application," Rule 38 be removed from the committee's agenda. A motion to that effect was made and seconded. It passed unanimously.

The meeting adjourned at noon on Saturday, October 21, 1995.

Respectfully submitted,

Carol Ann Mooney
Reporter

Advisory Committee on the Federal Appellate Rules
Table of Agenda Items -- Revised March 1996

FRAP Item	Proposal	Source	Current Status
86-24	Rule to permit sanctioning of attorneys for bringing frivolous appeals.	Chief Justice Vincent McKusick (ME)	See notes under item 86-19 and 92-8 Subcommittee appointed to monitor; no need for action at this time 4/93 C.J. Breyer's suggestion submitted to sub-committee 9/93, see item 93-9 Response provided to C.J. Breyer 5/94; no further action deemed appropriate at this time 4/94 Subcommittee to report 10/95 No further action deemed appropriate 10/95
89-5	Amendment of FRAP 35(c).	Mr. Robert St. Vrain (CA-8)	Under study by reporter Discussion with Supreme Court Clerk to precede any further action 10/90 Additional drafts requested 12/91 Approved for submission to Standing Committee 4/92 Standing Committee requested that Advisory Committee reconsider 6/92 Draft approved for submission to Standing Committee 4/93. Check all other FRAP for cross-references to "suggestions" for rehearing en banc Approved by Standing Committee for publication to bench and bar 6/93 Publication delayed pending completion of Items 91-25 and 92-4, 9/93 Published 9/95
90-1	Amend FRAP 35(b) and (c) to change "suggestion" for an en banc to a "petition" for an en banc.	Hon. Jon Newman (CA-2) Mr. St. Vrain (CA-8)	Under study See notes under item 89-5

FRAP Item	Proposal	Source	Current Status
91-3	Final decision by rule/expanding interlocutory appeal by rule.	Federal Courts Study Committee Judicial Improvement Act of 1990, P.L. No. 101-650; and Federal Courts Administration Act of 1992, P.L. No. 102-572	Discussion on-going 4/91 Consideration of interlocutory review of rulings on class certification. Referral from Civil Rules Committee 6/93
91-4	Typeface, re: rule 32.	Mr. Greacen (CA-5)	Reporter asked to draft language 12/91 Approved for submission to Standing Committee 11/92 Approved by Standing Committee for publication to bench and bar 12/92 Advisory Committee approved new drafts for submission to Standing Committee for re-publication 5/93 Standing Committee approved new draft for re-publication 6/93 Published 11/93 Advisory Committee approved new draft for submission to Standing Committee for republication 4/94 Approved by Standing Committee for republication 6/94 Published 9/94 New draft approved by Advisory Committee 4/95 Standing Committee referred back to Advisory Committee 6/96 New draft approved by Advisory Committee 10/95 Standing Committee approved new draft for publication 1/96

FRAP Item	Proposal	Source	Current Status
91-9	Amendment of Rule 32(a) to require counsel to include their telephone numbers on the covers of briefs and appendices.	Local Rules Project	Approved for submission to Standing Committee 12/91 Approved by Standing Committee for publication 1/92 Approved for resubmission to Standing Committee 4/93 Approved by Standing Committee 6/93 but not forwarded to the Judicial Conference, republished along with other changes to Rule 32 under item 91-4 Published 11/93 Republished 9/94 New draft approved by Advisory Committee 4/95 Standing Committee referred back to Advisory Committee 6/95 New draft approved by Advisory Committee 10/95 Standing Committee approved new draft for publication 1/96

FRAP Item	Proposal	Source	Current Status
91-14	Amendment of Rule 21 so that a petition for mandamus does not bear the name of the district judge and the judge is represented pro forma by counsel for the party opposing the relief unless the judge requests an order permitting the judge to appear.	Local Rules Project	Reporter asked to draft language 12/91 Approved for submission to Standing Committee 10/92 Standing Committee referred the proposal back to to Advisory Committee for further consideration 12/92 New draft approved for submission to Standing Committee 4/93 Approved by Standing Committee for publication to bench and bar 6/93 Published 11/93 Advisory Committee approved new draft for submission to Standing Committee for republication 4/94 Approved by Standing Committee for republication 6/94 Published 9/94 Approved for resubmission to Standing Committee 4/95 Standing Committee approved forwarding to Judicial Conference 6/95 Approved by Judicial Conference 9/95
91-17	Uniform plan for publication of opinions.	Local Rules Project & Federal Courts Study Committee	Further study recommended 12/91
91-24	Page limits for and contents of amicus briefs.	CA-5 in response to Local Rules Project	For future discussion 12/91 Approved in substance; Reporter to prepare new draft 9/93 Discussion of new draft postponed until fall meeting 4/94 Draft approved 10/94 to be submitted to Style Subcommittee Revised draft approved for submission to Standing Committee 4/95 Published 9/95

FRAP Item	Proposal	Source	Current Status
91-25	Amendment of Rule 35 to specify contents of suggestions for rehearing en banc.	CA-5 in response to Local Rules Project	For future discussion 12/91 Approved in substance; Reporter to prepare new draft 9/93 Discussion of new draft postponed until fall meeting 4/94 Draft approved 10/94 to be submitted to Style Subcommittee Revised draft approved for submission to Standing Committee 4/95 Published 9/95
91-28	Updating Rule 27.	Advisory Committee	Mr. Kopp asked to prepare memo 12/91 Held over 10/92 Subcommittee appointed 4/93 Approved in substance; subcommittee to prepare new draft 9/93 Approved for submission to Standing Committee 4/94 Approved by Standing Committee for publication 6/94 Published 9/94 Approved for resubmission to Standing Committee 4/95 Standing Committee referred back to Advisory Committee 6/95 New draft approved by Advisory Committee 10/95 Standing Committee approved new draft for publication 1/96

FRAP Item	Proposal	Source	Current Status
92-1	Amendment of Rule 47 to require that local rules follow uniform numbering system and delete repetitious language.	Standing Committee	Draft requested 1/92 Approved for submission to Standing Committee 4/92 Standing Committee referred to Committee of Reporters 6/92 New draft approved 10/92 Uniform language developed by Standing Committee--referred to Advisory Committee for incorporation 12/92 Approved by Advisory Committee for submission to Standing Committee 4/93 Approved by Standing Committee for publication to bench and bar 6/93 Published 11/93 Approved for resubmission to Standing Committee 4/94 Approved by Standing Committee for submission to Judicial Conference 6/94 Approved by Judicial Conference 9/94 Supreme Court forwarded to Congress 4/95 Effective 12/1/95
92-4	Amendment of Rule 35 to include intercircuit conflict as ground for seeking en banc.	Solicitor General Starr	Subcommittee consisting of Judges Logan and Williams and Mr. Kopp to consult with Reporter Report from FJC pending 1/93 On hold pending views of Solicitor General 4/93 Approved in substance; subcommittee to prepare new draft 9/93 Discussion of new draft postponed until fall meeting 4/94 Draft approved 10/94 to be submitted to Style Subcommittee Revised draft approved for submission to Standing Committee 4/95 Published 9/95

FRAP Item	Proposal	Source	Current Status
92-5	Amendment of Rule 25 re "most expeditious form . . . except special delivery".	Advisory Committee	Approved for submission to Standing Committee 4/93 Approved by Standing Committee for publication to bench and bar 6/93 Published 11/93 Advisory Committee approved new draft for submission to Standing Committee for republication 4/94 Approved by Standing Committee for republication 6/94 Published 9/94 Revised draft approved for resubmission to Standing Committee 4/95 Standing Committee approved forwarding to Judicial Conference 6/95 Approved by Judicial Conference 9/95
92-8	Amendment of Rule 38 re: 1) defining "frivolous"; 2) whether responsibility falls on the client or the attorney; 3) requiring a court to state reasons.	Alan B. Morrison, Esq.	Subcommittee appointed to monitor; no need for action at this time 4/93 Subcommittee reported; new chair to be approved 10/94 Subcommittee to report 10/95 No further action deemed appropriate 10/95
92-9	Amendment of Rule 10(b)(1) to conform to 4(a)(4).	Advisory Committee on Bankruptcy Rules	Approved for submission to Standing Committee 4/93 Approved by Standing Committee for publication to bench and bar 6/93 Published 11/93 Approved for resubmission to Standing Committee 4/94 Approved by Standing Committee for submission to Judicial Conference 6/94 Approved by Judicial Conference 9/94 Supreme Court forwarded to Congress 4/95 Effective 12/1/95

FRAP Item	Proposal	Source	Current Status
92-10	Reconsideration of some of the language of amended Rule 4(a)(4).	Standing Committee	Approved for submission to Standing Committee 4/93 Approved by Standing Committee for publication to bench and bar 6/93 Published 11/93 Approved for resubmission to Standing Committee 4/94 Approved by Standing Committee for submission to Judicial Conference 6/94 Approved by Judicial Conference 9/94 Supreme Court forwarded to Congress 4/95 Effective 12/1/95
92-11	Consideration of local rules that do not exempt government attorneys from being required to join court bar or from paying admission fees.	Attorney General Barr and Standing Committee	On hold pending views of Solicitor General 4/93
93-2	Amend Rule 8(c) re: cross-reference to Crim. R. 38.	Department of Justice	Approved for submission to Standing Committee 4/93 Approved by Standing Committee for publication 6/93 Published 11/93 Approved for resubmission to Standing Committee 4/94 Approved by Standing Committee for submission to Judicial Conference 6/94 Approved by Judicial Conference 9/94 Supreme Court forwarded to Congress 4/95 Effective 12/1/95
93-3	Amend Rule 41 re: 7-day period for issuance of mandate.	Advisory Committee	Draft approved 10/94 to be submitted to Style Subcommittee Revised draft approved for submission to Standing Committee 4/95 Published 9/95

FRAP Item	Proposal	Source	Current Status
93-4	Amend Rule 41 re: length of time for stay of mandate.	Advisory Committee	Draft approved 10/94 to be submitted to Style Subcommittee Revised draft approved for submission to Standing Committee 4/95 Published 9/95
93-5	Amend Rule 26.1 to delete use of term "affiliate."	Mr. Joseph Spaniol	Draft approved 10/94 to be submitted to Style Subcommittee Revised draft approved for submission to Standing Committee 4/95 Published 9/95
93-6	Amend Rule 41 re: effective date of mandate.	Solicitor General Days	Draft approved 10/94 to be submitted to Style Subcommittee] Revised draft approved for submission to Standing Committee 4/95 Published 9/95
95-1	Amend Civil Rule 23 so class members do not need to intervene to appeal.	Mr. Alan Morrison	Awaiting initial discussion
95-2	Amend Rules 3 and 24 re: denial of in forma pauperis status.	Mr. Wm. Johnson, Sr. & Mr. Kenneth Bonds	Awaiting initial discussion
95-3	Amend Rule 15(f) to conform to recent amendments to 4(a)(4).	Hon. Stephen Williams (CA-DC)	Awaiting initial discussion
95-4	Amend computation of time to conform to Civil Rules method.	Mr. James B. Doyle	Awaiting initial discussion
95-5	Amend Rule 31 to require submission of digitally readable copy of brief, when available.	Hon. Frank Easterbrook (CA-7)	Awaiting initial discussion
95-6	Amend Rule 3(d) & 15(5) to require appellant/petitioner to serve copies of notice of appeal.	Advisory Committee	Awaiting initial discussion

FRAP Item	Proposal	Source	Current Status
95-7	Amend Rule 4(a)(5) to make it clear that a "good cause" extension is available after expiration of original period.	Advisory Committee	Awaiting initial discussion
95-8	Does Rule 4(a)(7) repeal collateral order doctrine?	Advisory Committee	Awaiting initial discussion
95-9	Amend Rules 5 & 5.1 so that time for ordering transcript runs from entry of order granting permission to appeal.	Advisory Committee	Awaiting initial discussion
96-1	Amend Form 4 to obtain information about living expenses	Wm. Suter, Clerk of the Supreme Court	Awaiting initial discussion

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

FROM: Carol Ann Mooney, Reporter

DATE: March 27, 1996

SUBJECT: Gap Report concerning the proposed amendments to the Federal Rules of Appellate Procedure published September 1995

In September 1995 the Standing Committee published a packet of proposed amendments to the Federal Rules of Appellate Procedure. The period for public comment closed on March 1, 1996. At the Advisory Committee's meeting on April 15 and 16 the Committee must consider all the comments and decide whether to amend the published rules. If the Committee decides to make amendments, the Committee has the further task of deciding whether the amendments are substantial. If substantial amendments are made, it is necessary to republish the rule(s). If only minor amendments are made, republication is not necessary.

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

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

General Comments on the Proposed Amendments

1. Stanley I. Adelstein, Esquire,
3390 Kersdale Road
Pepper Pike, Ohio 44124-5607

Mr. Adelstein supports requiring:
- recycled paper;
- double-sided copying; and
- non-chlorine bleached recycled paper.[1]

2. Aaron H. Caplan, Esquire
Perkins Coie
1201 Third Avenue, 40th Floor
Seattle, Washington 98101-3099
on behalf of 12 members of the Law Firm Waste Reduction Network

Supports proposals under consideration to permit, or preferably to require, the use of double-sided copies and recycled paper for documents submitted to the federal courts.

3. Anthony J. DiVenere, Esquire
McDonald, Hopkins, Burke & Haber
2100 Bank One Center
600 Superior Avenue, E.
Cleveland, Ohio 44114-2653

Supports requiring: recycled paper for all filings; double-sided copying of documents; and use of non-chlorine bleached recycled paper.

4. Thomas H. Frankel, Esquire
102 E. Street
Davis, California 95616

Urges the use of recycled paper for all documents submitted to the courts.

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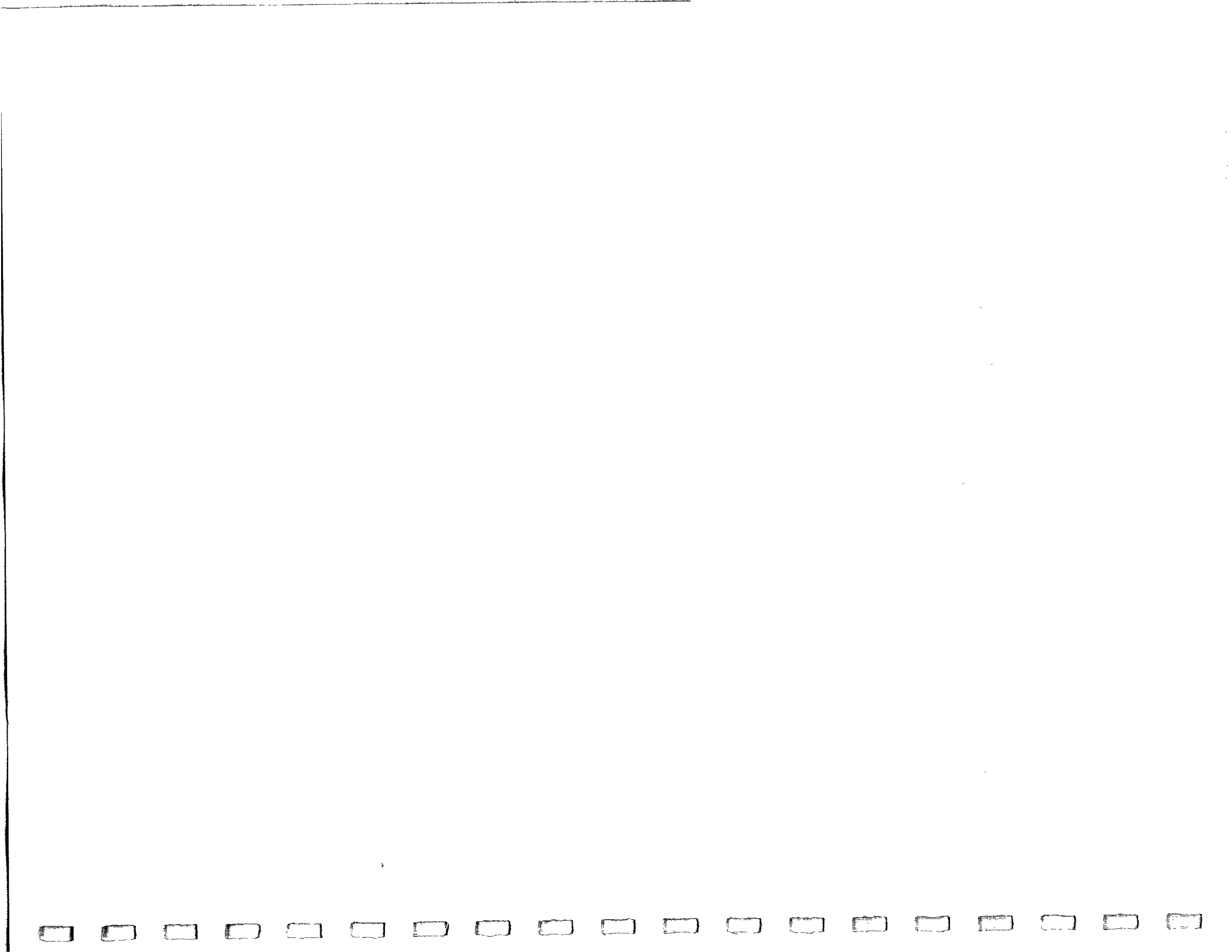
[1] Several of the "general" comments are addressed to the use of recycled paper and double-sided copying. They seem most relevant to Rule 32, but it is not part of this packet of rules. I note them here because the Administrative Office included them among the comments on the rules published last fall. I will retain them as relevant to Rule 32 when it is republished.

5. Philip A. Lacovara, Esquire
Mayer, Brown & Platt
1675 Broadway
New York, New York 10019-5820

States that most of the proposed amendments are well-considered and should be adopted but cautions against continuously fine-tuning the Federal Rules even if the changes are themselves worthwhile.



Rule 26.1. Corporate Disclosure Statement

(a) *Who Shall File.* ~~Any non-governmental corporate party to a civil or bankruptcy case or agency review proceeding and any non-governmental corporate defendant in a criminal case must file a statement identifying all parent companies, subsidiaries (except wholly-owned subsidiaries), and affiliates that have issued shares to the public. The statement must be filed with a party's~~ Any nongovernmental corporate party to a proceeding in a court of appeals shall file a statement identifying any parent corporation and listing stockholders that are publicly held companies owning 10% or more of the party's stock.

(b) *Time for Filing.* A party shall file the statement with the principal brief or upon filing a motion, response, petition, or answer in the court of appeals, whichever ~~first~~ occurs first, unless a local rule requires earlier filing. Even if the statement has already been filed, the party's principal brief shall include the statement before the table of

contents.

(c) *Number of Copies.* ~~Whenever~~ If the statement is filed before ~~a party's~~ the principal brief, the party shall file an original and three copies, ~~of the statement must be filed~~ unless the court requires the filing of a different number by local rule or by order in a particular case. ~~The statement must be included in front of the table of contents in a party's principal brief even if the statement was previously filed.~~

Committee Note

The rule has been divided into three subdivisions to make it more comprehensible.

Subdivision (a). The amendment deletes the requirement that a corporate party identify subsidiaries and affiliates that have issued shares to the public. Although several circuit rules require identification of such entities, the Committee believes that such disclosure is unnecessary.

A disclosure statement assists a judge in ascertaining whether or not the judge has an interest that should cause the judge to recuse himself or herself from the case. Given that purpose, disclosure of entities that would not be adversely affected by a decision in the case is unnecessary.

Disclosure of a party's parent corporation is necessary because a judgment against a subsidiary can negatively impact the parent. A judge who owns stock in the parent corporation, therefore, has an interest in litigation involving the subsidiary. Conversely, disclosure of a party's subsidiaries or affiliated corporations is ordinarily unnecessary. For example, if a party

is a part owner of a corporation in which a judge owns stock, the possibility is quite remote that the judge might be biased by the fact that the judge and the litigant are co-owners of a corporation.

The amendment, however, adds a requirement that the party list all its stockholders that are publicly held companies owning 10% or more of the stock of the party. A judgment against a corporate party can adversely affect the value of the company's stock and, therefore, persons owning stock in the party have an interest in the outcome of the litigation. A judge owning stock in a corporate party ordinarily recuses himself or herself. The new requirement takes the analysis one step further and assumes that if a judge owns stock in a publicly held corporation which in turn owns 10% or more of the stock in the party, the judge may have sufficient interest in the litigation to require recusal. The 10% threshold ensures that the corporation in which the judge may own stock is itself sufficiently invested in the party that a judgment adverse to the party could have an adverse impact upon the investing corporation in which the judge may own stock. This requirement is modeled on the Seventh Circuit's disclosure requirement.

Subdivision (b). The language requiring inclusion of the disclosure statement in a party's principal brief is moved to this subdivision because it deals with the time for filing the statement. No substantive change is intended.

Subdivision (c). The amendments are stylistic and no substantive changes are intended.

COMMENTS ON PROPOSED AMENDMENTS OF FED. R. APP. P. 26.1

The rule is divided into three subdivisions to make it more comprehensible. The rule continues to require disclosure of a party's parent corporation but the amendments delete the requirement that a corporate party identify subsidiaries and affiliates that have issued shares to the public. The amendments, however, add a requirement that the party list all its stockholders that are publicly held companies owning 10% or more of the stock of the party.

1. Robert L. Baechtol, Esquire
Chair, Rules Committee
The Federal Circuit Bar Association
1300 I Street, N.W.
Suite 700
Washington, D.C. 20005-3315

The Association agrees that recusal will rarely be required based on a judge's ownership of stock in a litigant's subsidiary or affiliate; but states that "rarely" does not mean "never." The Association urges that the rule continue to require disclosure of subsidiaries and affiliates because it does not impose a significant burden and not requiring it risks adverse reflection on the court's neutrality when a judge would have elected recusal had the facts been disclosed.

2. Robert S. Belovich, Esquire
5638 Ridge Road
Parma, Ohio 44129

The rule will not assure disclosure of publicly held corporations which may be a joint venture partner of a party to an appeal, or of a publicly traded corporation which is a grandparent or great grandparent of a party to an appeal. He gives as an example a party that is a closely held corporation, the majority shareholder of which is a corporation formed by a publicly traded corporation for the purpose of acquiring and holding the majority shares of the party. The publicly traded corporation's disclosure would not be required under a strict reading of the rule.

3. Donald R. Dunner, Esquire
Chair, Section of Intellectual Property Law
American Bar Association
750 N. Lake Shore Drive
Chicago, Illinois 60611

Mr. Dunner submitted comments prepared by two of the section's committees:

a. One committee says that the amendments appear reasonable.

b. Another committee says that the proposed deletions from the rule are well-advised but the committee has two concerns about requiring a party to disclose any publicly-held company owning 10% or more of the party's stock. First, it implies that a judge who owns any stock in a company that owns 10% of the stock in a party should recuse himself or herself; the committee thinks this "over-extends an assumption of disqualification in some circumstances" and that the provisions may prevent a judge from using mutual funds to avoid the appearance of impropriety. Second, the committee thinks that compliance with the disclosure requirement could be burdensome and that the burden is not justified by the indirect and potentially extremely minimal ownership interests it addresses.

4. Kent S. Hofmeister, Esquire
Section Coordinator
Federal Bar Association
1815 H Street, N.W.
Washington, D.C. 20006-3697

Mr. Hofmeister forwarded the comments of Mark Laponsky, Esquire, the Chair of the Labor Law and Labor Relations Section of the Federal Bar Association. Mr. Laponsky thinks the changes generally make the rule more comprehensible but questions whether the new rule will generate adequate information. Substituting "stockholders that are publicly traded companies" for "affiliates" is helpful, but limiting disclosure to stockholders with 10% or greater interest in the party may cause difficulties in obtaining the requisite information from a corporate client. Although he does not disagree that a 10% threshold will identify stockholders whose interests are most likely to be affected by litigation, he thinks it would be easier for the corporation to simply identify all publicly traded stockholders.

5. Jack E. Horsley, Esquire
Craig & Craig
1807 Broadway Avenue
Post Office Box 689
Mattoon, Illinois 61938-0689

Attorney Horsley makes two comments:

a. He suggests that the rule be expanded to require the filing of a statement by the Chief Executive Officer and by members of the Board of Directors of the company.

b. He suggests amending lines 23-28 to state: "If the statement is filed before the principal brief, the party shall file an original and <u>at least</u>

three copies, unless the court requires the filing of a ~~different~~ reasonable number by local rule or by order in a particular case."

6. Heather Houston, Esquire
Gibbs Houston Pauw
1111 Third Avenue, Suite 1210
Seattle, Washington 98101
on behalf of the Appellate Practice Committee of the Federal Bar Association for the Western District of Washington

It is not always clear whether a particular corporation is "publicly held." The committee suggests that the rule refer to companies "that have issued shares that are traded on exchanges or markets that are regulated by the Securities and Exchange Commission."

7. Philip A. Lacovara, Esquire
Mayer, Brown & Platt
1675 Broadway
New York, New York 10019-5820

Agrees with eliminating the need to identify a party's subsidiaries or affiliates; but suggests amending lines 12-14 as follows:
"listing any stockholder[s] that is a [are] publicly held company[ies] and that owns[ing] 10% or more of the party's stock."
The changes are intended to make it clear that the rule does not call for identifying public companies that, collectively, might own a total of 10% of the party's stock.

Even though there are other forms of financial involvement other than "stock" that could be effected by a decision for or against a party, e.g. convertible notes and debentures, Attorney Lacovara says that the difficulties of defining a broader category of investments and in tracking the identity of the investors make the focus on "stock" reasonable.

8. Don W. Martens, Esquire
President
American Intellectual Property Law Association
2001 Jefferson Davis Highway, Suite 203
Arlington, Virginia 22202

The AIPLA supports the additional requirement of listing owners of more than 10% of the stock of the party to the appeal, but it questions the need to delete the identification of subsidiaries and affiliates. Although it is unlikely that a subsidiary or affiliate would be affected by the outcome of the appeal,

it may be and the judges should have that information as well.

9. Honorable A. Raymond Randolph
Chair, Committee on Codes of Conduct of the
Judicial Conference of the United States
United States Courthouse
333 Constitution Avenue, N.W.
Washington, D.C. 20001-2866

The Committee supports the proposed revisions. Disclosure of only parent companies and public companies owning more than 10 percent of the party's stock should be adequate to ensure that the judges are made aware of parties' corporate affiliations and are able to make informed decisions about the need to recuse.

10. James A. Strain, Esquire
Seventh Circuit Bar Association
219 South Dearborn Street, Suite 2722
Chicago, Illinois 60604

Notes only that the proposed amendment brings the Federal Rule in accordance with its Seventh Circuit analogue.

11. Carolyn B. Witherspoon, Esquire
Office of the President
Arkansas Bar Association
P.O. Box 3178
Little Rock Arkansas 72203
(on behalf of the committee members of the Arkansas Bar Association Legislation and Procedures Committee)

Approves the proposed changes.

In addition to the comments submitted during the publication period, Judge James A. Parker, a member of the Standing Committee, wrote to Judge Logan and me after last summer's Standing Committee meeting. He is concerned that Rule 26.1 is too narrow because it deals only with corporations. Corporations are not the only form of organization that has numerous diverse owners. Judge Parker notes by way of example that the rule does not require a corporation that is a general or limited partner to disclose its interest in a limited partnership in which a judge may also be a limited partner. Judge Parker recommends broadening the language of Rule 26.1 to require identification of all types of organizations in which a party may have an

interest that would create a conflict for a judge. A copy of Judge Parker's letter follows this page.

One part of Judge Parker's example is probably not much different than the relationship between a party and its subsidiary or affiliates, a relationship that the Committee believes does not require disclosure. When a corporate party is a limited partner and there is the potential that the judge may also be a limited partner in the same partnership, a judgment for or against the corporate party should have no effect upon the judge. The point remains, however, that Rule 26.1 is narrow. The Advisory Committee has long been aware that Rule 26.1 is not as broad as may be desirable. However, the Committee consulted with the circuits during the development of Rule 26.1 and there was no consensus for a broader rule. The Committee has agreed with Mr. Lacovara's comment that the difficulty of defining a broader category of investments and in tracking the identity of investors makes the focus on stock reasonable.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO
POST OFFICE BOX 566
ALBUQUERQUE, NEW MEXICO 87103

JAMES A. PARKER
Judge

July 31, 1995

Honorable James K. Logan
United States Circuit Judge
P.O. Box 790
Olathe, Kansas 66061

Professor Carol Ann Mooney
University of Notre Dame
Law School
Notre Dame, Indiana 46556

Re: Proposed Appellate Rule 26.1 - Corporate Disclosure Statement

Dear Judge Logan and Professor Mooney:

I begin with an apology for not earlier having commented on proposed Rule 26.1. Obviously your Advisory Committee has devoted considerable time and thought to this rule. Unfortunately, I did not focus attention on the substance of Rule 26.1 until the Standing Committee meeting on July 6.

My concern is that proposed Rule 26.1 is worded too narrowly to accomplish its objective of requiring parties to provide information that will help judges identify potential conflicts of interest. The proposed rule covers only corporations. A corporation, of course, is only one form of organizations that have numerous, diverse owners. Another is a limited partnership. Limited partnerships that have been widely sold often have been parties in many lawsuits. As presently worded, proposed Rule 26.1(a) would not require a corporation that is either a general or a limited partner to disclose its interest in a limited partnership in which a judge may also be a limited partner.

I recommend broadening the language of proposed Rule 26.1(a) to require identification of all types of organizations, not just corporations, in which a party may have an interest that would create a conflict for a judge. Having said that, I apologize, again, for not proposing alternative language. I would suggest, however, deleting "corporate" from the title of Rule 26.1.

Sincerely,

James A. Parker

cc: Honorable Alicemarie H. Stotler
Standing Committee Chairperson

ISSUES AND CHANGES - RULE 26.1

Eleven letters commenting on the proposed amendments were received; the letter from the A.B.A. Section of Intellectual Property, however, included separate suggestions from two committees so there is a total of 12 commentators. Of the 12, four support the amendments, none generally oppose the amendments, but 8 suggest revisions.

1. Support

The opinion of the Judicial Conference Committee on Codes of Conduct was specifically solicited. The Committee supports the amendments. The Committee believes that disclosure only of parent companies and public companies owning more than 10 percent of the party's stock should be adequate to ensure that a judge is made aware of a party's corporate affiliations and that a judge is able to make an informed decision about recusal.

2. Suggested Revisions

All of the commentators who suggest revisions focus on the extent of the disclosure that should be required. Unfortunately, they are not in agreement about what should be done.

a. Two commentators urge the Committee to continue to require disclosure of subsidiaries and affiliates, although they apparently would also retain the new 10% rule. These commentators stress that although it would be rare that recusal would be required because a judge owns stock in a litigant's subsidiary or affiliate, "rarely" does not mean "never."

b. Three other commentators specifically approve the deletions but would make changes in that portion of the amendments that require disclosure of all publicly traded companies that own 10% or more of the party's stock:

   i. one commentator recommends dropping the requirement because the judge's interest may be extremely minimal — some stock in a company that owns 10% of the party's stock (would this preclude the use of mutual funds?) — and it would be a burden for the party to comply with the requirement;

   ii. another commentator would require disclosure of all stockholders that are publicly owned; he thinks it would be easier to list them all;

   iii. a third commentator would amend the language to make it clear that the rule does not call for identifying public companies that collectively might own a total of 10% of the party's stock; he would amendment the language as follows:

"listing any stockholders that is a ~~are~~ publicly held company ~~ies~~ and that owns ~~ing~~ 10% or more of the party's stock."

c. Another commentator suggests that it is not always clear whether a company is publicly held and suggests that the rule refer to companies "that have issued shares that are traded on exchanges or markets that are regulated by the Securities and Exchange Commission."

d. Another commentator believes that the rule should be expanded to include publicly held joint venture partners and grandparent or great grandparent companies.

3. The New Draft

The Advisory Committee specifically requested that the Committee on Codes of Conduct review the proposed amendments. Given the approval of the Committee on Codes of Conduct, the new draft does not reinstate the requirement that a party disclose "subsidiaries" and "affiliates." Both of the commentators who urged retention of the rule admitted that it would be rare that a judge should recuse himself or herself because of the judge's ownership of stock in a subsidiary or affiliate.

The new draft does continue to require disclosure of a stockholder that owns 10% or more of the party's stock if the stockholder is publicly held. Although one commentator believes that this provision "over-extends" the assumption of disqualification because a judge's interest may be extremely minimal, the disqualification statute is quite demanding. The statute requires a judge to disqualify himself or herself if the judge has a "financial interest" in a party "however small" the interest may be, if the interest could be "substantially affected by the outcome of the proceeding." 28 U.S.C. § 455(b)(4), (d)(4). Note, the statute does not require that the judge be substantially affected by the outcome, but that the judge's interest (however small) could be substantially affected. Although it could be argued that the judge does not have a financial interest in the party, but only in the stockholder, the commentator's focus upon the "minimal" nature of the judge's interest is inappropriate. As to the mutual fund question, the statute specifically says:

> Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund. 28 U.S.C. § 455(d)(4)(i).[2]

The draft, however, does not require the party to disclose all of the party's stockholders that are publicly held (as one commentator suggested) but continues

[2] That the statute creates a specific exception for mutual fund ownership may suggest that the statute is otherwise concerned about the sort of indirect ownership at issue in the proposed amendment.

only to require disclosure of those corporations that own 10% of the party's stock. The ten percent threshold makes the judge's interest in the stockholder a financial interest in the party. If a judge owns stock in a corporation which in turn owns a very small percentage of the party's stock, the argument that the judge does not have a financial interest in the party is quite strong.

Changes are made in the draft at lines 11 and 12. (Changes are shaded.) Mr. Lacovara's suggestion is adopted so that it is clear the rule applies only when a single corporate stockholder owns at least 10% of the party's stock. And at line 11, the rule now requires disclosure of "all" of a party's parent corporations, rather than "any" parent corporation. The intent of the change is to require disclosure of grandparent and great-grandparent corporations. See the underlined changes in the Committee Note.

At line 27 the words "the filing of" are deleted as suggested in the "style" version being prepared for publication.

Rule 26.1. Corporate Disclosure Statement

(a) *Who Shall File.* ~~Any non-governmental corporate party to a civil or bankruptcy case or agency review proceeding and any non-governmental corporate defendant in a criminal case must file a statement identifying all parent companies, subsidiaries (except wholly-owned subsidiaries), and affiliates that have issued shares to the public. The statement must be filed with a party's~~ Any nongovernmental corporate party to a proceeding in a court of appeals shall file a statement identifying all its parent corporations and listing any publicly held company that owns 10% or more of the party's stock.

(b) *Time for Filing.* A party shall file the statement with the principal brief or upon filing a motion, response, petition, or answer in the court of appeals, whichever ~~first~~ occurs first, unless a local rule requires earlier filing. Even if the statement has already been filed, the party's principal brief shall include the statement before the table of contents.

(c) *Number of Copies.* ~~Whenever~~ If the statement is filed before ~~a party's~~ the principal brief, the party shall file an original and three copies, ~~of the statement must be filed~~ unless the court requires ~~the filing of~~ a different number by local rule or by order in a particular case. ~~The statement must be included in front of the table of contents in a party's principal brief even if the statement was previously filed.~~

Committee Note

The rule has been divided into three subdivisions to make it more comprehensible.

Subdivision (a). The amendment deletes the requirement that a corporate party identify subsidiaries and affiliates that have issued shares to the public. Although several circuit rules require identification of such entities, the Committee believes that such disclosure is unnecessary.

A disclosure statement assists a judge in ascertaining whether or not the judge has an interest that should cause the judge to recuse himself or herself from the case. Given that purpose, disclosure of entities that would not be adversely affected by a decision in the case is unnecessary.

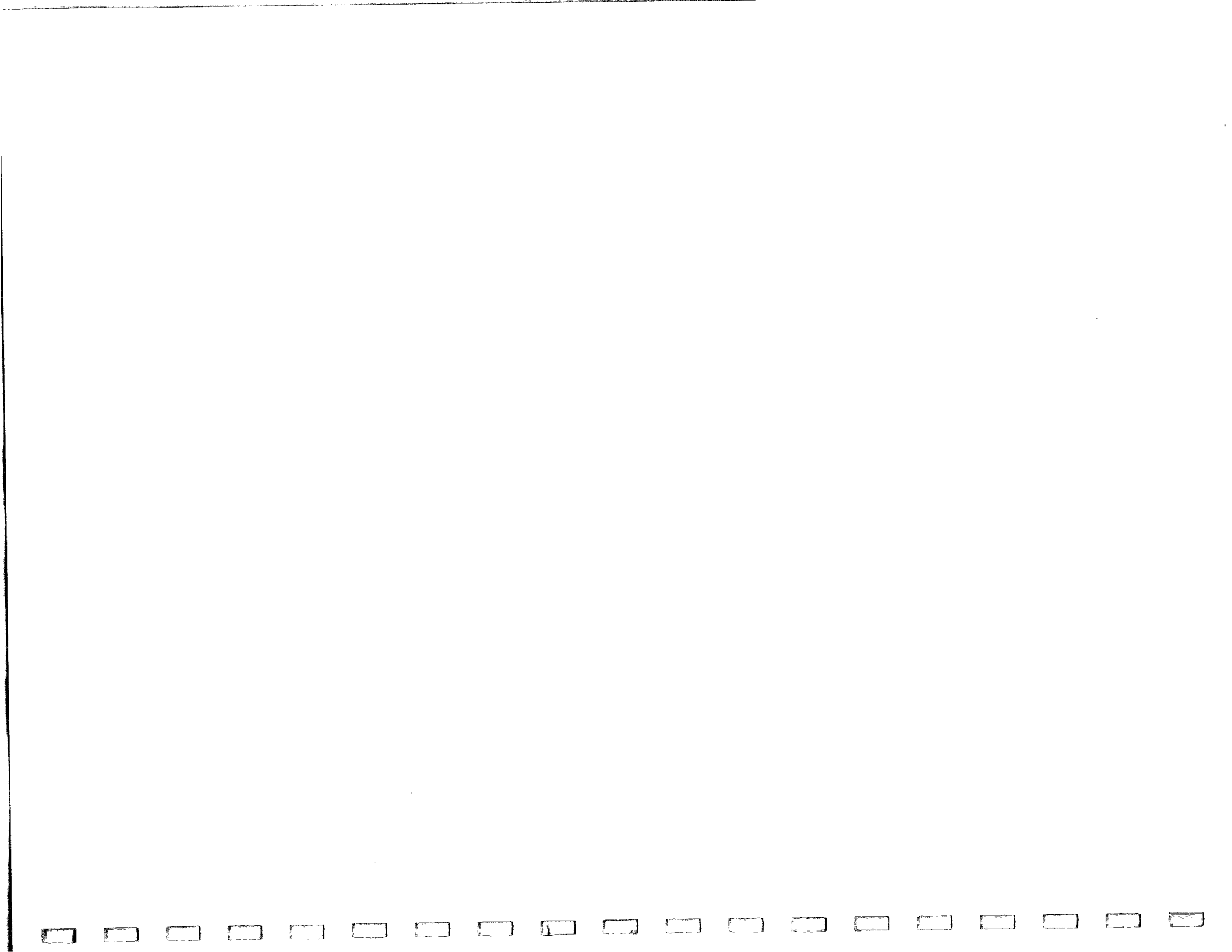
Disclosure of a party's parent corporation is necessary because a judgment against a subsidiary can negatively impact the parent. A judge who owns stock in the parent corporation, therefore, has an interest in litigation involving the subsidiary. The rule requires disclosure of all of a party's parent corporations meaning grandparent and great grandparent corporations as well. For example, if a party is a closely held corporation, the majority shareholder of which is a corporation

formed by a publicly traded corporation for the purpose of acquiring and holding the shares of the party, the publicly traded grandparent corporation should be disclosed. Conversely, disclosure of a party's subsidiaries or affiliated corporations is ordinarily unnecessary. For example, if a party is a part owner of a corporation in which a judge owns stock, the possibility is quite remote that the judge might be biased by the fact that the judge and the litigant are co-owners of a corporation.

The amendment, however, adds a requirement that the party list all its stockholders that are publicly held companies owning 10% or more of the stock of the party. A judgment against a corporate party can adversely affect the value of the company's stock and, therefore, persons owning stock in the party have an interest in the outcome of the litigation. A judge owning stock in a corporate party ordinarily recuses himself or herself. The new requirement takes the analysis one step further and assumes that if a judge owns stock in a publicly held corporation which in turn owns 10% or more of the stock in the party, the judge may have sufficient interest in the litigation to require recusal. The 10% threshold ensures that the corporation in which the judge may own stock is itself sufficiently invested in the party that a judgment adverse to the party could have an adverse impact upon the investing corporation in which the judge may own stock. This requirement is modeled on the Seventh Circuit's disclosure requirement.

Subdivision (b). The language requiring inclusion of the disclosure statement in a party's principal brief is moved to this subdivision because it deals with the time for filing the statement. No substantive change is intended.

Subdivision (c). The amendments are stylistic and no substantive changes are intended.



Rule 29. Brief of an Amicus Curiae

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

(a) *When Permitted.* The United States or its officer or agency, or a State, Territory or Commonwealth may file an amicus-curiae brief

without consent of the parties or leave of court. Any other amicus curiae may file a brief only if:

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

(2) the court grants leave on motion; or

(3) the court so requests.

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

(1) the movant's interest;

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

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

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

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

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

(d) *Length.* An amicus brief may be no more than one-half the maximum length of a party's principal brief.

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

answer.

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

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

Committee Note

Rule 29 is entirely rewritten.

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

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

The former rule only required the motion to identify the applicant's interest and to generally state the reasons why an amicus brief is desirable. The amended rule additionally requires that the motion state the relevance of the matters asserted to the disposition of the case. As Sup. Ct. R. 37.1 states:

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

Because the relevance of the matters asserted by an amicus is ordinarily the most compelling reason for granting leave to file, the Committee believes that it is helpful to explicitly require

such a showing.

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

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

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

Subdivision (e). The time limit for filing is unchanged; an amicus brief must be filed within the time allowed the party the amicus supports. Ordinarily this means that the amicus brief must be filed within the time allowed for filing the party's principal brief. That, however, is not always the case. For example, if an amicus is filing a brief in support of a party's petition for rehearing, the amicus brief is due within the time for filing that petition. Occasionally, an amicus supports neither party; in such instances, the amendment provides that the amicus brief must be filed within the time allowed the appellant or petitioner.

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

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

require the use of a reply brief.

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

COMMENTS ON PROPOSED AMENDMENTS OF FED. R. APP. P. 29

The rule is entirely rewritten. The provision in the former rule, granting permission to conditionally file an amicus brief with the motion for leave to file, is changed to require that the brief accompany the motion. In addition to identifying the applicant's interest and the reasons why an amicus brief is desirable, the amended rule requires that the motion state the relevance of the matters asserted to the disposition of the case. The contents and form of the brief are specified. The amendment limits an amicus brief to no longer than one-half the maximum length of a party's principal brief. An amicus is not permitted to file a reply brief.

1. Chicago Council of Lawyers
One Quincy Court Building
Suite 800
220 S. State Street
Chicago, Illinois 60604

The Council generally agrees with the proposed amendment but suggests amending subpart (d) so that the court has discretion to permit a longer brief. The Council suggests that (d) should read as follows:

> An amicus brief may be no longer than one-half the maximum length of a party's principal brief unless the Court grants the amicus leave to file a longer brief for good cause.

2. Donald R. Dunner, Esquire
Chair, Section of Intellectual Property Law
American Bar Association
750 N. Lake Shore Drive
Chicago, Illinois 60611

Mr. Dunner submits comments from two of the section's committees:

One committee makes no substantive comment.

Another committee offers several suggestions:

a. that the District of Columbia should be added to the list of entities allowed to file an amicus brief without consent;
b. insert the word "or" at the end of subparagraph (a)(1), for clarity;
c. the rule should not require submission of the brief along with a motion for leave to file, instead the rule should require that the motion concisely state the arguments that will be made in the brief;
d. the late filing of an amicus brief should be permitted by stipulation of all parties;
e. subparagraph (f) is unclear; it may leave ambiguity as to whether an

amicus may request leave to file a reply;

f. an amicus should be allowed to participate in oral argument if the party supported grants a portion of that party's allotted time to the amicus and the court is so informed.

3. Kent S. Hofmeister, Esquire
Section Coordinator
Federal Bar Association
1815 H Street, N.W.
Washington, D.C. 20006-3697

Mr. Hofmeister forwarded the comments to two different persons.

a. Sydney Powell, Esquire, the Chair of Appellate Law and Trial Practice Committee of the Federal Litigation Section. Attorney Powell suggests:

- It would be simpler to limit an amicus brief to 25 pages rather than "no more than one-half the maximum length of a party's principal brief." Currently it is not clear if "maximum" means maximum length "allowed" for a party's principal brief. She further notes that if a party is granted permission to file a longer brief, the rule appears to give the amicus one-half the expanded length. In which case, what happens if there are two appellants and one is allowed additional pages and the other is not? What happens when permission to file a longer brief is granted to the party very close to or contemporaneous with the deadline for filing the party's brief?
- It would be better to allow the filing of the motion and the brief within 15 days after the filing of the principal brief of the party whose position as to affirmance or reversal the amicus brief will support. The amicus can make an informed decision regarding whether it supports either party and can avoid repetition of the party's arguments. Ms. Powell concedes that special provision would need to be made to allow an appellant to respond to a brief in support of an appellee.

b. Mark Laponsky, Esquire, the Chair of the Labor Law and Labor Relations Section of the Federal Bar Association. Mr. Laponsky supports the amendments including specifically the requirement that the brief be submitted with the motion and the limit on the length of the brief.

4. Jack E. Horsley, Esquire
Craig & Craig
1807 Broadway Avenue
Post Office Box 689
Mattoon, Illinois 61938-0689

Attorney Horsley suggests that the language at lines 53-55 be made mandatory so that a summary of argument is required, not optional.

5. Heather Houston, Esquire
Gibbs Houston Pauw
1111 Third Avenue, Suite 1210
Seattle, Washington 98101
on behalf of the Appellate Practice Committee of the Federal Bar Association for the Western District of Washington

The committee agrees that an amicus brief is most helpful when it does not unnecessarily repeat the arguments and authorities relied upon by the parties. But in order to avoid such repetition, an amicus must be familiar with the party's arguments and authorities well before the time the amicus must file its brief.

- Because the proposed rule requires an amicus to file its brief at the same time as the party being supported, an amicus will rarely have an adequate opportunity to review the party's brief before filing its own.
- In addition to the fact that a draft of the party's brief may not be available until a few days before the filing deadline, the party being supported is not always willing to cooperate with the amicus. If the amicus does not support the position of either party, the amicus brief is due within the time allowed the appellant. An amicus who does not support either party is especially unlikely to receive the cooperation of the parties' counsel and the amicus cannot possibly be confident that it is not repeating the respondent's arguments.

The committee recommends that the brief of an amicus curiae be due within the time that a reply brief may be filed. The amicus would have an opportunity to review the parties' principal briefs. If a party believes additional briefing is necessary to respond to an amicus, a motion for leave to file such a brief should be permitted.

Alternatively the committee suggests:

a. Before the appellant's brief is due, an amicus should be permitted to file a motion for leave to file a brief and the motion need not be accompanied by the brief. If the brief does not accompany the motion, the amicus must indicate whether any of the parties have consented to the participation of the amicus and, if any have consented, the amicus

must describe the information it has received from the parties regarding their arguments. The amicus also must state whether it has had an adequate opportunity to review the parties' arguments in the trial court and how much time it needs to prepare its brief. Based on that information, the court will set a deadline for the amicus to file its brief.

b. If an amicus supports neither party, it may file its brief within the time allowed the respondent. If an amicus needs more time to prepare an adequate brief, it may file a motion without the brief and explain why it requires more time. If the parties have consented, the court will determine only whether the extra time will be allowed; if they have not, the court will rule on the motion for leave to file as well as on the request for extra time.

6. Miriam A. Krinsky, Esquire
Assistant United States Attorney
United States Courthouse
312 North Spring Street
Los Angeles, California 90012

Opposes the requirement that a motion for leave to file an amicus brief be accompanied by the brief; the requirement puts the parties and the court in the uncomfortable position of having to disregard the substance of the brief if the request is denied.

If that provision is not changed, she suggests that (e) be amended to require the court to promptly decide the request so that the opposing party is able to respond in its later brief to the arguments made in the amicus brief.

She also suggests that the rule provide for the filing of a short responsive brief if an amicus brief is filed in opposition to a request for rehearing en banc.

7. William J. Genego and Peter Goldberger, Esquires
Co-Chairs, National Association of Criminal
Defense Lawyers, Committee On Rules of Procedure
1627 K. Street, N.W.
Washington, D.C. 20006

The Association makes three suggestions:

a. It opposes limiting an amicus brief to 25 pages under present rules, or 20-22 pages under pending proposals. The Association files amicus briefs for three reasons:
   i) to show the flag, such briefs are rare and may be quite short;
   ii) when an issue in the case has important ramifications beyond

the facts of the particular party's situation; and

iii) when the issue is a good one but the association knows, or suspects, that the skills of the lawyer on the case are not really up to the task, in such cases the Association files an entire "shadow" brief with a full statement of the case and parallel argument.

The Association believes that an amicus brief of the third variety can be very helpful to the court and can "correct the defects in our adversary process that occasionally result from a mismatch of ability between counsel, where important rights hinging on the resolution of difficult issues are at stake." (But in such cases the Association would not be inclined to state for the record the real reason it feels the need to file.) Briefs in the latter two categories often demand more than 25 pages to fulfill their mission.

The Association prefers that an amicus have the same limitations as a party but if something shorter is thought to be necessary, it urges a rule in the 70-80% range so that an amicus has about 35 pages when the party's limit is 50.

b. Consent of parties. NACDL suggests that a representation by amicus counsel located and clearly labeled within the brief itself, that the parties have authorized counsel to state that they consent to the filing should be sufficient.

c. Time for filing. NACDL suggests that the presumptive time for filing an amicus brief should be within 10 days after the filing of the principal brief of the party supported and that the opposing party should have the normal period of time to respond, measured from the filing of the amicus brief.

8. Bert W. Rein, Esquire
Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006
January 18, 1996
on behalf of 6 attorneys in the firm

They do not oppose the shorter page limits for an amicus brief but note that there is "considerable tension" between the "emphasis on brevity and non-repetition, on the one hand, and the requirement that an amicus brief be submitted within the time allowed for the party being supported, on the other." They assert that it is not justified to assume that an amicus is in a position to coordinate its efforts with the party it is supporting or that the amicus will receive an advance copy of the party's brief well before the filing date. As to the latter, they point out that because appeals often address unpublished district court opinions, even a diligent amicus may not learn of

the case until the briefing schedule is underway, making it quite difficult to comply with a contemporaneous filing requirement.

They recommend adopting the Fifth Circuit's local rule 29.1 under which an amicus submits its brief

> "within 15 days after the filing of the principal brief of the party whose position . . . the amicus will support."

Because FRAP 31(a) provides only 14 days for an appellant to file a reply brief, they further suggest amending rule 29(e) to read:

> An amicus curiae shall file its brief, accompanied by a motion for filing when necessary, within 15 days after the filing of the principal brief of the party being supported when that party is the appellant, or within 7 days after the filing of the principal brief of the party being supported when that party is the appellee.

9. Kent S. Scheidegger, Esquire
Criminal Justice Legal Foundation
2131 L Street
Sacramento, California 95816
on behalf of the Criminal Justice Legal Foundation, the American Alliance for Rights and Responsibilities, and the Institute for Justice

The organizations make several suggestions:

a. They object to limiting the length of an *amicus* brief to one-half the length of a party's principal brief. They argue that in the courts of appeals amicus briefing is the exception rather than the rule and is likely to be in cases of greater complexity than average and a 25 page limit will result in routine motions to exceed the limits or in briefs of reduced usefulness to the court. In circuits such as the Ninth, which limits a principal brief to 35 pages, an amicus brief will be limited to even less than 25 pages. They suggest the following:

> (d) Length. An amicus brief may be no more than 35 pages, except by permission of the court or as specified by local rule.

b. The rule requires written consent of the parties or a motion. With the decline in professional courtesy, counsel for a party increasingly fail to return written consent even though they have no particular objection. The organizations suggest a new subpart (b) with the present subparts (b)-(g) redesignated:

> (b) Consent by Default. When a party fails to respond in writing to a written request for consent to file an amicus brief within two weeks of the request, that party shall be deemed to have consented. A declaration of

counsel for amicus setting forth the requisite facts may accompany the brief in lieu of the written consent.

c. The comment to subdivision (e) implies that an amicus brief may be permitted in support of a petition for rehearing; that should be reflected in the body of the rule.

d. The requirement for a formal corporate disclosure statement will very often be unnecessary. They suggest adding a sentence to Rule 26.1 stating: "If the amicus is a nonprofit corporation with no stockholders, a statement to that effect is sufficient.

10. Benjamin G. Shatz, Esquire
Crosby, Heafey, Roach & May
700 South Flower Street, Suite 2200
Los Angeles, California 90017
on behalf of the Appellate Courts Committee of the Los Angeles County Bar Association

The committee opposes limiting the length of an amicus brief to one-half the length of a party's principal brief. An amicus brief can assist the court by compensating for a party's inadequate presentation of an issue, by analyzing the broader impact of a position, and by presenting alternative viewpoints. That may require more than one-half the length allowed the party.

11. Reagan Wm. Simpson, Esquire
Fulbright & Jaworski
1301 McKinney, Suite 5100
Houston, Texas 77010-3095
on behalf of the Tort & Insurance Practice Section (TIPS) of the American Bar Association

TIPS opposes three aspects of the amendments:

a. An amicus brief should not be required to accompany the motion for leave to file. Such a requirement causes a potential amicus to incur the cost of preparing a brief before it knows whether it can be filed.

b. The page limit is too restrictive.

c. The rule should not ban any reply brief by an amicus

12. Arthur B. Spitzer, Esquire
Legal Director
American Civil Liberties Union of the National Capital Area
1400 20th Street, N.W.
Washington, D.C. 20036

The ACLU of the National Capital Area makes two suggestions:

a. Consent of parties. The ACLU suggests that the rule be modified to provide that an amicus brief may be filed if "it is accompanied by a written representation that all parties consent." The D.C. Cir. Rule 29 so provides. The ACLU points out that it is not unusual for an amicus to become aware of a pending appeal in a court of appeal just before briefs are due. It may be difficult to obtain written consents in a very short time. It is common practice for counsel to represent, in a motion or notice, that counsel for other parties have consented to a given matter — for example, an extension of time or a brief exceeding page limits. If a party's consent to file is misrepresented, the party will have time to correct the error before the amicus brief is considered by the court.

b. Filing brief with motion. The ACLU opposes the requirement that the proposed amicus brief be presented with the motion for leave to file. There are two reasons why it is desirable to file the motion for leave to file in advance of the brief. First, filing a notice (when all parties consent) or a motion (when all parties do not consent) in advance allows all potential amici to become known to each other and allows the preparation of a joint amicus brief by those on the same side. That would not be possible if the brief must be filed with the motion. Second, a potential amicus may know that there will be opposition to its motion. It is less wasteful to file the motion and obtain the ruling before writing the brief.

13. James A. Strain, Esquire
Seventh Circuit Bar Association
219 South Dearborn Street, Suite 2722
Chicago, Illinois 60604

The proposed amendments reflect a welcome simplification and unification of appellate practice. In particular, the statement as to why an amicus brief is desirable and that the matters asserted are relevant to the case should be helpful.

14. Carolyn B. Witherspoon, Esquire
Office of the President
Arkansas Bar Association
P.O. Box 3178
Little Rock Arkansas 72203
(on behalf of the committee members of the Arkansas Bar Association Legislation and Procedures Committee)

Approves the proposed changes.

15. Hugh F. Young, Jr.
Executive Director
Product Liability Advisory Council
1850 Centennial Park Drive, Suite 510
Reston, Virginia 22091

The PLAC supports the effort to establish uniformity in determining the length of briefs and believes that 25 pages should be sufficient in virtually every instance. But PLAC points out that the Ninth Circuit limits a party's principal brief to 35 pages, and the D.C. Circuit limits a principal brief to 12,500 words. PLAC suggests that the rule should make it clear that an *amicus* brief may be no more than one-half the maximum length of a principal brief or 25 pages whichever is longer. Also, if a party is granted permission to file a longer principal brief, the *amicus* should automatically be entitled to one-half of the enlarged length.

PLAC also urges that the rule or Committee Note make it clear that an *amicus* may seek leave to file a longer brief.

ISSUES AND CHANGES - RULE 29

Fifteen letters that comment on proposed Rule 29 were submitted. Two of the letters contain separate suggestions from two persons or committees so there is a total of 17 commentators. Of the 17 commentators, 3 support the amendments without reservation, 13 suggest revision, 1 makes no substantive comment, and none generally oppose the proposals.

1. Support

The Chair of the Labor Law and Labor Relations Section of the Federal Bar Association supports the amendments specifically noting the requirement that the brief be submitted with the motion and the limit on the length of an amicus brief.

The Seventh Circuit Bar Association also supports the amendments calling them a "welcome simplification and unification of appellate practice." The Association also observes that the statement explaining why an amicus brief is desirable and that the matters asserted are relevant to the case should be helpful.

2. Suggested Revisions

a. Limiting the Length

Seven of the commentators who suggest revisions are unhappy with the provision that limits an amicus brief to one-half the length of a party's brief.

- 4 commentators state that limiting an amicus brief to one-half the length of a party's brief (an approximately 25 page limit) is too restrictive. One of the 4 suggests a 35 page limit; another prefers that an amicus have the same limitation as a party but urges at least 70-80% so that an amicus has about 35 pages when the party's limit is 50 pages.
- One commentator states that it would be better to limit an amicus brief to 25 pages rather than one-half the length of a party's brief. As written, if a court grants a party leave to file a longer brief, the rule appears to give the amicus one-half the expanded length. If that is so, the commentator notes that additional questions are created. For example, what is the limit on the amicus brief if there are two appellants and one is allowed additional pages and the other is not? Or, what happens if permission to file a longer brief is given to the party very close to filing time or contemporaneously with it?
- Two commentators note that the one-half rule combined with existing local rules (the Ninth Circuit's 35 page limit for a party's brief, the D.C. Circuit's 12,500 word limit) could limit an amicus brief to less than 25 pages. One of them suggests that the limit should be one-half

or 25 pages whichever is longer.

- 3 suggest that the rule should specify that a court has discretion to permit a longer brief.

b. Filing the brief contemporaneously with the motion for leave to file

4 commentators oppose the requirement that the brief must accompany a motion for leave to file.

- One of the four states only that the motion should concisely state the arguments that will be made in the brief.
- Another notes that if leave to file is not granted, the parties and the court are in the uncomfortable position of having to disregard the substance of a brief that has been submitted to them. If simultaneous filing of the motion and brief continues to be required, the commentator suggests amending the rule to require the court to promptly decide the request so that the opposing party is able to respond in its later brief to the arguments made in the amicus brief.
- Two of the commentators emphasize that the cost of preparing a brief must be incurred before the amicus knows whether it can be filed.
- One of them also notes that if either a notice of intent to file an amicus brief (when all parties consent) or a motion (when all parties do not consent) is filed in advance of the brief, all potential amici become known to each other and preparation of a joint amicus brief by those on the same side becomes possible.

c. Time for filing

4 commentators oppose the requirement that the brief must be filed within the time allowed the party being supported. 3 of those commentators state that a delay is necessary to avoid repetition of the party's arguments. In addition to the fact that a draft of a party's brief ordinarily is not available until a few days before the filing deadline, it is unrealistic to assume that the party is always willing to cooperate with an amicus.

- Two of the commentators suggest that it would be better to allow the filing within 15 days after the filing of the principal brief of the party being supported. Because an appellant only has 14 days to file a reply brief, special provision would need to be made to allow an appellant to reply to an amicus brief in support of an appellee. One of these commentators, therefore, would require an amicus who supports an appellee to file the amicus brief within 7 days after the filing of the appellee's brief.
- Another suggests that the brief should be due 10 days after the filing of the principal brief of the party being supported and that the opposing party should have the normal period of time to respond, measured from the filing of the amicus brief.

• 1 commentator suggests that an amicus brief should not be due until the appellant's reply brief is due. That commentator does not believe that the rule should routinely provide the parties with an opportunity to respond to the amicus brief, but suggests that a party who wants to have that opportunity should file a motion for leave to respond. As alternatives the commentator suggests:

i. An amicus should be authorized to file a motion (unaccompanied by the brief) for leave to file. The motion should indicate whether any of the parties have consented to participation of the amicus and, if any have consented, the motion should describe the information the amicus has received from the parties regarding their arguments. The motion must also state whether it has had an adequate opportunity to review the parties' arguments in the trial court and how much time the amicus needs to prepare its brief. Based on that information, the court will establish a deadline for filing the amicus brief.

ii. If an amicus supports neither party, its brief should be due within the time allowed the appellee.

d. Written consent to file

Both the existing and the proposed rules permit the filing of an amicus brief by leave of court or when the brief is "accompanied by written consent of all parties."

• Two commentators suggest that a clearly labeled statement included in the amicus brief that all parties have consented to the filing of the brief should be sufficient. The D.C. Circuit Rule 29 contains such a provision. It may be difficult to obtain written consents in a very short time and it is common practice for lawyers to represent in a motion that counsel for other parties have consented to some matter, for example to an extension of time or to a brief exceeding page limits. If a party's consent is misrepresented, the party will have time to correct the error before the amicus brief is considered by the court.

• A third commentator goes a step further. It states that lawyers increasingly fail to return written consent even though they do not object to participation of the amicus. This commentator suggests that failure to respond within 2 weeks to a request for consent to file should be treated as consent. A statement of counsel reciting the requisite facts may accompany the brief in place of written consent.

e. Miscellaneous

i. Two commentators say that it is unclear whether subparagraph (f) bars an amicus from requesting leave to file a reply or

whether such a request is permitted.

ii. One suggests that the District of Columbia should be added to the list of entities allowed to file an amicus brief without consent.

iii. One suggests that late filing of an amicus brief should be permitted on stipulation of all parties.

iv. One says that an amicus should be allowed to participate in oral argument if the party supported grants a portion of the party's allotted time to the amicus and the court is so informed.

v. One says that a summary of argument should be required rather than optional.

vi. One commentator notes that although the Committee Note assumes that an amicus brief may be filed in connection with a petition for rehearing, the rule does not, but should, explicitly authorize such a filing. Another says that the rule should authorize a short responsive brief when an amicus brief is filed in opposition to a request for rehearing en banc.

vii. One commentator says that a formal corporate disclosure statement will seldom be necessary. The commentator suggests amending Rule 26.1 to state that "[i]f an amicus is a nonprofit corporation with no stockholders, a statement to that effect is sufficient."

viii. One says that the word "or" should be inserted at the end of subparagraph (a)(1).

3. The New Draft

a. Length

The new draft does not change the limit on the length of an amicus brief except to provide 1) that permission granted to a party to file a longer brief has no effect upon the length of an amicus brief, and 2) that a court may grant an amicus permission to file a longer brief. FRAP 2 gives a court of appeals authority to suspend the provisions of the rules when appropriate and to direct the proceedings by order. It is unnecessary, therefore, to state that a court may grant an amicus leave to file a longer brief. However, there are a number of places in the restylized rules where a provision begins with the words "except by permission of the court."

If the restylized version of Rule 32 is ultimately approved, Rule 32 will preempt any local rule that establishes a shorter limit than that provided in Rule 32; therefore, the new draft does not address the concern that in some circuits an amicus could be limited to less than "25 pages."

b. Filing the Brief with the Motion

The existing rule permits, but does not require, "conditional" filing of the amicus brief with the motion. The proposed amendments require the brief to accompany the motion. The new draft deletes that requirement so the cost of preparing the brief need not be incurred unless the amicus knows that it will be permitted to file its brief. (Changes at lines 27-28, and 62-65.)

c. Time for Filing

The existing rule requires an amicus curiae to file its brief "within the time allowed the party whose position as to affirmance or reversal the amicus brief will support" unless:

1. all parties otherwise consent, or
2. the court for cause shown grants leave for later filing.

The proposed amendments drop the exception based upon consent of all parties, but otherwise leave the time for filing the brief unchanged.

When developing the proposed amendments the Committee spent a great deal of time discussing the timing issues. The Committee realized that a tension is created by requiring an amicus to file simultaneously with the party and prohibiting the amicus from repeating the party's arguments. In most instances, however, the party and the amicus cooperate and share information. The Committee rejected the practice of allowing an amicus to file after the party it supports because the Committee thought it would then be necessary to extend the time for filing responsive briefs. An appellee's brief is due within 30 days after service of the appellant's brief. An appellant's reply brief is due within 14 days after service of the appellee's brief. So, if an amicus is permitted to file its brief 15 days after the party it supports and the amicus supports the appellee, the appellant's reply brief would be due (14 days after service of the appellee's brief) before the amicus brief is due (15 days after service of the appellee's brief). The commentators suggest approaches that would not require delaying the briefing schedule:

- An amicus who supports the appellant must file within 15 days after the appellant, but an amicus who supports the appellee must file within 7 days after the appellee and no adjustment is made in the time for filing responsive briefs.

  The draft does not adopt that approach for two reasons: first, it would make the rule more complex; and second, when an amicus supports the appellee, it is likely to produce a motion for extension of time to file the reply brief. An amicus who supports the appellee would have until 7 days after filing of the appellee's brief to file the amicus brief, leaving the appellant only 7 days to prepare and file a response to the amicus brief.

  If the Advisory Committee is correct and the amicus and the party ordinarily work together, simultaneous filing is not a hardship and the briefing schedule

is not disrupted. In the rarer instances in which there is no cooperation between the amicus and the party, the amicus may seek leave for later filing.

- An amicus brief is not due until the appellant's reply brief is due. The rule should not routinely provide the parties with an opportunity to respond to the amicus brief. A party who wants to have that opportunity should file a motion for leave to respond.
The draft does not adopt that approach because it is likely to routinely spawn a motion for leave to respond and the briefing schedule would be extended with the added work of processing the motion.

d. Written Consent for Filing

The new draft adopts the suggestion that a statement that all parties have consented to the filing of the brief is sufficient and it is not necessary to file the written consent of all the parties.

e. Other changes

In subpart (a) the District of Columbia is added to the list of entities allowed to file an amicus brief without consent.

The new draft makes it clear in subpart (f) that an amicus may request leave to file a reply.

With regard to subpart (g) the Advisory Committee considered and rejected a provision stating that an amicus should be allowed to participate in oral argument if the party supported grants a portion of the party's allotted time to the amicus. The Committee believes that an amicus can exert undue pressure on a party to cede some of its time to the amicus and that leaving the decision entirely in the party's control will have the effect of increasing the pressure. If the party is willing to grant some of its time to an amicus, a motion should be filed seeking permission for the amicus curiae's participation.

Rule 29. Brief of an Amicus Curiae

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

(a) **When Permitted.** The United States or its officer or agency, or a State, Territory, Commonwealth, or the District of Columbia may file an amicus-

curiae brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only if ~~it is accompanied by the written consent of all parties~~ the brief states that all parties have consented to its filing or by leave of court.

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

(1) the movant's interest;

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

(c) **Contents and Form.** An amicus brief shall comply with Rule 32. In addition to the requirements of Rule 32, the cover shall identify the party or parties supported or indicate whether the brief supports affirmance or reversal. If an amicus curiae is a corporation, the brief shall include a disclosure statement like that required of parties by Rule 26.1. ~~An amicus brief need not comply with Rule 28, but~~ shall include the following:

(1) a table of contents, with page references;

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

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

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

(d) **Length.** Except by the court's permission an amicus brief may be no more than one-half the maximum length of a party's principal brief but if the court grants a party permission to file a longer brief than is authorized by these rules, that extension does not affect the length of an amicus brief.

(e) **Time for Filing.** An amicus curiae ~~must~~ may conditionally file its brief with the motion for leave to file, ~~accompanied by a motion for filing~~

~~when necessary.~~ The brief shall be filed within the time allowed to the party being supported. An amicus curiae who does not support either party shall file its brief within the time allowed to the appellant or petitioner. A court may grant leave for later filing, specifying the time within which an opposing party may answer.

(f) **Reply Brief.** Except by permission of the court, an amicus curiae is not entitled to file a reply brief.

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

Committee Note

Rule 29 is entirely rewritten.

Subdivision (a). The major change in this subpart is that when a brief is filed with the consent of all parties, it is no longer necessary to obtain the parties' written consent and to file the consents with the brief. It is sufficient to obtain the parties' oral consent and to state in the brief that all parties have consented. It is sometimes difficult to obtain all the written consents by the filing deadline and it is not unusual for counsel to represent that parties have consented; for example, in a motion for extension of time to file a brief it is not unusual for the movant to state that the other parties have been consulted and they do not object to the extension. If a party's consent has been misrepresented, the party will be able to take action before the court considers the amicus brief.

The District of Columbia is added to the list of entities allowed to file an amicus brief without consent of all parties. The other changes in this material are stylistic.

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

The former rule only required the motion to identify the applicant's interest and to generally state the reasons why an amicus brief is desirable. The amended rule additionally requires that the motion state the relevance of the matters asserted to the disposition of the case. As Sup. Ct. R. 37.1 states:

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

Because the relevance of the matters asserted by an amicus is ordinarily the most compelling reason for granting leave to file, the Committee believes that it is helpful to explicitly require such a showing.

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

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

Subdivision (d). This new provision imposes a shorter page limit for an amicus brief than for a party's brief. This is appropriate for two reasons. First, an amicus may omit certain items that must be included in a party's brief. Second, an

amicus brief is supplemental. It need not address all issues or all facets of a case. It should treat only matter not adequately addressed by a party.

Subdivision (e). The time limit for filing is unchanged; an amicus brief must be filed within the time allowed the party the amicus supports. Ordinarily this means that the amicus brief must be filed within the time allowed for filing the party's principal brief. That, however, is not always the case. For example, if an amicus is filing a brief in support of a party's petition for rehearing, the amicus brief is due within the time for filing that petition. Occasionally, an amicus supports neither party; in such instances, the amendment provides that the amicus brief must be filed within the time allowed the appellant or petitioner.

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

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

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

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

En Banc Proceedings

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

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

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

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

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

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

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

(B) the proceeding involves one or more questions of exceptional importance, each of which shall be concisely stated; a proceeding may present a question of exceptional importance if it involves an issue as to which the panel decision conflicts with the authoritative decisions of every other federal court of appeals that has addressed the issue (citation to the conflicting case or cases being required).

(2) Except by the court's permission, a petition for en banc hearing or rehearing shall not exceed 15 pages, excluding

material not counted under Rule 28(g).

(3) Except by the court's permission, if a petition for panel rehearing and a petition for rehearing en banc are both filed--whether or not they are combined in a single document--the combined documents shall not exceed 15 pages, excluding material not counted under Rule 28(g).

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

(c) *Time for ~~suggestion of a party~~ Petition for Hearing or Rehearing ~~in~~ En Banc.* ~~; suggestion does not stay mandate. If a party desires to suggest that~~ A petition that an appeal be heard initially ~~in~~ en

banc ~~, the suggestion must~~ shall be ~~made~~ filed by the date ~~on which~~ when the appellee's brief is ~~filed~~ due. A ~~suggestion~~ petition for a rehearing ~~in~~ en banc ~~must~~ shall be ~~made~~ filed within the time prescribed by Rule 40 for filing a petition for rehearing. ~~, whether the suggestion is made in such petition or otherwise. The pendency of such a suggestion whether or not included in a petition for rehearing shall not affect the finality of the judgment of the court of appeals or stay the issuance of the mandate.~~

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

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

(f) *Voting on a Petition.* The clerk shall forward any such petition to the judges of the court who are in regular active service and, with respect to a petition for rehearing, to any other members of

the panel that rendered the decision sought to be reheard. But a vote need not be taken to determine whether the cause will be heard or reheard en banc unless one of those judges requests a vote.

Committee Note

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

Subdivision (a). The title of this subdivision is changed from "When hearing or rehearing in banc will be ordered" to "When Hearing or Rehearing En Banc May Be Ordered." The change emphasizes the discretion a court has with regard to granting en banc review.

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

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

Intercircuit conflict is cited as a reason for determining

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

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

The amendment states that "a proceeding may present a question of exceptional importance if it involves an issue as to which the panel decision conflicts with the authoritative decisions of every other federal court of appeals that has addressed the issue." That language contemplates two situations in which a rehearing en banc may be appropriate. The first is when a panel decision creates a conflict. A panel decision creates a conflict when it conflicts with the decisions of all other circuits that have considered the issue. If a panel decision simply joins one side of an already existing conflict, a rehearing en banc may not be as important because it cannot avoid the conflict. The second situation that may be a strong candidate for a rehearing en banc is one in which the circuit persists in a conflict created by a pre-existing decision of the same circuit and no other circuits have joined on that side of the conflict. The amendment states that the conflict must be with an "authoritative" decision of another circuit. "Authoritative" is used rather than "published" because in some

circuits unpublished opinions may be treated as authoritative.

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

Paragraph (2) of this subdivision establishes a maximum length for a petition. Fifteen pages is the length currently used in five circuits: D.C. Cir. R. 35(b), 5th Cir. R. 35.5, 10th Cir. R. 35.5, 11th Cir. R. 35-8, and Fed. Cir. R. 35(d). Each request for en banc consideration must be studied by every active judge of the court and is a serious call on limited judicial resources. The extraordinary nature of the issue or the threat to uniformity of the court's decision can be established in most cases in less than fifteen pages. A court may shorten the maximum length on a case by case basis but the rule does not permit a circuit to shorten the length by local rule. The Committee has retained page limits rather than using a word count similar to that in proposed Rule 32 because there has not been a serious enough problem to justify importing the word count and typeface requirements that may become applicable to briefs into other contexts.

Paragraph (3), although similar to (2), is separate because it deals with those instances in which a party files both a petition for rehearing en banc under this rule and a petition for panel rehearing under Rule 40.

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

Subdivision (c). Two changes are made in this subdivision. First, the sentence stating that a request for a rehearing en banc does not affect the finality of the judgment or stay the issuance of the mandate is deleted. The deletion of that sentence does not affirmatively accomplish the goal of extending the period for filing a petition for writ of certiorari; it simply sets the stage for such an amendment. In order to affirmatively accomplish that objective, Sup. Ct. R. 13.3 must be amended.

Second, the language permitting a party to include a request for rehearing en banc in a petition for panel rehearing

is deleted. The Committee believes that those circuits that want to require two separate documents should have the option to do so.

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

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

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

COMMENTS ON PROPOSED AMENDMENTS OF FED. R. APP. P. 35

One of the purposes of the amendments is to treat a request for a rehearing en banc like a petition for panel rehearing so that a request for a rehearing en banc will suspend the finality of a court of appeals' judgment and extend the period for filing a petition for writ of certiorari. The sentence stating that a request for rehearing en banc does not suspend the finality of the judgment or stay the mandate is deleted. The term "suggestion" for rehearing en banc is changed to "petition" for rehearing en banc. Companion amendments are made to Rule 41.

The amendments require each petition for en banc consideration to begin with a statement concisely demonstrating that the case meets the criteria for en banc consideration. Intercircuit conflict is cited as a reason for determining that a proceeding involves a question of "exceptional importance."

The amendments make 15 pages the maximum length for a petition.

1. Peter H. Arkison, Esquire
Suite 502
103 East Holly Street
Bellingham, Washington 98225-4728

Points out that there is an unnecessary double negative in both 35(b)(2) and (3) ("excluding material not counted"). The paragraphs are also unnecessarily wordy because they repeat "petition for rehearing and a petition for rehearing en banc." He also suggests excluding "except by the court's permission" because it is in Rule 28(g).

He suggests:

35(b)(2) "Rule 28(g) shall apply with a page limit of 15 pages for a petition."

35(b)(3) "For purposes of Rule 35(b)(2), a petition for panel rehearing and a petition for rehearing en banc shall be considered a single document regardless of whether they are filed separately."

2. Robert L. Baechtol, Esquire
Chair, Rules Committee
The Federal Circuit Bar Association
1300 I Street, N.W.
Suite 700
Washington, D.C. 20005-3315

The Association suggests that 35(b)(1)(B) should be expanded to include an additional consideration:

> . . . or involves an issue which is one of first impression or on which the prior law was unsettled in the circuit.

3. Donald R. Dunner, Esquire
Chair, Section of Intellectual Property Law
American Bar Association
750 N. Lake Shore Drive
Chicago, Illinois 60611

Mr. Dunner submits comments from two of the section's committees:

One committee states that the 15-page limit "may be a bit too restrictive, especially where both a petition for en banc review and a petition for panel rehearing are filed. Perhaps 35(b)(3) could be further amended to provide for additional pages upon leave of court." The committee states that the remaining amendments "appear to be acceptable."

Another committee agrees that the distinction between a petition for rehearing and a petition for rehearing en banc should be abolished but disagrees that a panel decision needs to conflict with every other federal court of appeals in order to "present a question of exceptional importance." If a split is significant and the panel decision illuminates or heightens the conflict, the proceeding may present a question of exceptional importance warranting en banc treatment even when the decision joins one side of a preexisting conflict.

4. William J. Genego and Peter Goldberger, Esquires
Co-Chairs, National Association of Criminal
Defense Lawyers, Committee On Rules of Procedure
1627 K Street, N.W.
Washington, D.C. 20006

NACDL welcomes the elimination of the distinction between a petition for rehearing and a suggestion for rehearing en banc and approves expansion of

the grounds for rehearing to include intercircuit conflicts. It does not oppose imposition of a uniform page length. But it does not see the point of changing the spelling of "in banc" which conforms to the statutory usage.

5. Kent S. Hofmeister, Esquire
Section Coordinator
Federal Bar Association
1815 H Street, N.W.
Washington, D.C. 20006-3697

Mr. Hofmeister forwarded the comments of Mark Laponsky, Esquire, the Chair of the Labor Law and Labor Relations Section of the Federal Bar Association. Mr. Laponsky endorses the proposed amendments.

6. Miriam A. Krinsky
Assistant United States Attorney
United States Courthouse
312 North Spring Street
Los Angeles, California 90012

"Wholeheartedly endorse[s]" the change so that a request for rehearing en banc suspends the finality of a judgment and extends the time for filing a petition for a writ of certiorari; the change eliminates a trap that is based upon an ill-advised distinction.

Urges consideration of an amendment that clarifies the precedential value of a panel opinion after rehearing en banc is granted. Most circuits either automatically, or usually, vacate the panel opinion when en banc review is granted; but the Ninth and Tenth Circuits presume that the three-judge panel opinion remains in effect pending disposition of the case by the en banc court. It may be undesirable to have, during the time the case is awaiting en banc resolution, a number of district court judgments handed down based on a panel decision that is likely to be modified.

7. Philip A. Lacovara, Esquire
Mayer, Brown & Platt
1675 Broadway
New York, New York 10019-5820

Supports the change in terminology from "suggestion" to "petition" for rehearing en banc. But objects to two features of the proposed amendments to subpart (b).

a. Requiring in (b)(1) that the petition must explain that <u>either</u> the panel decision conflicts with other decisions <u>or</u> involves a question of

exceptional importance implies that these are the only grounds for en banc treatment. The circuits have used en banc rehearings when a majority of the active judges believe that a panel decision is simply wrong. Mr. Lacovara says that the rule should not purport to deprive the circuits of this error-correcting capacity, even if the circuits are not often inclined to use it.

He suggests deleting "either" from line 18 and "or" from line 27 on page 17; striking the period on line 39 and inserting "or" and then adding the following:

"(C) there are other specific and compelling reasons for the court en banc to consider the matter."

b. Subsection (b)(1)(B) may imply that a circuit should not bother with a decision unless it is out of line with "every other" circuit. That test is too demanding and does not represent current, sound appellate practice. It is the prerogative of the full court to have the opportunity to decide, where there is otherwise an intercircuit conflict, whether to align itself with the other side of the split—or to adopt another approach—rather than acquiesce in the position taken by the panel. He suggests amending lined 36-39 to read:

"decisions of [every] other federal courts of appeals that have[as] addressed the issue . . . ."

Mr. Lacovara also questions the assertion in the Committee Note that, in order for a "petition" for rehearing en banc to extend the time for petitioning for certiorari, the Supreme Court would have to amend its Rule 13.3. At most, the commentary should indicate that it is not clear what effect the Supreme Court would extend to the new characterization.

8. Mr. John Mayer
3821 North Adams Road
Bloomfield Hills, Michigan 48304

Suggests using the plain English term "full court" rather than *in banc* or *en banc*.

9. Honorable Jon O. Newman
United States Circuit Judge
450 Main Street
Hartford, Connecticut 06103

Chief Judge Newman opposes three aspects of the proposed revisions.

a. He recommends deleting that portion of 35(b) which relates the existence of a question of exceptional importance to a conflict among circuits.

- He believes that the proposed wording states a bias in favor of an in banc rehearing whenever the panel decision conflicts with a decision of another circuit and it is "not the business of national rule-makers to construe the phrase 'exceptional importance,' which has been one of the two criteria" for a full court rehearing for decades.
- "[T]he rule invokes its new test of importance whenever a decision conflicts with the decision of just one other circuit." Whether a court should rehear such a case in banc is best left to the sound judgment of each court of appeals.

b. The amendment of 35(c) will create confusion by dropping the sentence that makes it clear a suggestion for a rehearing in banc does not stay the issuance of the mandate or affect finality. He suggests that the Committee try to coordinate the effective date of the proposed amendment to Rule 35(c) to coincide with an amendment to Supreme Court Rule 13.3, or provide that the amendment to Rule 35(c) does not become effective unless and until a corresponding change is made in Supreme Court Rule 13.3

c. Chief Judge Newman states that the change in spelling from "in banc" to "en banc" is extremely ill-advised. He would retain "in banc" because it conforms to the spelling used in the statute, 28 U.S.C. § 46(c), and there should be a compelling reason supporting any such variation. Second, "in banc" is a phrase of English words. Third, no rule change should be made unless there are significant reasons for it. The only reason given for the change is in the summary prepared by the Administrative Office; the summary says that "en banc" is in "much wider usage among the courts." That is not a substantial reason.

10. Honorable Jerry E. Smith
United States Circuit Judge
12621 United States Courthouse
515 Rusk
Houston, Texas 77002-2598

Urges the committee to use a word count similar to that in proposed in Rule 32 rather than a page limit. He says that attorneys circumvent the page limits by using small typeface and single-spaced footnotes, etc. and that the problem is serious enough to warrant attention in the rules.

Judge Smith suggests either that 40(b) require petitions to be in the form prescribed in Rule 32(a) (with a corresponding changed to FRAP 32(b)) or that the rule could permit circuits to implement a local rule to control the use of compressed devices so as not to defeat the intent of the 15 page limit. He further states that it is incongruous to retain restrictions for petitions for panel rehearing but not for rehearing in banc.

11. James A. Strain, Esquire
Seventh Circuit Bar Association
219 South Dearborn Street, Suite 2722
Chicago, Illinois 60604

Favors adoption of the changes and notes that Supreme Court Rule 13.3 will need to be conformed so that a "petition" for rehearing en banc will extend the time for filing a petition for certiorari.

12. Carolyn B. Witherspoon, Esquire
Office of the President
Arkansas Bar Association
P.O. Box 3178
Little Rock Arkansas 72203
(on behalf of the committee members of the Arkansas Bar Association Legislation and Procedures Committee)

Approves the proposed changes.

13. Hugh F. Young, Jr.
Executive Director
Product Liability Advisory Council
1850 Centennial Park Drive, Suite 510
Reston, Virginia 22091

The PLAC suggests clarification of 35(b)(1)(b) on two points:

a. that intercircuit conflicts are not the only questions of exceptional importance that warrant *en banc* review; and
b. that a panel decision should not be required to conflict with every other circuit.

14. Michael Zachary, Esquire
Supervisory Staff Attorney
United States Court of Appeals
United States Courthouse
40 Foley Square
New York, New York 10007

Says it is unclear whether the language in (b)(1)(B) concerning a panel decision that creates a split among the circuits (a) gives an example of a proceeding that presents a question of exceptional importance and that the courts are free to grant en banc consideration in other circumstances presenting questions of exceptional importance; or (b) represents the only circumstance in which a question will be deemed of such exceptional

importance as to warrant en banc consideration. He suggests that the Committee Note implies that the latter is true. Mr. Zachary does not state a preference for one approach over the other, however, he suggests that the Committee's intent should be clarified.

He also suggests that the Committee Note is unclear whether the intercircuit conflict language applies only to (b)(1)(B) or also to (b)(1)(A). He suggests that a sentence in the comment be amended as follows:

> The second situation that may be a strong candidate for a rehearing en banc is one in which the circuit persists in an intercircuit conflict created by a pre-existing decision of the same circuit . . . .

ISSUES AND CHANGES - RULE 35

Fourteen letters were received which comment upon the proposed amendments to Rule 35. One letter from an A.B.A. section, however, contains comments from two of the section's committee. There are, therefore, fifteen commentators.

Of the 15 commentators none express general opposition to the changes. Eight express general approval of the amendments, but 4 of the 8 suggest some revisions. Seven others also suggest revisions.

1. Suggested Revisions

a. Additional criteria for granting a rehearing en banc

One commentator says that the criteria for granting a rehearing en banc should be expanded beyond the two listed in (b)(1)(A) [the panel decision conflicts with a decision of the Supreme Court or of the circuit] and (b)(1)(B) [question of exceptional importance]. He says the language in (b)(1) requiring a petition to explain that either the panel decision conflicts with other decisions or involves a question of exceptional importance implies that these are the only grounds for en banc treatment. He says the circuits sometimes rehear a case en banc when a majority of the active judges think a panel decision is wrong. He argues that the circuits should be able to retain this "error-correcting capacity" even if they are not often inclined to use it. He suggests adding a subparagraph (C) so that the petitioner can argue that rehearing en banc is appropriate because:

> (C) there are other specific and compelling reasons for the court en banc to consider the matter.

b. Breadth of the "question of exceptional importance" criterion

Five commentators are concerned about the breadth of the "question of exceptional importance" criterion.

- Three of them state that intercircuit conflicts are not the only questions of exceptional importance that warrant en banc review (they apparently believe that the amended rule implies that intercircuit conflict is the exclusive means of determining exceptional importance rather than an example of it). One of the three suggests expanding (b)(1)(B) to include a proceeding that

> "involves an issue which is of first impression or on which the prior law was unsettled in the circuit."

- With regard to intercircuit conflicts, three commentators state that a case can present a question of exceptional importance even if the panel decision does not conflict with every other federal court of appeals. A panel

decision may illuminate or heighten a conflict and, therefore, be of exceptional importance. The full court also should have the opportunity to decide whether to align itself with the other side of the split, or to adopt another approach, rather than being forced to acquiesce in the position taken by the panel.

- Chief Judge Newman recommends deleting that portion of 35(b)(1)(B) which relates the existence of a question of exceptional importance to a conflict among the circuits. He believes that the proposed wording states a bias in favor of in banc rehearing whenever a panel decision conflicts with a decision of another circuit. He says that it is "not the business of national rulemakers to construe the phrase 'exceptional importance,' which has been one of the two criteria" for a full court rehearing for decades. He also notes that the "rule invokes its new test of importance whenever a decision conflicts with the decision of just one other circuit" and whether a court should rehear such a case in banc is best left to the judgment of each court of appeals.

c. Spelling — "En Banc" or "In Banc"

Two commentators object to changing the spelling of "in banc," which conforms to the statutory usage, to "en banc." Chief Judge Newman, one of those two commentators, also objects to the change because "in banc" is a phrase of English words and thus should be preferred, and because no significant reason is given to support the change.

Another commentator suggests using neither spelling; he suggests using the plain English term "full court."

d. Page limit

- One commentator says that 15 pages may be too restrictive when both a petition for en banc review and a petition for panel rehearing are filed. The commentator suggests amending (b)(3) to provide for additional pages "upon leave of court."
- Another commentator urges the Committee to consider using a word count similar to that in proposed Rule 32. He says that attorneys do abuse the page limits by using small typeface and long textual single-spaced footnotes, etc.

e. Coordination with Supreme Court Rule

Two commentators are concerned about the interrelationship between the proposed amendments to Rule 35 and the need to amend Supreme Court Rule 13.3

- Chief Judge Newman suggests that the Committee try to coordinate the

effective date of the proposed amendment of rule 35(c) to coincide with amendment of Supreme Court Rule 13.3, or provide that the amendment of Rule 35(c) does not become effective until a corresponding change is made in Supreme Court Rule 13.3

- Another commentator questions the assumption that Supreme Court Rule 13.3 must be amended in order for a "petition" for rehearing en banc to extend the time for petitioning for certiorari. He believes that with the change in terminology in FRAP 35 (from "suggestion" for rehearing en banc to "petition" for rehearing en banc) the existing language in Rule 13.3 could be read so that the filing of a petition for rehearing en banc extends the time for filing a petition for certiorari. Sup. Ct. R. 13.3 says that a "suggestion for rehearing en banc" is not a "petition for rehearing" (which does extend the time for petitioning for certiorari) within the meaning of the Rule "unless so treated by the United States court of appeals."

f. Miscellaneous

i. One commentator says that the Committee Note makes it unclear whether the intercircuit conflict language applies only to (b)(1)(B) or whether it also applies to (b)(1)(A). The commentator suggests amendment of the Committee Note.

ii. One commentator urges consideration of a problem not addressed by either the current rule or the proposed amendments — the precedential value of a panel opinion after rehearing en banc is granted but before disposition of the case by the en banc panel. The Ninth and Tenth Circuits presume that the three-judge panel opinion remains in effect. But it may be undesirable for additional district court judgments to be rendered based on a panel decision that is likely to be modified.

iii. A commentator suggests word changes as follows:

35(b)(2)	"Rule 28(g) shall apply with a page limit of 15 pages for a petition.
35(b)(3)	"For purposes of Rule 35(b)(2), a petition for panel rehearing and a petition for rehearing en banc shall be considered a single document regardless of whether they are filed separately.

2. The New Draft

a. Additional Criteria

No change recommended.

Although it is unusual for the rules to include substantive criteria, the criteria for granting en banc consideration are found in 35(a) and, so far as I can determine, they have been there since 1938. Adding other criteria at this time has not been contemplated by the Committee and it would be a substantial change requiring republication. The new draft suggests no change in subpart (a).

Strictly read, new paragraph (b)(1) of the proposed amendments does not create or restrict the long accepted criteria listed in subpart (a). Rather, paragraph (b)(1) simply requires that a petition for en banc consideration state that the case falls within one of the criterion. (Ten circuits currently have similar local rules although many of the local rules require the statement only when the petitioner is represented by counsel.) It is true that subpart (a) says that en banc consideration "ordinarily" will not be granted unless the proceeding falls within the criteria. The qualifier "ordinarily" leaves a court free to grant an en banc hearing for other reasons. Paragraph (b)(1) does not limit the court's discretion but it directs a party to assert that the case falls within one of the criterion.

b. Breadth of the "exceptional importance" criterion

The Solicitor General urged amendment of Rule 35 so that intercircuit conflict would constitute grounds for granting en banc consideration. After much debate and compromise, the Advisory Committee rejected adding inter-circuit conflict to subpart (a) as an additional criterion for granting rehearing en banc. Instead, the Committee agreed that the existence of intercircuit conflict could be considered in determining whether a proceeding involves a question of exceptional importance and thus the proposed amendments discuss intercircuit conflict in paragraph (b)(1).

The new draft makes three changes in the language of (b)(1)(B):

1. The discussion of intercircuit conflict is labeled as an example of a question of exceptional importance to avoid the implication that intercircuit conflict is the only circumstance in which a question is deemed of exceptional importance.

2. Chief Judge Newman objects that it is not the role of national rulemakers to construe the phrase exceptional importance and he urges the Committee to delete that portion dealing with intercircuit conflict. He believes that the proposed wording states a bias in favor of en banc rehearing whenever a panel decision conflicts with a decision of another circuit. The draft does not follow Chief Judge Newman's suggestion but it could be easily accomplished by deleting everything

after the semicolon in (b)(1)(B). The draft does, however, attempt to eliminate any implication that a court should grant en banc reconsideration in all such cases. New language emphasizes that a party may assert that the existence of intercircuit conflict gives rise to a question of exceptional importance.

3. The example is broadened to avoid the implication that a case cannot present a question of exceptional importance unless it conflicts with every other federal court of appeals. (Given the first change — making it clear that this is only an example of a question of exceptional importance and not the only circumstance that may be so considered — it may be unnecessary to make this change even if the Committee desires to be responsive to the commentators who stressed that other circumstances of exceptional importance warrant en banc review.)

c. The spelling of "en banc" remains as in the published version. Unfortunately, the plain English term "full court" probably cannot be used in place of either "in banc"(used in 28 U.S.C. § 46(c)) or "en banc" (used in Pub.L. 95-486, § 6, 92 Stat. 1633). The term full court would seem to anticipate participation of all active circuit judges. Whereas an "en banc" or "in banc" court may, in circuits having more than 15 active judges, be composed of some subset of the members of the court.

d. The page limit remains unchanged. It is not yet clear whether the type of length limitations contained in proposed Rule 32 will be adopted and it would be premature to import them here.

Rule 35. ~~Determination of Couses by the Court In Banc~~ En Banc Determination

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

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

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

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

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

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

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

(B) the proceeding involves one or more questions of exceptional importance, each of which must be concisely stated; for example, a petition may assert that a proceeding ~~may~~ presents a question of exceptional importance if it involves an issue as to which the panel decision conflicts with the authoritative decisions of ~~every~~ other federal courts of appeals that ~~has~~ have addressed the issue. ~~(citation to the conflicting case or cases being required).~~

(2) Except by the court's permission, a

petition for an en banc hearing or rehearing shall not exceed 15 pages, excluding material not counted under Rule 28(g).

(3) For purposes of the page limit in Rule 35(b)(2), if a party files both a petition for panel rehearing and a petition for rehearing en banc, they are considered a single document even if they are filed separately.

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

(c) **Time for ~~suggestion of a party~~ Petition for Hearing or Rehearing ~~in~~ En Banc. ~~; suggestion~~**

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

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

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

(f) **Voting on a Petition.** The clerk shall forward any such petition to the judges of the court who are in regular active service and, with respect to a

petition for rehearing, to any other members of the panel that rendered the decision sought to be reheard. But a vote need not be taken to determine whether the cause will be heard or reheard en banc unless one of those judges requests a vote.

Committee Note

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

Subdivision (a). The title of this subdivision is changed from "When hearing or rehearing in banc will be ordered" to "When Hearing or Rehearing En Banc May Be Ordered." The change emphasizes the discretion a court has with regard to granting en banc review.

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

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

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

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

The amendment states that "a petition may assert that a proceeding ~~may~~ presents a question of exceptional importance if it involves an issue as to which the panel decision conflicts with the authoritative decisions of ~~every~~ other federal courts of appeals that ~~has~~ have addressed the issue." A panel decision that creates a conflict, joins one side of an already existing conflict, or persists in an intercircuit conflict created by a pre-existing decision of the same circuit all fall within that description. ~~That language contemplates two situations in which a rehearing en banc may be appropriate. The first is when a panel decision creates a conflict. A panel decision creates a conflict when it conflicts with the decisions of all other circuits that have considered the issue. If a panel decision simply joins one side of an already existing conflict, a rehearing en banc may not be as important because it cannot avoid the conflict. The second situation that may be a strong candidate~~

~~for a rehearing en banc is one in which the circuit persists in a conflict created by a pre-existing decision of the same circuit and no other circuits have joined on that side of the conflict.~~ The amendment states that the conflict must be with an "authoritative" decision of another circuit. "Authoritative" is used rather than "published" because in some circuits unpublished opinions may be treated as authoritative.

Counsel are reminded that their duty is fully discharged without filing a petition for rehearing en banc unless the case meets the rigid standards of subdivision (a) of this Rule and even then the granting of a petition is entirely within the court's discretion.

Paragraph (2) of this subdivision establishes a maximum length for a petition. Fifteen pages is the length currently used in five circuits: D.C. Cir. R. 35(b), 5th Cir. R. 35.5, 10th Cir. R. 35.5, 11th Cir. R. 35-8, and Fed. Cir. R. 35(d). Each request for en banc consideration must be studied by every active judge of the court and is a serious call on limited judicial resources. The extraordinary nature of the issue or the threat to uniformity of the court's decision can be established in most cases in less than fifteen pages. A court may shorten the maximum length on a case by case basis but the rule does not permit a circuit to shorten the length by local rule. The Committee has retained page limits rather than using a word count similar to that in proposed Rule 32 because there has not been a serious enough problem to justify importing the word count and typeface requirements that may become applicable to briefs into other contexts.

Paragraph (3), although similar to (2), is separate because it deals with those instances in which a party files both a petition for rehearing en banc under this rule and a petition for panel rehearing under Rule 40.

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

Subdivision (c). Two changes are made in this subdivision. First, the sentence stating that a request for a rehearing en banc does not affect the finality of the judgment or stay the issuance of the mandate is deleted. The deletion of

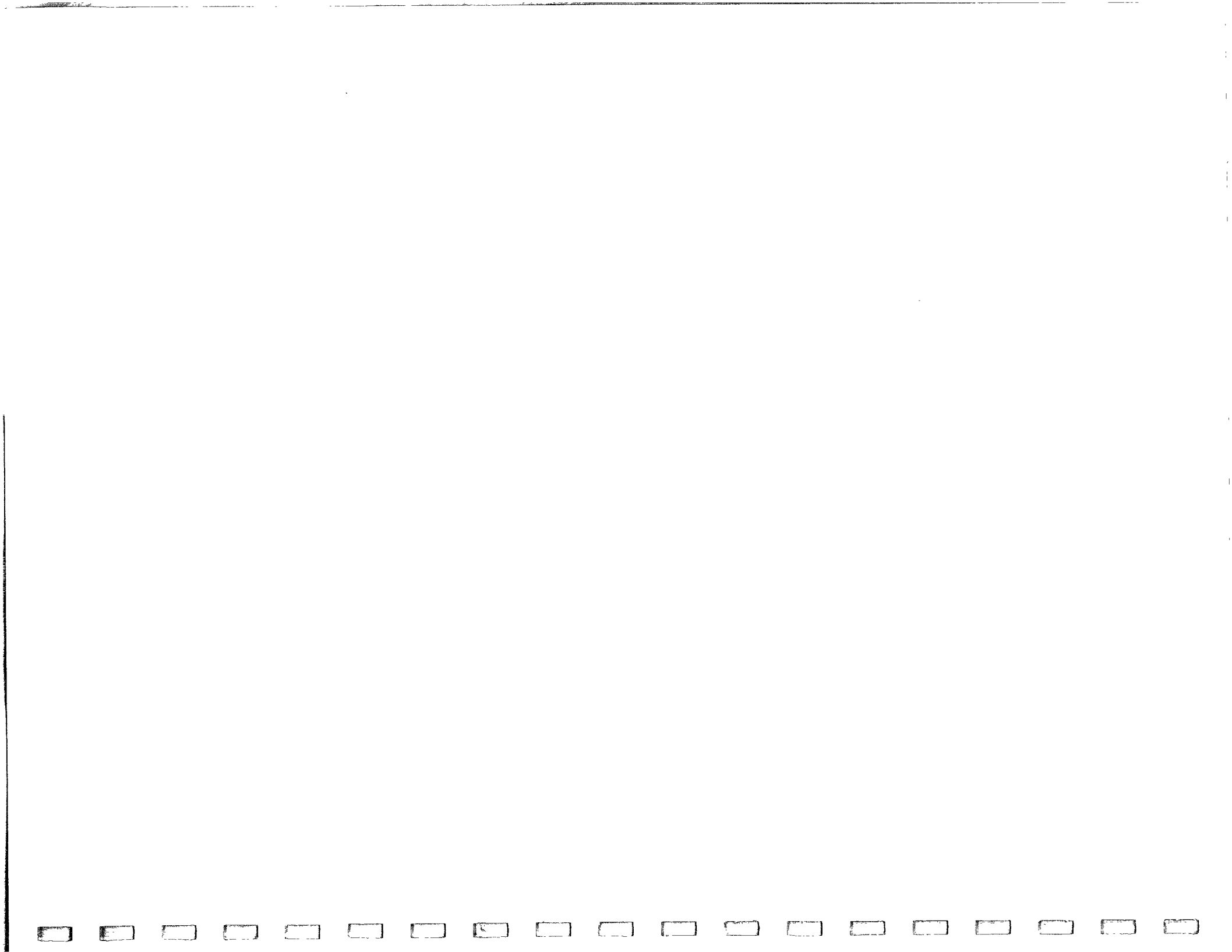
that sentence does not affirmatively accomplish the goal of extending the period for filing a petition for writ of certiorari; it simply sets the stage for such an amendment. In order to affirmatively accomplish that objective, Sup. Ct. R. 13.3 must be amended.

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

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

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

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



Rule 41. Issuance of Mandate; Stay of Mandate

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

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

(2) ~~The mandate of the court must issue 7 days after the expiration of the time for filing a petition for rehearing unless such a petition is filed or the time is shortened or enlarged by order. A certified copy of the judgment and a copy of the opinion of the court, if any, and any direction as to costs shall constitute the mandate, unless the court directs that a formal mandate issue.~~ The court's mandate shall issue 7 days after the time for filing a petition for rehearing expires, unless an order shortens or extends the time, or a party files a petition for rehearing, a petition for rehearing en banc, or a motion for a stay

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

(3) The mandate is effective when issued.

(b) *Stay of Mandate Pending Petition for Certiorari.* ~~A party who files a motion requesting a stay of~~

~~mandate pending petition to the Supreme Court for a writ of certiorari must file, at the same time, proof of service on all other parties. The motion~~ A party may move to stay the mandate pending the filing of a petition for a writ of certiorari in the Supreme Court. The motion shall be served on all parties and shall ~~must~~ show that ~~a petition for certiorari~~ the certiorari petition would present a substantial question and that there is good cause for a stay. The stay cannot exceed ~~30~~ 90 days, unless the period is extended for good cause ~~shown~~, and it cannot, in either case, exceed the time that the party who obtained the stay has to file a petition for a writ of certiorari in the Supreme Court. ~~or unless during the period of the stay, a notice from~~ But if the clerk of the Supreme Court ~~is filed showing~~ files a notice during the stay indicating that the party who ~~has~~ obtained the stay ~~has~~ filed a petition for the writ, ~~in which case~~ the stay ~~will~~ continues until ~~final disposition by~~ the Supreme Court's final disposition. The court of appeals ~~must~~ 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 ~~as a condition to the~~ before granting or ~~continuance of~~ continuing a stay of ~~the~~ mandate.

Committee Note

Subdivision (a). The amendment to paragraph (2) provides that the filing of a petition for rehearing en banc or a motion for a stay of mandate pending petition to the Supreme Court for a writ of certiorari delays the issuance of the mandate until the court disposes of the petition or motion. The provision that a petition for rehearing en banc delays the issuance of the mandate is a companion to the amendment of Rule 35 that deletes the language stating that a request for a rehearing en banc does not affect the finality of the judgment or stay the issuance of the mandate. The Committee's objective is to treat a request for a rehearing en banc like a petition for panel rehearing so that a request for a rehearing en banc will suspend the finality of the court of appeals' judgment and extend the period for filing a petition for writ of certiorari. The change made in this rule advances the Committee's objective of tolling the time for filing a petition for writ of certiorari only indirectly. Amendment of Sup. Ct. R. 13.3 is also necessary. Because the filing of a petition for rehearing en banc will stay the mandate, a court of appeals will need to take final action on the petition but the procedure for doing so is left to local practice.

The amendment to paragraph (2) also provides that the filing of a motion for a stay of mandate pending petition to the Supreme Court for a writ of certiorari delays the issuance of the mandate until the court disposes of the motion. If the court denies the motion, the court must issue the mandate 7 days after entering the order denying the motion. If the court grants

the motion, the mandate is stayed according to the terms of the order granting the stay. Delaying issuance of the mandate eliminates the need to recall the mandate if the motion for a stay is granted. If, however, the court believes that it would be inappropriate to delay issuance of the mandate until disposition of the motion for a stay, the court may order that the mandate issue immediately.

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

Subdivision (b). The amendment changes the maximum period for a stay of mandate, absent the court of appeals granting an extension for cause, to 90 days and in any event to no longer than the period the party who obtained the stay has to file a petition for a writ of certiorari to the Supreme Court. The presumptive 30-day period was adopted when a party had to file a petition for a writ of certiorari in criminal cases within 30 days after entry of judgment. Supreme Court Rule 13.1 now provides that a party has 90 days after entry of judgment by a court of appeals to file a petition for a writ of certiorari whether the case is civil or criminal.

The amendment does not require a court of appeals to grant a stay of mandate that is coextensive with the period granted for filing a petition for a writ of certiorari. The granting of a stay and the length of the stay remain within the discretion of the court of appeals. The amendment means only that a 90-day stay may be granted without a need to show cause for a stay longer than 30 days.

COMMENTS ON PROPOSED AMENDMENTS OF FED.R. APP. P. 41

In keeping with the objective of the amendments to Rule 35 that a request for a rehearing en banc be treated like a request for a panel rehearing, the amendments provide that the filing of a petition for rehearing en banc or a motion for a stay of mandate pending petition to the Supreme Court for a writ of certiorari delay the issuance of the mandate until the court disposes of the petition or motion.

A new paragraph is added that says a mandate is effective when issued.

The presumptive period for a stay of mandate pending petition for a writ of certiorari is extended to 90 days.

1. Donald R. Dunner, Esquire
Chair, Section of Intellectual Property Law
American Bar Association
750 N. Lake Shore Drive
Chicago, Illinois 60611

Mr. Dunner submitted the comments of two of the section's committees.

One committee makes no substantive comments.

Another committee says that the rule should state when a court's mandate will issue if a petition for rehearing or rehearing en banc is granted. The committee also suggests that in subpart (b) the party, and not the Clerk of the Supreme Court, should have the burden of filing notice that the party has obtained a stay.

2. William J. Genego and Peter Goldberger, Esquires
Co-Chairs, National Association of Criminal
Defense Lawyers, Committee On Rules of Procedure
1627 K Street, N.W.
Washington, D.C. 20006

Thanks the committee for responding to NACDL's suggestions to conform the presumptive duration of a stay of mandate to the 90-day period allowed for filing a petition for a writ of certiorari.

3. Kent S. Hofmeister, Esquire
Section Coordinator
Federal Bar Association
1815 H Street, N.W.
Washington, D.C. 20006-3697

Mr. Hofmeister forwarded the comments of two different persons.

a. Sydney Powell, Esquire, the Chair of the Appellate Law and Trial Practice Committee of the Federal Litigation Section. Ms. Powell commends the committee for clarifying that "the mandate is effective when issued."

b. Mark Laponsky, Esquire, the Chair of the Labor Law and Labor Relations Section. Mr. Laponsky approves the proposed amendments.

4. Miriam A. Krinsky
Assistant United States Attorney
United States Courthouse
312 North Spring Street
Los Angeles, California 90012

Supports the proposed changes and in particular the amendment to subpart (b) that changes the presumptive period for a stay to 90 days.

5. Philip A. Lacovara, Esquire
Mayer, Brown & Platt
1675 Broadway
New York, New York 10019-5820

Approves enlarging the stay-of-mandate period to 90 days in most cases. Suggests language changes in lines 59-61 on page 29 to return to the existing language ("unless during the period of the stay, a notice from the clerk of the Supreme Court is filed showing . . . .") or to substitute new language ("If, however, during the period of the stay, the clerk of the court of appeals receives a notice from the clerk of the Supreme Court indicating that . . . .") Either formulation avoids the inaccurate implication that the Clerk of the Supreme Court files papers in a court of appeals (that is the responsibility of the clerk of the court of appeals; the Supreme Court Clerk does his filing at the Supreme Court).

6. James A. Strain, Esquire
Seventh Circuit Bar Association
219 South Dearborn Street, Suite 2722
Chicago, Illinois 60604

Recommends adoption of the proposed amendments because they mesh with the Supreme Court rules and assist counsel and eliminate unnecessary motion practice.

7. Carolyn B. Witherspoon, Esquire
Office of the President
Arkansas Bar Association
P.O. Box 3178
Little Rock Arkansas 72203
(on behalf of the committee members of the Arkansas Bar Association Legislation and Procedures Committee)

Approves the proposed changes.

ISSUES AND CHANGES - RULE 41

Seven letters were received which comment upon the proposed amendments to Rule 41. Two of the letters from A.B.A. sections, however, contain comments from two of the sections' committees. There are, therefore, nine commentators.

Six of the commentators approve the amendments without reservation. Two other commentators suggest revisions. One commentator makes no substantive comment. None express general disapproval of the proposed changes.

1. Revisions

   a. Party should notify the court of appeals when the Supreme Court grants a stay.

Two commentators suggest amending the language of subpart (b) to make it clear that the party, not the Supreme Court Clerk, has the burden of notifying the court of appeals when the Supreme Court grants a stay.

   b. Mandate.

One commentator suggests that the rule should state when the mandate will issue if a petition for rehearing or a petition for rehearing en banc is granted.

Reporter's Note: I believe this is already covered by the rule. The court enters a new judgment after the rehearing and the mandate issues within the normal time after entry of that judgment.

2. New Draft

The new draft is simply the restyled draft, which is in many respects superior to the published draft. It deletes much of the repetition that is in the published draft.

It eliminates the implication that the clerk of the Supreme Court files notice that the Supreme Court has granted a stay.

Because there are substantial organizational differences between the new draft and the published draft, the Committee Note has been amended as indicated by the underlined and stricken text.

Rule 41. ~~**Issuance of Mandate; Stay of Mandate**~~ **Mandate: Contents; Issuance and Effective Date; Stay**

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

(b) When Issued. ~~The mandate of the court must issue 7 days after the expiration of the time for filing a petition for rehearing unless such a petition is filed or the time is shortened or enlarged by order. A certified copy of the judgment and a copy of the opinion of the court, if any, and any direction as to costs shall constitute the mandate, unless the court directs that a formal mandate issue.~~ The court's mandate shall issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing or rehearing en banc, or motion for stay of mandate, whichever is later. The court may shorten or extend the time.

(c) **Effective Date.** The mandate is effective when issued.

~~(b) Stay of Mandate Pending Petition for Certiorari. A party who filed a motion requesting a stay of mandate pending petition to the Supreme Court for a writ of certiorari must file, at the same time, proof of service on all other parties. The motion must~~

(d) Staying the Mandate.

(1) On Petition for Rehearing or Motion. The timely filing of a petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, stays the mandate until disposition of the petition or motion, unless the court orders otherwise.

(2) Pending Petition for Certiorari.

(A) A party may move to stay the mandate pending the filing of a petition for a writ of certiorari in the Supreme Court. The motion shall be served on all parties and

shall show that ~~a petition for certiorari~~ the certiorari petition would present a substantial question and that there is good cause for a stay.

(B) The stay ~~cannot~~ shall not exceed ~~30~~ 90 days, unless the period is extended for good cause ~~shown~~, or ~~unless during the period of the stay,~~ a notice from the ~~clerk of the~~ Supreme Court clerk is filed during the stay ~~showing~~ indicating that the party who ~~has~~ obtained the stay has filed a petition for the writ ~~in which~~ . In that case, the stay ~~will~~ continues until ~~final disposition by~~ the Supreme Court's final disposition.

(C) The court may require a bond or other security as a condition to granting or continuing a stay of the mandate.

(D) The court of appeals ~~must~~ 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 as a condition to the grant or continuance of a stay of the mandate.~~

Committee Note

The rule has been restructured to add clarity.

Subdivision (a). The sentence describing the contents of a mandate has been rewritten and moved to the beginning of the rule; the substance remains unchanged from the existing rule.

Subdivision (b). The existing rule provides that the mandate issues 7 days after the time to file a petition for panel rehearing expires unless such a petition is timely filed. If the petition is denied, the mandate issues 7 days after entry of the order denying the petition. Those provisions are retained but the amendments further provide that if a timely petition for rehearing en banc or motion for stay of mandate are filed, the mandate does not issue until 7 days after entry of an order denying the last of all such requests.

Subdivision (c). Subdivision (c) is new. It provides that the mandate is effective when the court issues it. A court of appeals' judgment or order is not final until issuance of the mandate; at that time the parties' obligations become fixed. This amendment is intended to make it clear that the mandate is effective upon issuance and that its effectiveness is not

delayed until receipt of the mandate by the trial court or agency, or until the trial court or agency acts upon it. This amendment is consistent with the current understanding. See, *e.g.*, 4th Cir. I.O.P. 41.1; 10th Cir. I.O.P. VIII.B.1. Unless the court orders that the mandate issue earlier than provided in the rule, the parties can easily calculate the anticipated date of issuance and verify issuance with the clerk's office. In those instances in which the court orders earlier issuance of the mandate, the entry of the order on the docket alerts the parties to that fact.

Subdivision (d) Amended paragraph (1) provides that the filing of a petition for rehearing en banc or a motion for a stay of mandate pending petition to the Supreme Court for a writ of certiorari ~~delays~~ stays the issuance of the mandate until the court disposes of the petition or motion. The provision that a petition for rehearing en banc ~~delays the issuance of~~ stays the mandate is a companion to the amendment of Rule 35 that deletes the language stating that a request for a rehearing en banc does not affect the finality of the judgment or stay the issuance of the mandate. The Committee's objective is to treat a request for a rehearing en banc like a petition for panel rehearing so that a request for a rehearing en banc will suspend the finality of the court of appeals' judgment and extend the period for filing a petition for writ of certiorari. The change made in this rule advances the Committee's objective of tolling the time for filing a petition for writ of certiorari only indirectly. Amendment of Sup. Ct. R. 13.3 is also necessary. Because the filing of a petition for rehearing en banc will stay the mandate, a court of appeals will need to take final action on the petition but the procedure for doing so is left to local practice.

Paragraph (1) also provides that the filing of a motion for a stay of mandate pending petition to the Supreme Court for a writ of certiorari ~~delays the issuance of~~ stays the mandate until the court disposes of the motion. If the court denies the motion, the court must issue the mandate 7 days after entering the order denying the motion. If the court grants the motion, the mandate is stayed according to the terms of the order granting the stay. Delaying issuance of the mandate eliminates the need to recall the mandate if the motion for a stay is granted. If, however, the court believes that it would be inappropriate to delay issuance of the mandate until disposition of the motion for a stay, the court may order that the mandate

issue immediately.

Paragraph (2). The amendment changes the maximum period for a stay of mandate, absent the court of appeals granting an extension for cause, to 90 days ~~and in any event to no longer than the period the party who obtained the stay has to file a petition for a writ of certiorari to the Supreme Court~~. The presumptive 30-day period was adopted when a party had to file a petition for a writ of certiorari in criminal cases within 30 days after entry of judgment. Supreme Court Rule 13.1 now provides that a party has 90 days after entry of judgment by a court of appeals to file a petition for a writ of certiorari whether the case is civil or criminal.

The amendment does not require a court of appeals to grant a stay of mandate that is coextensive with the period granted for filing a petition for a writ of certiorari. The granting of a stay and the length of the stay remain within the discretion of the court of appeals. The amendment means only that a 90-day stay may be granted without a need to show cause for a stay longer than 30 days.

Subparagraph (C) is not new; it has been moved from the end of the rule to this position.

Supreme Court of the United States
Office of the Clerk
Washington, D.C. 20543-0001

WILLIAM K. SUTER
CLERK OF THE COURT

September 21, 1995

AREA CODE 202
479-3014

95-AP-G

Mr. Peter G. McCabe
Secretary to the Rules Committee
Administrative Office of the U.S. Courts
Washington, DC 20544

Dear Peter:

Parties desiring to proceed *in forma pauperis* in this Court are required by our Rules to file an affidavit or declaration in the form prescribed by Form 4, Federal Rules of Appellate Procedure. In my opinion, Form 4 is deficient in several respects. It does not ask for a description of the affiant's monthly living expenses, debts, age, physical condition or place of residence. Additionally, it does not ask specifically about other assets such as spouse income, pensions, alimony, child support, or public financial assistance. I understand that some federal courts have designed their own forms for this purpose and it has been suggested that Form CJA 23 would be a better model. It would not be workable for this Court to have its own form.

I recommend that Form 4, Federal Rules of Appellate Procedure, be revised in order to provide more information. I make this recommendation in my capacity as Clerk of the Court. I do not consider it necessary to obtain Conference approval.

Please contact me if you need additional information concerning this matter.

Best wishes.

Sincerely,

Bill

William K. Suter
Clerk

United States Court of Appeals for the Tenth Circuit

OFFICE OF THE CLERK
Byron White United States Courthouse
1823 Stout Street
Denver, Colorado 80257
(303) 844-3157

Patrick J. Fisher, Jr.
Clerk of Court

Elisabeth A. Shumaker
Chief Deputy Clerk

February 12, 1996

Professor Carol Ann Mooney
Reporter, Advisory Committee on Appellate Rules
University of Notre Dame
Law School
Notre Dame, Indiana 46556

Dear Professor Mooney:

William K. Suter, Clerk of the Supreme Court, wrote requesting that the Committee consider a revision to the affidavit in support of a motion for leave to proceed on appeal in forma pauperis. Fed. R. App. P., Form 4. I do not have a copy of the letter, but Mr. Suter proposed the use of an affidavit in the same form as the one used to support an application for appointment of counsel under the Criminal Justice Act. I surveyed all the other appellate clerks about changing the form and those who were not in favor did not object.

Enclosed is a proposed revision of Form 4. Though it does not appear in the Criminal Justice Act form, I preserved the statement that the applicant's poverty prevents payment of the fee, that he or she is entitled to redress, and the language about penalty of perjury. Since Mr. Suter's problem with the existing form is knowing about expenses, I added a question about living expenses. I also added the language we use on our form instead of the subscription block which seems useless to me.

By copy of this letter, I request that Mr. Rabiej provide a copy of Mr. Suter's letter and this proposed form to the Committee for their consideration.

Very truly yours,

Patrick Fisher

c: Hon. James K. Logan
William K. Suter
John K. Rabiej
Clerks, Courts of Appeals

Form 4. Affidavit to Accompany Motion for Leave to Appeal in Forma Pauperis

United States District Court for the _____ District of _____

United States of America	)	
v.	)	No. _____
A. B.	)	

Affidavit in Support of Motion to Proceed on Appeal in Forma Pauperis

I, _____ being first duly sworn, depose and say that I am the _____ in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress; and that the issues which I desire to present on appeal are the following:

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed?

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

c. If you are married, is your spouse employed?

d. If the answer is yes, how much does your spouse earn per month?

e. If you are a minor under age 21, what is your parents' or guardian's approximate monthly income?

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account?

a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

6. Itemize your monthly living expenses and/or, if you pay them, those of your dependents.

6. List your debts and monthly bills. Include banks, loan companies, charge accounts, etc.

	Creditors	Total Debt	Monthly Payt.
Apartment or home:	_____	$_____	$_____
	_____	$_____	$_____
	_____	$_____	$_____
	_____	$_____	$_____
	_____	$_____	$_____

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE UNITED STATES OF AMERICA THAT THE FOREGOING IS TRUE AND CORRECT. 28 U.S.C. § 1746, 18 U.S.C. § 1621.

Date: _____ Signature: _____

Let the applicant proceed without prepayment of costs or fees or the necessity of giving security therefor.

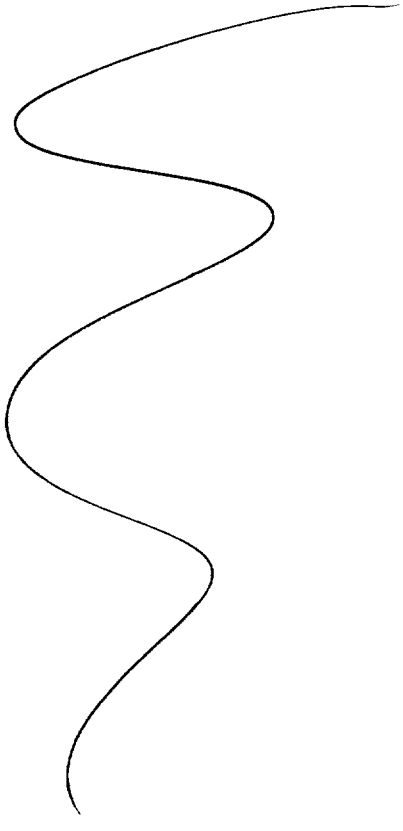
(s)_____,
District Judge

Supplemental

Agenda

Book

Materials



Preliminary Draft of Proposed Revision of the Federal Rules of Appellate Procedure Using Guidelines for Drafting and Editing Court Rules

and

Preliminary Draft of Proposed Amendments to Appellate Rules 27, 28, and 32

Request for Comment

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE JUDICIAL CONFERENCE OF THE UNITED STATES

Rule 26.1. Corporate Disclosure Statement*	Rule 26.1. Corporate Disclosure Statement
Any non-governmental corporate party to a civil or bankruptcy case or agency review proceeding and any non-governmental corporate defendant in a criminal case must file a statement identifying all parent companies, subsidiaries (except wholly-owned subsidiaries), and affiliates that have issued shares to the public. The statement must be filed with a party's principal brief or upon filing a motion, response, petition, or answer in the court of appeals, whichever first occurs, unless a local rule requires earlier filing. Whenever the statement is filed before a party's principal brief, an original and three copies of the statement must be filed unless the court requires the filing of a different number by local rule or by order in a particular case. The statement must be included in front of the table of contents in a party's principal brief even if the statement was previously filed. * Italicized text represents proposed amendments that were published for public comment in September 1995. If approved — with or without revision — by the advisory committee, Standing Committee, Judicial Conference, and Supreme Court, the amendments take effect on December 1, 1997, unless Congress acts otherwise.	(a) **Who Must File.** Any nongovernmental corporate party to a proceeding in a court of appeals must file a statement identifying its parent corporation and listing any publicly held company that owns 10% or more of the party's stock. (b) **Time for Filing.** A party must file the statement with the principal brief or upon filing a motion, response, petition, or answer in the court of appeals, whichever occurs first, unless a local rule requires earlier filing. Even if the statement has already been filed, the party's principal brief must include the statement before the table of contents. (c) **Number of Copies.** If the statement is filed before the principal brief, the party must file an original and three copies, unless the court requires a different number by local rule or by order in a particular case.

*(a) **Who Shall File.** Any nongovernmental corporate party to a proceeding in a court of appeals shall file a statement identifying any parent corporation and listing stockholders that are publicly held companies owning 10% or more of the party's stock.* *(b) **Time for Filing.** A party shall file the statement with the principal brief or upon filing a motion, response, petition, or answer in the court of appeals, whichever occurs first, unless a local rule requires earlier filing. Even if the statement has already been filed, the party's principal brief shall include the statement before the table of contents.* *(c) **Number of Copies.** If the statement is filed before the principal brief, the party shall file an original and three copies, unless the court requires the filing of a different number by local rule or by order in a particular case.*	

Committee Note

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Rule 29. Brief of an Amicus Curiae*	Rule 29. Brief of an Amicus Curiae
A brief of an amicus curiae may be filed only if accompanied by written consent of all parties, or by leave of court granted on motion or at the request of the court, except that consent or leave shall not be required when the brief is presented by the United States or an officer or agency thereof, or by a State, Territory or Commonwealth. The brief may be conditionally filed with the motion for leave. A motion for leave shall identify the interest of the applicant and shall state the reasons why a brief of an amicus curiae is desirable. Save as all parties otherwise consent, any amicus curiae shall file its brief within the time allowed the party whose position as to affirmance or reversal the amicus brief will support unless the court for cause shown shall grant leave for later filing, in which event it shall specify within what period an opposing party may answer. A motion of an amicus curiae to participate in the oral argument will be granted only for extraordinary reasons.	(a) **When Permitted.** The United States or its officer or agency, or a State, Territory or Commonwealth may file an amicus-curiae brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only if it is accompanied by the written consent of all parties or by leave of court. (b) **Motion for Leave to File.** The motion must be accompanied by the proposed brief and state: (1) the movant's interest; (2) the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case.

* Italicized text represents proposed amendments that were published for public comment in September 1995. If approved — with or without revision — by the advisory committee, Standing Committee, Judicial Conference, and Supreme Court, the amendments take effect on December 1, 1997, unless Congress acts otherwise.

*(a) **When Permitted.** The United States or its officer or agency, or a State, Territory or Commonwealth may file an amicus-curiae brief without consent of the parties or leave of court. Any other amicus curiae may file a brief only if:* *(1) it is accompanied by written consent of all parties;* *(2) the court grants leave on motion; or* *(3) the court so requests.* *(b) **Motion for Leave to File.** The motion shall be accompanied by the proposed brief, and shall state:* *(1) the movant's interest;* *(2) the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case.*	

(c) Contents and Form. An amicus brief shall comply with Rule 32. In addition to the requirements of Rule 32, the cover shall identify the party or parties supported or indicate whether the brief supports affirmance or reversal. If an amicus curiae is a corporation, the brief shall include a disclosure statement like that required of parties by Rule 26.1. With respect to Rule 28, an amicus brief shall include the following: *(1) a table of contents, with page references, and a table of cases (alphabetically arranged), statutes and other authorities cited, with references to the pages of the brief where they are cited;* *(2) a concise statement of the identity of the amicus and its interest in the case; and* *(3) an argument, which may be preceded by a summary and which need not include a statement of the applicable standard of review.*	(c) **Contents and Form.** An amicus brief must comply with Rule 32. In addition to the requirements of Rule 32, the cover must identify the party or parties supported or indicate whether the brief supports affirmance or reversal. If an amicus curiae is a corporation, the brief must include a disclosure statement like that required of parties by Rule 26.1. An amicus brief need not comply with Rule 28, but must include the following: (1) a table of contents, with page references; (2) a table of authorities — cases (alphabetically arranged), statutes and other authorities — with references to the pages of the brief where they are cited; (3) a concise statement of the identity of the amicus curiae and its interest in the case; (4) an argument, which may be preceded by a summary and which need not include a statement of the applicable standard of review; and (5) a certificate of compliance, if required by Rule 32(a)(7).

*(d) **Length.** An amicus brief may be no more than one-half the maximum length of a party's principal brief.*	(d) **Length.** An amicus brief may be no more than one-half the maximum length of a party's principal brief.
*(e) **Time for Filing.** An amicus curiae shall file its brief, accompanied by a motion for filing when necessary, within the time allowed to the party being supported. If an amicus does not support either party, the amicus shall file its brief within the time allowed to the appellant or petitioner. A court may grant leave for later filing, specifying the time within which an opposing party may answer.*	(e) **Time for Filing.** An amicus curiae must file its brief, accompanied by a motion for filing when necessary, within the time allowed to the party being supported. An amicus curiae who does not support either party must file its brief within the time allowed to the appellant or petitioner. A court may grant leave for later filing, specifying the time within which an opposing party may answer.
*(f) **Reply Brief.** An amicus curiae is not entitled to file a reply brief.*	(f) **Reply Brief.** An amicus curiae is not entitled to file a reply brief.
*(g) **Oral Argument.** An amicus curiae's motion to participate in oral argument will be granted only for extraordinary reasons.*	(g) **Oral Argument.** An amicus curiae's motion to participate in oral argument will be granted only for extraordinary reasons.

Committee Note

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Rule 35. En Banc Proceedings	
*(a) **When Hearing or Rehearing En Banc May Be Ordered.** A majority of the circuit judges who are in regular active service may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc. An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless:* *(1) consideration by the full court is necessary to secure or maintain uniformity of its decisions; or* *(2) the proceeding involves a question of exceptional importance.*	

(b) Suggestion of a party for hearing or rehearing in banc. — A party may suggest the appropriateness of a hearing or rehearing in banc. No response shall be filed unless the court shall so order. The clerk shall transmit any such suggestion to the members of the panel and the judges of the court who are in regular active service but a vote need not be taken to determine whether the cause shall be heard or reheard in banc unless a judge in regular active service or a judge who was a member of the panel that rendered a decision sought to be reheard requests a vote on such a suggestion made by a party.	**(b) Petition for Hearing or Rehearing En Banc.** A party may petition for a hearing or rehearing en banc. (1) The petition must begin with a statement that either: (A) the panel decision conflicts with a decision of the United States Supreme Court or of the court to which the petition is addressed (with citation to the conflicting case or cases) and consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions; or (B) the proceeding involves one or more questions of exceptional importance, each of which must be concisely stated; a proceeding may present a question of exceptional importance if it involves an issue as to which the panel decision conflicts with the authoritative decisions of every other federal court of appeals that has addressed the issue (citation to the conflicting case or cases being required). (2) Except by the court's permission, a petition for an en banc hearing or rehearing must not exceed 15 pages, excluding material not counted under Rule 32. (3) Except by the court's permission, if a petition for a panel rehearing and a petition for rehearing en banc are both filed — whether or not they are combined in a single document — the combined documents must not exceed 15 pages, excluding material not counted under Rule 32.

*(b) **Petition for Hearing or Rehearing En Banc.** A party may petition for a hearing or rehearing en banc.* *(1) The petition shall begin with a statement that either:* *(A) the panel decision conflicts with a decision of the United States Supreme Court or of the court to which the petition is addressed (with citation to the conflicting case or cases) and consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions; or* *(B) the proceeding involves one or more questions of exceptional importance, each of which shall be concisely stated; a proceeding may present a question of exceptional importance if it involves an issue as to which the panel decision conflicts with the authoritative decisions of every other federal court of appeals that has addressed the issue (citation to the conflicting case or cases being required).* *(2) Except by the court's permission, a petition for en banc hearing or rehearing shall not exceed 15 pages, excluding material not counted under Rule 28(g).* *(3) Except by the court's permission, if a petition for a panel rehearing and a petition for rehearing en banc are both filed — whether or not they are combined in a single document — the combined documents shall not exceed 15 pages, excluding material not counted under Rule 28(g).*	

(c) Time for suggestion of a party for hearing or rehearing in banc; suggestion does not stay mandate. — If a party desires to suggest that an appeal be heard initially in banc, the suggestion must be made by the date on which the appellee's brief is filed. A suggestion for a rehearing in banc must be made within the time prescribed by Rule 40 for filing a petition for rehearing, whether the suggestion is made in such a petition or otherwise. The pendency of such a suggestion whether or not included in a petition for rehearing shall not affect the finality of the judgment of the court of appeals or stay the issuance of the mandate.	(c) **Time for Petition for Hearing or Rehearing En Banc.** A petition that an appeal be heard initially en banc must be filed by the date when the appellee's brief is due. A petition for a rehearing en banc must be filed within the time prescribed by Rule 40 for filing a petition for rehearing.
(c) Time for Petition for Hearing or Rehearing En Banc. A petition that an appeal be heard initially en banc shall be filed by the date when the appellee's brief is due. A petition for a rehearing en banc shall be filed within the time prescribed by Rule 40 for filing a petition for rehearing.	
(d) Number of Copies. — The number of copies that must be filed may be prescribed by local rule and may be altered by order in a particular case.	(d) **Number of Copies.** The number of copies to be filed must be prescribed by local rule and may be altered by order in a particular case. (e) **Response.** No response may be filed to a petition for an en banc consideration unless the court orders a response. (f) **Voting on a Petition.** The clerk must forward any such petition to the judges of the court who are in regular active service and, with respect to a petition for rehearing, to any other members of the panel that rendered the decision sought to be reheard. But a vote need not be taken to determine whether the cause will be heard or reheard en banc unless one of those judges requests a vote.

*(d) **Number of Copies.** The number of copies that shall be filed may be prescribed by local rule and may be altered by order in a particular case.* *(e) **Response.** No response may be filed to a petition for en banc consideration unless the court orders a response.* *(f) **Voting on a Petition.** The clerk shall forward any such petition to the judges of the court who are in regular active service and, with respect to a petition for rehearing, to any other members of the panel that rendered the decision sought to be reheard. But a vote need not be taken to determine whether the cause will be heard or reheard en banc unless one of those judges requests a vote.*	

Committee Note

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Rule 41. Issuance of Mandate; Stay of Mandate*	Rule 41. Mandate: Contents; Issuance and Effective Date; Stay
(a) Date of Issuance. — The mandate of the court must issue 7 days after the expiration of the time for filing a petition for rehearing unless such a petition is filed or the time is shortened or enlarged by order. A certified copy of the judgment and a copy of the opinion of the court, if any, and any direction as to costs shall constitute the mandate, unless the court directs that a formal mandate issue. The timely filing of a petition for rehearing will stay the mandate until disposition of the petition unless otherwise ordered by the court. If the petition is denied, the mandate must issue 7 days after entry of the order denying the petition unless the time is shortened or enlarged by order.	(a) **Contents.** Unless the court directs that a formal mandate issue, the mandate consists of a certified copy of the judgment, a copy of the court's opinion, if any, and any direction about costs. (b) **When Issued.** The court's mandate must issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, rehearing en banc, or motion for stay of mandate, whichever is later. The court may shorten or extend the time. (c) **Effective Date.** The mandate is effective when issued.

* Italicized text represents proposed amendments that were published for public comment in September 1995. If approved — with or without revision — by the advisory committee, Standing Committee, Judicial Conference, and Supreme Court, the amendments take effect on December 1, 1997, unless Congress acts otherwise.

(a) The Mandate; Date of Issuance, Effective Date. *(1) Unless the court directs that a formal mandate issue, the mandate consists of a certified copy of the judgment, a copy of the court's opinion, if any, and any direction about costs.* *(2) The court's mandate shall issue 7 days after the time for filing a petition for rehearing expires, unless an order shortens or extends the time, or a party files a petition for rehearing, a petition for rehearing en banc, or a motion for stay of mandate pending petition to the Supreme Court for a writ of certiorari. Unless the court orders otherwise, the timely filing of a petition for rehearing, a petition for rehearing en banc, or the filing of a motion for a stay of mandate pending petition to the Supreme Court for a writ of cetiorari, stays the mandate until the court disposes of the petition or motion. If the court denies the petition for rehearing or rehearing en banc, or the motion for a stay of mandate, the court shall issue the mandate 7 days after entry of the order denying the last such petition or motion, but an order may shorten or extend the time.* *(3) The mandate is effective when issued.*	

(b) Stay of Mandate Pending Petition for Certiorari. — A party who files a motion requesting a stay of mandate pending petition to the Supreme Court for a writ of certiorari must file, at the same time, proof of service on all other parties. The motion must show that a petition for certiorari would present a substantial question and that there is good cause for a stay. The stay cannot exceed 30 days unless the period is extended for cause shown or unless during the period of the stay, a notice from the clerk of the Supreme Court is filed showing that the party who has obtained the stay has filed a petition for the writ, in which case the stay will continue until final disposition by the Supreme Court. The court of appeals must issue the mandate immediately when a copy of a Supreme Court order denying the petition for writ of certiorari is filed. The court may require a bond or other security as a condition to the grant or continuance of a stay of the mandate.	**(d) Staying the Mandate.** (1) **On Petition for Rehearing or Motion.** The timely filing of a petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, stays the mandate until disposition of the petition or motion, unless the court orders otherwise. (2) **Pending Petition for Certiorari.** (A) A party may move to stay the mandate pending the filing of a petition for a writ of certiorari in the Supreme Court. The motion must be served on all parties and must show that the certiorari petition would present a substantial question and that there is good cause for a stay. (B) The stay must not exceed 90 days, unless the period is extended for good cause or a notice from the Supreme Court clerk is filed during the stay indicating that the party who obtained the stay has filed a petition for the writ. In that case, the stay continues until the Supreme Court's final disposition. (C) The court may require a bond or other security as a condition to granting or continuing a stay of the mandate. (D) The court of appeals must issue the mandate immediately when a copy of a Supreme Court order denying the petition for writ of certiorari is filed.

(b) Stay of Mandate Pending Petition for Certiorai. A party may move to stay the mandate pending the filing of a petition for a writ of certiorari in the Supreme Court. The motion shall be served on all parties and shall show that the certiorari petition would present a substantial question and that there is good cause for a stay. The stay cannot exceed 90 days, unless the period is extended for good cause, and it cannot, in either case, exceed the time that the party who obtained the stay has to file a petition for a writ of certiorari in the Supreme Court. But if the clerk of the Supreme Court files a notice during the stay indicating that the party who obtained the stay filed a petition for the writ, the stay continues until the Supreme Court's final disposition. 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 before granting or continuing a stay of mandate.	

Committee Note

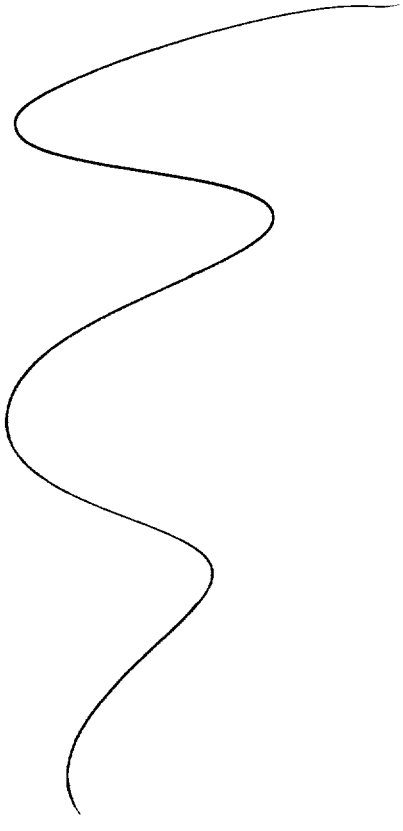
The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Supplemental

Agenda

Book

Materials



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

ROBERT E. KEETON
CHAIRMAN

PETER G. McCABE
SECRETARY

CHAIRMEN OF ADVISORY COMMITTEES
KENNETH F. RIPPLE
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EDWARD LEAVY
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SAM C. POINTER, JR.
CIVIL RULES

WILLIAM TERRELL HODGES
CRIMINAL RULES

RALPH K. WINTER, JR.
EVIDENCE RULES

September 23, 1993

MEMORANDUM TO THE HONORABLE ALICEMARIE H. STOTLER

FROM: ROBERT E. KEETON

SUBJECT: *Judicial Conference Action of 9/20/93 on FAX Filing*

I write to confirm and supplement my oral report to you about the Judicial Conference action of September 20, 1993, on fax filing.

The formal action was adoption of the following motion made by Chief Judge Mikva:

> The Judicial Conference referred to the Committee on Rules of Practice and Procedure, in coordination with the Committees on Automation and Technology and Court Administration and Case Management, for a report to the September 1994 Conference, the question of whether, and under what technical guidelines, filing by facsimile on a routine basis should be permitted.

Judge Mikva's explanation of his motion included a comment that I interpreted as meaning the Rules Committee may need to be exposed to a little heat from the Judicial Conference to get it moving. This comment was made after I had explained that the Rules Enabling Act process would require a minimum of four months - and preferably a longer period - for public comment, as well as consideration by Advisory Committees and the Standing Committee both before and after the period of public comment. Judge Mikva had earlier supported my comment that for the Judicial Conference to bypass the Rules Enabling Act process would be an embarrassment to our continuing efforts to get Congress not to do that in other matters of greater significance than fax filing. Thus, when I put his several comments together, I infer that he, at least, and perhaps many others among those who contributed to the substantial majority voting for Judge Mikva's motion, are pressing the Rules Committees to find a way to expedite the Rules Enabling

Act process so a proposal can be ready for the Judicial Conference to adopt it (or vote to send it on to the Supreme Court and Congress, if rules amendments are required) at the September 1994 meeting of the Judicial Conference.

Is it possible to proceed that rapidly, consistent with the requirements of the Rules Enabling Act? The answer may depend on what the proposal is and how controversial it turns out to be in the Bench and Bar. In any event, however, in order to be well prepared for the September 1994 Conference meeting, you will need to be able to demonstrate that the Rules Committees have done their best to comply with both the letter and spirit of the September 1993 vote.

If you wait for a vote of the Standing Committee (at its January 1994 meeting) to approve publication of a draft for comment, the comment period could not commence before February or March and could not close before May or June. That would be too late for reconsideration by the Advisory Committees in time to have their recommendations before the Standing Committee at its June 1994 meeting, when it would need to act in order to have a recommendation before the Judicial Conference in September 1994.

If you want to consider requesting the Standing Committee to approve publication by telephone vote before the Committee meets in January 1994, the key obstacle is the necessity of stirring the Advisory Committees to prepare almost immediately, for publication, a suitable draft or drafts of proposed rules amendments (it might need to be more than a single draft, because the Bankruptcy Committee strongly believes it has special reasons for not allowing local option for fax filings in bankruptcy clerks' offices).

Judge Boyle from Rhode Island (the district judge member of the Judicial Conference from the First Circuit) made the point both in the meeting and more fully to me outside the meeting that if we have either a rule of procedure, or a Judicial Conference guideline, or both, regarding fax filing, probably it should also deal with fax service by lawyer upon lawyer. Fax service may be less difficult to deal with because of the consensual context - both lawyers must have fax machines and machines that are compatible before it can happen. But problems may nevertheless arise about how quick and reliable the service will be, and we may get a fair amount of public comment about any proposed rule on fax service.

I have two comments as an ex officio member of the Subcommittee on Style (through September 30 only, of course).

First, on the flight down to Washington on September 20, I was reading over the latest draft of "GUIDELINES FOR FILING BY FACSIMILE," Agenda F-7 (Appendix A), which you will note bears a striking similarity to the high-pressure draft done by the conscripts we sent off to a separate room to work while the Standing Committee was meeting in June. In part II (2) you will see a proposed style change I interlined to deal

with what seemed to me an ambiguity. In the Conference session, somebody raised a question about whether II (2) meant the fax machine had to be in the Clerk's office? Before I could answer, "Clearly not," others said, "Yes, of course." For me, this was a clear demonstration of the Standing Committee's point that the current draft is still imperfect.

Second, my other interlineations on the attached draft (changing the title to "Guidelines for Facsimile Transmission" and proposing associated changes) are suggestions I was thinking about, as a means of avoiding conflicts between guidelines and rules, before the discussion this morning (September 23) in the meeting of the Advisory Committee on Appellate Rules. By one or more separate communications, you will receive more information about the very constructive recommendations of that Committee.

I will leave further distribution of this memorandum to your discretion.

Bob

Robert E. Keeton

Attachments

Appendix

III. *Technical requirements:*

For purposes of these guidelines, in order for courts to accept the filing of papers by facsimile on a routine basis, the following technical requirements must be met. [1]

(1) Facsimile Machine Standards:

(a) A facsimile machine must be able to send or receive a facsimile transmission using the international standard for scanning, coding, and transmission established for Group 3 machines by the Consultative Committee of International Telegraphy and Telephone of the International Telecommunications Union (CCITT), in regular resolution.

(b) The receiving unit must be connected to and print through a printer using xerographic technology, or a facsimile modem that is connected to a personal computer that prints through a printer using xerographic technology. Only plain paper (no thermal paper) facsimile machines may be used.

(2) Additional Facsimile Standards for Senders:

(a) Each sender must have the following equipment standards:

(i) CCITT Compatibility - Group 3 [2];

(ii) Modem Speed - 9600-2400 bps (bits per second) with automatic stepdown; and

(iii) Image Resolution - Standard 203 x 98.

(b) A facsimile machine used to send documents to a court must be able to produce a transmission record, as proof of transmission at

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[1] The Administrative Office will monitor technological advances and will recommend modifications to these guidelines when necessary.

[2] Group 3 fax machines are currently the most common, accounting for 97% of the devices on the market. Group 3 compatibility is mandatory for public applications at the present time. Group 3 fax can utilize the public telephone network (voice grade lines) and does not require special data lines. Group 3 fax devices transmit at under 1 minute per page, may have laser printing capability, and use various standard data compression techniques to increase transmission speed.

(2) Unless a local rule or court order in a particular case requires otherwise, the cover sheet must be the first page transmitted. The cover sheet need not be filed in the case and is not counted toward any page limit established by the court.

(3) The facsimile cover sheet does not replace any cover sheet that the court may require. It is for the clerk's use in identifying the document and identifying any applicable fees.

VIII. *Fees:*

(1) Payment of filing fees and any additional charges prescribed or authorized by the Judicial Conference for the use of the facsimile filing option shall be made in a manner determined by the Administrative Office.

(2) If a court authorizes the filing of papers by facsimile on a routine basis, the clerk must ensure that appropriate filing fees and any additional charges are paid.

(3) Other Fees for Filing by Fax [4]

(a) When documents are received on the court's fax equipment, the court shall collect the following fees, in addition to any other filing fees required by law:

For the first ten pages of the document, excluding the cover sheet and special handling instruction sheet . . . . . $ 5.00

For each additional page . . . . . $ .75

Any necessary copies to be reproduced by the court, for each page [5] . . . . . $ .50

(b) No fees are to be charged for services rendered on behalf of the United States.

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[4] These fees may be collected once the Judicial Conference approves amendments to the Miscellaneous Fee Schedules promulgated under 28 U.S.C. §§ 1913, 1914, and 1930.

[5] See Miscellaneous Fee Schedules.

Rule 25. Filing and Service.

(a) Filing.

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

(A) by mail addressed to the clerk;

(B) by facsimile transmission, by means meeting the standards then in effect under Guidelines for Receiving Facsimile Transmissions promulgated by the Judicial Conference of the United States, if the court of appeals by local rule or by order in a particular case has approved facsimile transmission; or

(C) by filing with a single judge, with that judge's permission, a motion that may be granted by a single judge, in which event the judge must note thereon the filing date and give it to the clerk.

(2) Filing is not timely unless the paper is received by the clerk or the single judge, or the facsimile transmission is received by the clerk, within the time fixed for filing, except that briefs and appendices are treated as filed on the day of mailing if the most expeditious form of delivery by mail, other than special delivery, is used.

(3) A paper filed by an inmate confined in an institution is timely filed or deposited in the institution's internal mail system on or before the last day for filing. Timely filing of a paper by an inmate confined in an institution may be shown by a notarized statement or declaration (in compliance with 28 U.S.C. § 1746) setting forth the date of deposit and stating that first-class postage has been prepaid.

(4) The clerk must 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 rule or practice.

* * * *

(c) Manner of Service. Service may be personal, by mail, or by facsimile transmission if permitted by the court of appeals by local rule or by order in a particular case. Personal service is complete on delivery of a copy to a clerk or other responsible person at the office of counsel. Service by mail is complete on mailing. Service by facsimile transmission is complete upon electronic acknowledgement of receipt by means meeting the standards then in effect under Guidelines for Receiving Facsimile Transmissions promulgated by the Judicial Conference of the United States.

(d) Proof of Service.

[Insert, in line 43 of the draft approved by the Judicial Conference in September 1993, after "mailing" the words "or facsimile transmission," and in line 44, after "mailed" the words "or transmitted."]

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.

* * * * *

(d) *Proof of Service.* - Papers presented for filing shall contain an acknowledgment of service by the person served or proof of service in the form of a statement of the date and manner of service, ~~and~~ of the names of the persons served, and if service was accomplished by mailing, the addresses to which the papers were mailed, certified by the person who made service. Proof of service may

United States District Court
Eastern District of Kentucky

William O. Bertelsman
Chief Judge
Covington, Kentucky 41012

P.O. Box 1012
(606) 655-3800

April 12, 1993

Honorable Kenneth F. Ripple
United States Circuit Judge
208 Federal Building
204 South Main Street
South Bend, IN 46601

Re: Proposed Mandamus Rule

Dear Judge Ripple:

First, I wish to express my thanks to you and the members of your Committee for inviting me to express my comments on the above rule, which was discussed at the Standing Committee meeting in December 1992.

After that meeting, I asked my law clerk to do some background research on the history of mandamus. Since in his youthful exuberance he did an excellent job, I am attaching a copy of his memorandum for your reference. I would like to refer to certain parts thereof which illustrate my points.

First of all, the very filing of a writ of mandamus constitutes an express or implied accusation against the trial judge that he/she has perpetrated a judicial usurpation of power which will justify the invocation of this extraordinary remedy. In re Allied Signal, Inc., 915 F.2d 190 (6th Cir. 1990) (Attached memorandum, p.4).

In some mandamuses, the parties merely seek a review of some issue of law for which there is no adequate remedy by appeal. In these kinds of mandamuses, the integrity or prestige of the trial judge is no more involved than in any proceeding for appellate review.

Other kinds of mandamuses, such as those concerning disqualifications or the implementation by the trial judge of novel procedures, attack the trial judge directly and the dignity of his/her office requires, in my view, a right of reply in those cases.

An excellent example of the latter kind of mandamus is In re Allied Signal, Inc., supra, wherein certain district judges handling asbestos cases created a novel procedure which, in their view, would expedite the handling of such cases. The mandamus was filed to prevent the implementation of this procedure. The eminent Chief Judge Lambros felt so strongly about dealing with this thorny problem that he not only filed a response but appeared in person to argue before the Sixth Circuit.

Such a personal appearance would be extremely rare and the judge's appearance would almost always be by a written submission. But the trial judge should have the right to file such a written submission in cases where his/her integrity or authority has been attacked and not have to approach the Court of Appeals as a supplicant for the right to be heard.

In these kinds of cases, the view of the court as an institution needs to be represented.

Speaking personally, I try not to file a response in mandamus cases and to allow the parties to represent me without my having any contact with them, if it is in some party's interest to support the ruling of the court in the manner that would be involved in any appeal.

There have been cases involving innovative procedures, however, for example, the imposition of trial time limits, where I have been threatened by the parties with mandamus. As it happens, the mandamus was never filed but, if it had been, the interests of the court would not have been represented by the parties.

For instance, in that situation, when one party threatened the mandamus and I asked the other party's position, it was: "Your Honor, I feel that the plaintiff should have as much time as they would like to have and so should we."

In summary, I see no problem with eliminating the trial judge as named party, and thereby reducing conflict of interest problems.

However, I respectfully submit that the trial judge should have a right to file a response and not have to request the leave of court to do so. As noted in the attached memorandum, the proposed rules are also inconsistent with the Supreme Court rules.

I would like to thank the Committee in advance for their consideration of these views.

With kindest regards, I remain

Sincerely yours,

William O. Bertelsman

William O. Bertelsman
Chief Judge

WOB/ptb
Enclosure

M E M O R A N D U M

TO: JUDGE BERTELSMAN
FROM: KEN DREIFACH
RE: PROPOSED CHANGES IN APPELLATE RULE 21 (MANDAMUS)
Date: April 2, 1993

I. Historical Background of Writ of Mandamus

The writ of mandamus is a remedy of great antiquity, which originated in England. It appears to have been used as early as the reign of Edward III,[1] and, at that time, represented the control assumed by the King's judges over the autonomous organs of local government. In time, mandamus was employed "in all cases where there was a legal right to justice, but for which right the law had not provided any specific legal remedy." Thomas Tapping, The Law and Practice of the High Prerogative Writ of Mandamus 3 (1848). Specifically, the writ was often employed to enforce a person's right to perform a service or exercise a function, after dispossession of such right by an overseeing authority. See Tapping at 12. Similarly, the writ was applicable to procure restitution from a party who had committed a criminal act, where indictment would not serve a similar purpose.[2] By contrast, the writ would not lie where any other legal remedy, such as appeal, equity, indictment or execution (as in a debt) would serve the same purpose. See generally, Tapping

[1] See 52 Am Jur. 2d Mandamus § 2.

[2] Tapping at 24 (citing R. v. Severn Railway, 2 B & A 646).

at 9-20.[3]

It appears that the writ was primarily used in 17th century England to remedy the loss of some position or office. See Rapp v. Van Dusen, 350 F.2d 806, 811 (1965) (discussing roots of mandamus). By the time of Blackstone, mandamus had become more widely used in other matters, notably the supervision by the Court of King's Bench over inferior courts, "usually in matters more akin to judicial administration than to judicial review." Id. at 811; see also Sir Carleton Kemp Allen, Law & Orders 250 (1956) (noting that "mandamus more frequently concerns the administrative than the judicial," although it "may also be powerful in the [judicial] sphere").

By the mid-19th Century, mandamus was applied to a wide range of subjects, providing they had interfered with some right (again, most often the right to occupy an office). Among its applications were commanding the admission and swearing in of public officials, such as aldermen (by the Court of Aldermen); the restoration to public office of public servants, such as clerks, comptrollers, constables and ale-tasters (as the ale-taster of Honitan); and the holding of elections (as of burgesses of a borough). Mandamus was also occasionally applied in the less "public" spheres, as to order the swearing in of a director of a chartered company, the removal of a public nuisance, or the payment of alimony. The writ was often employed against inferior

[3] Thus, mandamus would not lie to command the Bank of England to transfer stock, where an action on the case existed. R. v. Bank of England, 1 Doug. 524.

courts, not only to restore persons to positions, but also to command inferior jurisdictions to enter continuances, hear cases and appeals, to make a record. Tapping at 91, 109-112. The writ would not be applied, however, to command discretionary acts, such as commandment of justices to issue an alehouse license, or to rehear an application for an alehouse license. Tapping at 40-41.

Upon application of the writ, the party whose action was demanded was required to respond. Id. at 290. No distinction appears to have been made between a respondent-court and any other respondent party. However, as one American court has pointed out, because the action demanded was usually more administrative than legal, "no difficulty arose [as in conflict of interest] in requiring a judge to make return to the application for the writ." Rapp, 350 F.2d at 811.

II. Rule 21 Currently and Its Proposed Amendment

In American law, the writ of mandamus is, of course, codified at 18 U.S.C. § 1651 (the All Writs Act) and its implementing rule, Fed. R. App. P. 21, as well as at Sup. Ct. R. 20 (1992). As in England, the writ in an American federal court may be employed against a wide array of respondents, to order performance of a non-discretionary act. However, the writ is an extraordinary remedy granted only under exceptional circumstances. See 16 C. Wright & A. Miller, Federal Practice and Procedure: Jurisdiction § 3932 (1977).

Of particular relevance here, mandamus relief is often directed against district courts. The Supreme Court has recognized that the writ is available where a district court, although possessing jurisdiction, has taken actions that were "not mere error but usurpation of power." De Beers Consol. Mines v. United States, 325 U.S. 212, 217 (1945).[4]

Rule 21 itself, titled Writs of Mandamus and Prohibition Directed to a Judge or Judges and Other Extraordinary Writs, was promulgated in 1967, its authority derived from Section 1651. The rule currently provides:

> (a)... 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.
> . . . .
>
> (b) If the court is of the opinion that the writ should not be granted, it shall deny the petition. Otherwise, it shall order that an answer to the petition be filed by the respondents within the time fixed by the order. The order shall be served by the clerk on the judge or judges named respondents and on all other parties to the action in the trial court. All parties below other than the petitioner shall also be deemed respondents for all purposes .... 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 ....

Thus, by providing that a trial judge be named as a party, and treated as such with respect to service of papers, Rule 21, in its present form, insures the right of a trial judge to

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[4] For common issues addressed by such petitions, see cases cited at infra notes 7-15 and accompanying text.

respond in a mandamus proceeding against him.[5]

The proposed Rule 21, however, will provide that "[t]he petition shall be titled simply, In re _____, Petitioner. All parties below other than the petitioner are respondents for all purposes." It will likewise eliminate the provisions insuring a district judge's right to file a brief,[6] and provide:

> To the extent that relief is requested of a particular judge, unless otherwise ordered, counsel for the party opposing the relief, who shall appear in the name of the party and not of the judge, shall represent the judge pro forma.

(Emphasis added.)

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[5] The Supreme Court rules also specifically recognize the right of a judge to oppose a mandamus petition, by means of a brief. Sup.Ct.R. 20 (1992), titled Procedure on a Petition for an Extraordinary Writ, provides:

> .3 (b) The [mandamus] petition shall be served on the judge or judges to whom the writ is sought to be directed and shall also be served on every other party to the proceeding .... The judge or judges and the other parties may ... file 40 printed copies of a brief or briefs in opposition thereto .... If the judge or judges who are named respondents do not desire to respond to the petition, they may so advise the Clerk and all parties by letter. All persons served shall be deemed respondents for all purposes in the proceedings in this Court.

[6] Specifically, the proposed rule will eliminate the sentences reading:

> All parties below other than the petitioner shall also be deemed respondents for all purposes. Two or more respondents may answer jointly. If the judge or judges named respondents do not desire to appear in the proceeding, they may so advise the clerk and all parties by letter, but the petition shall not thereby be taken as admitted.

The comments to the proposed rule do, however, note that "[a] judge who wishes to appear may seek an order permitting the judge to appear." Committee Note Subdivision (b).

This proposal reflects the fact that the local rules of nine circuits state that a petition for mandamus should not bear the name of the trial judge. Minutes of Meeting of Advisory Committee on Appellate Rules, Oct. 20 & 21, 1992, at 10. Six of those local rules further provide that, unless otherwise ordered, the trial judge shall be represented pro forma by counsel for the party opposing the relief. Id. The proposal is thus an attempt to codify those local rules.

Similarly, while Rule 21 requires that a judge advise a clerk by letter if he does not wish to appear, six of the local rules reverse this presumption, and require that a judge who wishes to appear seek an order permitting him to. Id.

Supporters of the proposed rule changes might well observe that the current rule is somewhat anomalous, given these contrary local rules and the simple fact that, as the Committee notes, "a judge may not wish to appear in the proceeding." No doubt true, this assertion nonetheless ignores an important minority of mandamus cases in which judges have not only made appearances, but also filed briefs. In addition to the cases discussed above, district judges have put forth the effort to file briefs -- often lengthy ones -- in cases addressing a wide range of legal issues. Thus, district judges have answered writs addressing their

denials of motions for jury trial;[7] orders vacating verdict[8] or dismissing indictment[9], or granting new trial[10]; their findings of fact and conclusions;[11] their reference to magistrate and denial of jury trial;[12] their innovative sentencing techniques;[13] their transfer of cases to another district;[14] or their denial of transfer.[15]

The remainder of this memorandum attempts to reconcile the tension between the notion that judges should best avoid the mandamus arena, and the countervailing, long-recognized interest that district judges have in appearing in that arena. It analyzes the breadth and scope of the policies cited by courts which have discouraged judicial participation in mandamus

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[7] See, e.g., In re Zweibon, 565 F.2d 742 (D.C.Cir. 1977).

[8] United States v. Smith, 156 F.2d 642 (3d Cir. 1946), rev'd, 331 U.S. 469.

[9] United States v. Weinstein, 452 F.2d 704 (2d Cir. 1971), cert. denied sub nom. Grunberger v. United States, 406 U.S. 917 (1972).

[10] FDIC v. Alker, 234 F.2d 113 (3d Cir. 1956); United States v. Smith, 156 F.2d 642 (3d Cir. 1946).

[11] Madden v. Perry, 264 F.2d 169 (7th Cir.), cert. denied, 360 U.S. 931 (1959).

[12] William Goldman Theatres v. Kirkpatrick, 154 F.2d 66 (3d. Cir. 1946).

[13] United States v. Regan, 503 F.2d 234 (8th Cir. 1974), cert. denied sub nom. 420 U.S. 1006 (1975).

[14] Swindell-Dressler Corp. v. Dumbauld, 308 F.2d 267 (3d Cir. 1962).

[15] Minnesota Mining and Mfg. Co. v. Platt, 314 F.2d 369 (1963), rev'd, 376 U.S. 240 (1964).

proceedings, and which presumably have spurred the proposed changes.

III. Analysis of Proposed Changes

1. Removal of Long-Recognized Right to File

It is not an overstatement to say that the proposed Rule 21 strips district judges of a long-recognized right -- the right to answer a mandamus petition filed against them. The current Rule 21 merely implemented what was previously recognized as the right of a district judge to file an answer to a writ of mandamus against him (although judges rarely exercised that right). For a sampling of such pre-Rule 21 cases in which the district judge filed a brief, see Swindell-Dressler Corp. v. Dumbauld, 308 F.2d 267 (3d Cir. 1962); Nelson v. Grooms, 307 F.2d 76 (5th Cir. 1962); Madden v. Perry, 264 F.2d 169 (7th Cir.), cert. denied, 360 U.S. 931 (1959); FDIC v. Alker, 234 F.2d 113 (3d Cir. 1956); United States v. Smith, 156 F.2d 642 (3d Cir. 1946); William Goldman Theatres v. Kirkpatrick, 154 F.2d 66 (3d Cir. 1946).

In fact, both before and since promulgation of the rule, Courts of Appeals have, pursuant to Rule 21, generally ordered district judges to file an answer to a mandamus petition. See Yagman v. Republic Ins., 137 F.R.D. 310, 313 (C.D. Cal. 1991) ("Pursuant to Rule 21 of the Federal Rules of Appellate Procedure, unless the Circuit Court denies a petition for mandamus, the appellate court must order the district judge to answer the petition."), vacated, ____ F.2d _____, No. 91-55871,

1993 WL 54583 (9th Cir. March 4, 1993). This has taken the form of a "show cause" order directed to the district court. See, e.g., United States v. Weinstein, 452 F.2d 704 (2d Cir.), cert. denied sub nom. Grunberger v. United States, 406 U.S. 917 (1972); Rapp v. Van Dusen, 350 F.2d 806 (3d Cir. 1965); Minnesota Mining and Mfg. Co. v. Platt, 314 F.2d 369 (1963); Swindell-Dressler, 308 F.2d at 272.

The proposed changes are thus quite significant, in that they completely shift the nature and focus of a judge's answer to a mandamus petition. Filing an answer, always a matter of right which Courts of Appeals have requested district courts to exercise (despite their myriad other duties), will now be a matter left to the discretion of the Courts of Appeals.[16]

2. Policies Reflected by Proposed Changes: Van Dusen Rule and Its Progeny

The policy change probably represents the view that an aura of impropriety, even partiality, attaches when a judge files a brief in an action that is before him. The Supreme Court has noted that a writ of mandamus has "the unfortunate consequence of making the judge a litigant, obliged to obtain personal counsel or to leave his defense to one of the litigants before him." Ex Parte Fahey, 332 F.2d 258, 260 (1947). Some commentators, as

[16] An interesting question, incidentally, is whether, as in the cases cited supra, Courts of Appeals may, under the changes, still order a district judge to file an answer, as they might for any other respondent. Given the changes, I would assume that they cannot.

well, have opined that a judge's direct involvement is to be discouraged. See, e.g., Fullerton, Exploring the Far Reaches of Mandamus, 49 Bklyn L. Rev. 1131, 1140 (1983) (suggesting that making a judge a respondent may have "the appearance of judicial partiality").

This view has its legal roots in caselaw dating from the mid-1960's -- before the promulgation of the present Rule 21 -- when the Third Circuit adopted the practice of deeming district judges mere nominal respondents, rather than parties to the action. As stated above, nine circuits now require that a mandamus petition not bear the name of the district judge.

The seminal case representing this viewpoint is Rapp v. Van Dusen, 350 F.2d 806 (3d Cir. 1965). There, District Judge Van Dusen granted a motion to transfer to another district a series of personal injury suits. Plaintiffs, wishing to overturn his order, sought mandamus review, naming as respondents the defendants and the Judge. After eventual disposition and remand of the case by the Supreme Court,[17] plaintiffs moved to disqualify Judge Van Dusen, arguing that in complying with the Third Circuit's order to file an answer to the petition for mandamus, the Judge had consulted with defense counsel. The Third Circuit ruled that Judge Van Dusen's conduct disqualified him from further presiding over the litigation. The court reasoned that "the proper administration of justice requires of a judge not only actual impartiality, but also the appearance of a

[17] Van Dusen v. Barrack, 376 U.S. 612 (1964).

detached impartiality." 350 F.2d at 812. Such an appearance was sullied not only because Judge Van Dusen had met with opposing counsel to file his brief, but also for the more general reason that he had become a "litigant" to the action.

The Third Circuit thus set forth a new rule:

> [W]here mandamus [is] sought to review an order of transfer, the judge below, although named as a respondent, shall be deemed a nominal party only and the prevailing parties in the challenged decision shall be deemed to be respondents and permitted to answer the petition.

350 F.2d at 812-13.

The court reasoned that its new rule would have several beneficial effects. First, it would "keep [a judge] from becoming entangled as an active party to litigation in which his role is judicial and in which he has no personal interest." 350 F.2d at 813. Second, it would ease the burdens of the trial bench by making it "unnecessary for a judge to retain counsel and thus ... avoid burdening him with the undesirable alternatives of acting as his own counsel, or seeking outside counsel ... or obtaining the services of counsel for the successful parties ...." Id. Finally, it would enhance judicial integrity and the appearance of propriety, by "guard[ing a judge] from engaging in ex parte discussions with counsel or aligning himself even temporarily with one side in pending litigation." Id. The Third Circuit also implicitly disapproved of the proposed Fed.R.App.P. Rule 20, now Rule 21, which would continue to make the judge a respondent. See 350 F.2d at 812-13.

Despite the subsequent passage of Rule 21, deeming the judge a respondent who shall be ordered to file an answer, several Circuits have instead followed the "Van Dusen rule," discouraging district judges from filing briefs. Those Circuits have done so either through caselaw,[18] or by promulgating local rules[19] directing that a district judge be named as nominal respondent and represented pro forma by the party opposing the relief.

3. "Van Dusen" Rule Discouraging Participation of District Judges Contemplates Exceptions

The Van Dusen court itself expressly contemplated at least one category of exceptions to the rule discouraging participation of District Judges in mandamus proceedings, drawing a distinction between "those cases where an attack is made on the merits of a judicial act and those rare instances where the claim is directed against the judge himself." 350 F.2d at 812. The court noted

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[18] See, e.g., United States v. King, 482 F.2d 768, 772 & n.24 (D.C.Cir. 1973) (following Van Dusen, court held that district judge need not be joined in mandamus action, as that was a "dispensable bit of formalism"); Walker v. Columbia Broadcasting System, Inc., 443 F.2d 33, 34 (7th Cir. 1971) (recognizing that "mandamus proceeding seeking, in effect, a review of the intrinsic merits of [judge's] action [regarding transfer of case] was in reality an adversary proceeding between the parties to the underlying ... suit"); General Tire & Rubber Co. v. Watkins, 363 F.2d 87 (4th Cir.) (adopting Van Dusen rule prospectively), cert. denied 385 U.S. 899 (1966); see also In re Justices of Supreme Court of Puerto Rico, 695 F.2d 17, 23 (1st Cir. 1982) (usually, where judge is named as defendant in mandamus case, he is merely "a formal participant").

[19] See, e.g., 1st Cir.Loc.R. 21 (to the extent that a mandamus petition seeks relief referable to judicial act, "unless otherwise ordered the judge shall be represented pro forma by counsel for the party opposing the relief").

that in those latter such cases, i.e. "the rare occasion in which the ground for the application is extrinsic to the merits of a decision," it would be appropriate for the court to file an answer and contest the petition. Id. at 813. As examples, the court noted one case in which a judge was required to rule promptly on a motion for preliminary injunction[20] and another in which a "recalcitrant" judge was ordered to proceed with a desegregation case.[21] Id.

Similarly, courts following Van Dusen have been careful to specify that the "Van Dusen rule" applied to mandamus petitions seeking review of "the intrinsic merits" of a judge's action. See, e.g., United States v. Haldemann, 559 F.2d 31, 138 (D.C.Cir. 1976) (where sole purpose of mandamus petition is to obtain "determination on the intrinsic merits of a judicial act," -- there regarding release of evidence to Congress - judge is at most a nominal party), cert. denied sub nom. Ehrlichman v. United States and Mitchell v. United States, 431 U.S. 933 (1977); Walker v. Columbia Broadcasting System, Inc., 443 F.2d 33, 34 (7th Cir. 1971) (judge was a nominal party where petition sought review of "intrinsic merits," of judicial action -- there, regarding transfer to another district).

Precedent does not offer guidance as to what mandamus issues are "extrinsic to the merits of a decision," and thus exempted

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[20] Davis v. Board of School Comm'rs of Mobile County, Ala., 318 F.2d 63 (5th Cir. 1963).

[21] Hall v. West, 335 F.2d 481 (5th Cir. 1964).

from the "Van Dusen rule." See Van Dusen 350 F.2d at 813. At a minimum, though, this definition would probably include petitions addressing docketing matters, unnecessary delay, conduct of or cessation of proceedings, and administrative matters. See, e.g., id. (citing cases); see also In re IBM, 687 F.2d 591 (2d Cir. 1982) (Judge Edelstein filed 66 page brief opposing writ of mandamus to compel him to cease further proceedings, based on asserted termination of case and lack of jurisdiction); Nelson v. Grooms, 307 F.2d 76 (5th Cir. 1962) (district judge filed answer to petition explaining that time, effort, and expense would be saved by his action postponing a hearing, pending the outcome of an identical case filed by other plaintiffs).

The proposed rule would violate the spirit of the Van Dusen exceptions in several other types of cases in which no other party can competently express the judge's viewpoint. For instance, a common "instance[] where the claim is directed against the judge himself," as Van Dusen put it,[22] occurs upon petition for recusal or disqualification. Although that situation, like a transfer, probably falls under the category of "intrinsically legal" acts, it is nonetheless true that a judge can best argue against his own disqualification. Over the years, several judges have done so, raising factual or legal arguments against disqualification which might otherwise have gone unaddressed. See, e.g., City of Pittsburgh v. Simmons, 729 F.2d 953, 955 n.2 (3d Cir. 1984) (judge "categorically denied" certain

[22] Van Dusen, 350 F.2d at 812.

charges raised by petition seeking recusal);[23] Rosen v. Sugarman, 357 F.2d 794 (1966), (writ denied where district judge responded, through U.S. Attorney's Office, to charges that he "had a personal bias and prejudice against [the petitioner]"); cf. Moody v. Simmons, 858 F.2d 137, 141 (3d Cir. 1988) (judge filed 75-page brief in answer to writ seeking vacation of his comments and actions after recusal from case), cert. denied, 489 U.S. 1078 (1989); Brown v. Baden, 815 F.2d 575 (9th Cir.) (judge opposed, through counsel, petition demanding his reassignment of case (discussed in Yagman v. Republic Ins., 137 F.R.D. 310, 313 (C.D. Cal. 1991)), cert. denied sub nom., Real v. Yagman, 484 U.S. 963 (1987).

Other situations arise in which a trial judge stands in a uniquely appropriate position to answer a mandamus petition. For instance, where a judge seeks to employ innovative trial or settlement techniques he might find himself standing alone against one or more parties. In In re Allied-Signal, Inc., 915 F.2d 190 (6th Cir. 1990), Judge Thomas D. Lambros faced a mandamus petition contesting assertedly ultra-jurisdictional acts which he took to facilitate a consistent resolution for thousands of asbestos cases, both within and beyond the borders of his district. Judge Lambros had attempted to certify a nationwide, mandatory class action, to ensure that the defendants' limited resources were fairly allocated. Upon mandamus review, Judge

[23] Simmons, a Third Circuit case, suggests that an exception to Van Dusen lies when recusal is sought.

Lambros took the unusual step of appearing at oral argument to defend his actions. After hearing Lambros' arguments, the Sixth Circuit offered him guidance as to class certification, in lieu of issuing a mandamus order.

A judge against whom mandamus review is sought might have other public policy concerns, very specific to a particular case. In Smith v. Phillips, 881 F.2d 902 (10th Cir. 1989), representatives of prisoners who had died of strychnine poisoning while in custody brought suit against various officials. The case was settled before trial and confidentiality agreements were signed. Judge Lyn R. Phillips signed the dismissal order, but denied the confidentiality order. After an appeal on another issue, Judge Phillips ordered the settlement terms made available to the public, and the petitioners refused, and filed a petition for mandamus. Plaintiffs were not represented, their interests having presumably been satisfied. Thus, Judge Phillips alone was left to file a brief favoring the disclosure, in opposition to petitioners' application.

In all of the cases cited above, the district judges were either the best persons to address the mandamus petition, or had specific concerns unaddressable by the other parties. It would concededly be difficult to set forth a rule distinguishing such cases from those in which, as contemplated by the "Van Dusen rule," district judges should refrain from participation. The best solution, then, might well be to leave the judges' rights intact, to the extent that the Appellate Rules may do so.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
KENTUCKY · TENNESSEE · OHIO · MICHIGAN

CHAMBERS OF
DANNY J. BOGGS
CIRCUIT JUDGE
220 GENE SNYDER U.S. COURTHOUSE
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April 19, 1993

Professor Carol Mooney
Notre Dame Law School
Notre Dame, IN 46556

Dear Professor Mooney:

I am writing to convey the general results of our Sub-Committee's consideration of the question of revisions to the apparatus of sanctions that may be imposed by the courts of appeals for various types of misconduct by lawyers. The conclusion of the Committee was that further consideration of the topic would not be fruitful at this time, though there was a sense that the area does bear watching, and may be revisited in the future.

In particular, the following points, I believe, were generally agreed to by the members of the subcommittee:

(1) The current apparatus, including FRAP 38 and 46(c), and the statutes 28 USC § § 1912 and 1927, is not a model of clarity;

(2) However, the bench and bar are generally familiar with it, and major problems have not arisen from its use;

(3) The apparatus is probably sufficient to permit courts who have appropriate occasion to do so to sanction improper behavior;

(4) With the consideration of the Committee's draft rule on notice and opportunity to be heard (Item 86 - 89) additional comment and experience may be generated that will be useful for future consideration.

In our deliberations, several approaches were suggested and considered. Mr. Mumford felt that the Appellate Rules should simply adopt Rule 11 of the Civil Rules by reference, primarily for the virtue of having a single form of words to guide the bench and bar, and a growing body of experience and precedent to guide it.

Judge Hall was quite opposed to this, seeing Rule 11 as a source of ever-expanding litigation and contention, and one that should certainly not be expanded into the appellate area. Mr. Froeb felt that, ideally, the area of explicitly sanctionable activity should be somewhat expanded, to provide protection against unwarranted and vexatious conduct.

We discussed the approach of the draft model rule of March 14, 1991 (Item 86-24) which would impose sanctions in three areas

-- frivolous appeals

-- appeals taken for delay or other improper purpose and

-- activities that needlessly multiply proceedings and increase the cost of litigation.

While the Sub-Committee was generally in agreement that these were appropriate areas for sanction, we ultimately tended in the direction that while adopting a new (albeit clearer and more rational) form of words had some advantages, it was not clear that there would be a net benefit from going to a new set of words and abandoning ones which the participants had become familiar.

The Sub-Committee was generally of the view that, if the matter were to be pursued, sanctions probably should be explicitly limited to lawyers, or certainly not explicitly permitted to be levied on parties. Given the nature of appellate practice, the situations that arise under Civil Rule 11 where parties are the sanctionable actors are very unlikely to arise in the appellate courts.

Therefore, the Sub-Committee would recommend that it be discharged from consideration of this matter and there be no further consideration of it by the Appellate Rules Committee.

Sincerely yours,

Danny J. Boggs

DJB:rc

cc: Donald F. Froeb
Luther T. Munford
Cynthia H. Hall

United States Court of Appeals
For The Seventh Circuit
219 South Dearborn Street
Chicago, Illinois 60604

Thomas F. Strubbe
Clerk
312-435-5850

April 15, 1993

Hon. Kenneth F. Ripple
United States Court of Appeals
for the Seventh Circuit
208 Federal Building
204 S. Main Street
South Bend, IN 46601

Re: Survey of USCA Clerks Regarding Agenda Items for April Advisory Committee Meeting

Dear Judge Ripple:

At the last meeting of the Advisory Committee, at Notre Dame last October, I was directed to obtain clerks' input on a few matters being considered by the committee. They were: (1) type size; (2) Mr. Kopp's proposals regarding Rule 32; and (3) the allocation of costs between originals and copies for recovery purposes. On November 10, 1992, I wrote to all the other court of appeals' clerks requesting their comments on those subjects, and also on the proposition that clerks no longer be allowed to act as screening agents regarding tendered documents having format deficiencies. Since that time, you asked that I solicit comments from court of appeals' clerks concerning the possibility of adopting a uniform date for the effectiveness of local rules and, again, regarding the allocation of word processing costs between originals and copies. I wrote to my colleagues on February 22, 1993. In that letter I also requested comment upon agenda item 86-23 regarding timeliness of mail delivery to incarcerated persons. On that day I also wrote to Mr. Duane Lee, Chief of the A.O.'s Court Administration Division, regarding on the issue of the allocation of copying costs between originals and copies.

I have received written responses from most of the individuals from whom I solicited comments. I did not receive written responses from everyone, but a couple of clerks have called me with their oral comments. I am enclosing herewith the responses I've received, including that from Duane Lee at the Administrative Office. (I am keeping a copy of each for myself, but am sending you the originals because they are more readable; please excuse my highlighting and marginal notes.) If I could briefly summarize the respondents' views, I think a fair characterization would be as follows:

amortization of equipment and software was something that we took into account when we set our hourly rate". That rationale has convinced me that courts can do without a formal rule on this topic. Additionally, almost all clerks indicate that this subject has not been a problem in their courts. Mr. Lee's response for the Administrative Office indicates that Mr. Steve Mora, the printing officer, thinks a "bright line" rule could be developed, but it appears that he is speaking only as to the recovery of costs for producing copies, not as to the costs of creating the original. We talked on the phone last week and he said nothing to change my impression in that regard.

Consensus: There is no need for a national rule concerning the allocation of costs between originals and copies.

4. **Agenda Item 91-15.** All of the other clerks are unanimous in their view that adoption of a "day certain" for the effectiveness of local rules would create more problems than it would solve. Their primary objection involved the delay such a procedure would cause, particularly if an important local rule were adopted months before the pre-designated effective date. I personally like the practice because it minimizes the number of times we are required to send out local rule amendments to the current 280 or so recipients. Obviously, if a rule change of great significance, for example, regarding death penalty procedures, should be enacted, its effective date could be set as soon as possible, without awaiting the annual effective date.

Consensus: There is no need for a uniform effective date for local rules.

5. **Agenda Item 86-23.** It appears that changes to Rules 25(c) and 26(c) and (d) are already under serious consideration; nevertheless, the clerks are agreed that this is really not a problem demanding a change in the Federal Rules of Appellate Procedure. As their letters reflect, problems with mail going to prisons are difficult to pinpoint. Such delays may effectively, in turn, delay the prisoner's response to a document delivered to him after what may be deemed a reasonable delivery interval. But it might prove impossible to ascertain when a particular piece of mail actually gets into the prisoner's hands. Amending Rule 25(c) to hold that service on one confined in an institution is complete only on delivery to the inmate is going to make for difficulty in ascertaining the "delivery date". Not all prison systems keep track of such real delivery dates. Many courts, it appears, simply get around this by allowing some leeway for the late arrival of prisoner mail. These practices concern documents which, unlike notices of appeal, are not jurisdictional in nature. As with most rules, clerks are concerned that involved, complex rules might be adopted to meet special situations engendered by peculiar circumstances. We all feel the rules should be kept as simple, as understandable, and as workable as possible.

MINUTES OF THE MEETING
OF THE ADVISORY COMMITTEE ON APPELLATE RULES
APRIL 20 & 21, 1993

Judge Kenneth F. Ripple called the meeting to order in the fourth floor conference room of the Federal Judiciary Building in Washington, D.C. In addition to Judge Ripple, the Committee Chair, the following Committee members were present: Judge Danny Boggs, Mr. Donald Froeb, Judge Grady Jolly, Judge James Logan, Mr. Luther Munford, and Judge Stephen Williams. Mr. Robert Kopp attended on behalf of the Acting Solicitor General. Judge Robert Keeton, Chair of the Standing Committee was present. Mr. Strubbe, the Clerk of the Seventh Circuit, attended on behalf of the clerks. Professor Mooney, the Reporter, was present. Mr. Peter McCabe - the Secretary, Mr. John Rabiej - Chief of the Rules Support Office, Mr. Paul Zingg - Mr. McCabe's assistant, and Mr. Joseph Spaniol were present along with Mr. Joseph Cecil of the Federal Judicial Center.

Judge Ripple began the meeting by greeting and introducing Mr. Munford, the newest member of the Committee.

Judge Ripple then turned the Committee's attention to the first item on the agenda a review and assessment of the comments submitted concerning the proposed amendments published in January 1993.

I. GAP Report

General Comments

The Reporter noted that in addition to the comments concerning specific rules, two comments were received that were general in nature.

First, one commentator opposed the change from "shall" to "must." He pointed out that unless Congress also makes the same changes, the rules and statutes will use different terminology to refer to the same thing. Professor Mooney stated that the change from shall to must is supported by the Style Subcommittee of the Standing Committee. Indeed the Style Subcommittee has decided to use "must" with both active and passive voice. Because some of the published rules were drafted when the Style Subcommittee continued to use "shall" with the active voice, the Reporter changed every remaining "shall" in the published rules to "must" except in those instances where it is used to indicate the future tense. The Committee agreed that the change is appropriate.

Second, Mr. Munford had written asking whether it would be preferable to omit citations to specific circuit rules in the Committee Note accompanying a rule amendment. He pointed out that local rules change frequently and that in some instances the purpose of an amendment is to supplant a local rule. He suggested that it might be better to simply refer to "local rules of the X & Y Circuits" rather than to cite to specific rules. Mr. Munford further pointed out that citation to specific local rules has not been consistent in the past.

Judge Ripple noted that one reason for citing the local rules is that a significant portion of the amendments originate with local rules, and citation to the local rules becomes a part of the legislative history. He added further that if the Committee thought it would avoid confusion, the Committee Notes could state that citations are to local rules effective as of a certain date. Judge Jolly remarked that the exact citation facilitates historical research. Judge Ripple suggested that we should be conscious of the problem and be careful in writing notes that readers are not mislead, but that we should also try to provide an accurate and complete legislative history. The Committee concurred.

The Committee then turned its attention to the specific comments submitted concerning the proposed amendments.

Item 86-10

The proposed amendment to Rule 38 requires a court to give an appellant notice and opportunity to respond before damages or costs are assessed for filing a frivolous appeal. The published rule states:

> If a court of appeals shall determine that an appeal is frivolous, it may, after notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee.

Two comments were received. The National Association of Criminal Defense Lawyers supports the proposal. The NLRB suggests deleting the requirement that the notice come "from the court."

Mr. Froeb asked whether a statement by a court in its order that the court intends to sanction is sufficient? Judge Logan responded that he believes a show cause order should be entered.

Judge Jolly noted that the rule allows the court to award single or double costs. He asked whether notice must be given before a court may award single costs. The consensus was that Rule 38 applies only to "frivolous appeals" and that single costs may always be awarded under Rule 39 without notice. To omit single costs from Rule 38 might imply that only double costs could be awarded. The Reporter stated that the Committee had long discussed more radical amendments of Rule 38 but had finally decided to leave the rule basically unchanged but to add the notice requirement. Mr. Froeb suggested leaving the wording of the underlying rule unchanged. Rule 11 is currently undergoing changes and he believes that there will be evolutionary changes in Rule 38.

Mr. Munford questioned whether the new language requiring the court to give notice and opportunity to respond should be moved after "court of appeals" in the first line of the rule. The consensus was that the new language was properly placed. A court may decide whether an appeal is frivolous first, but it must give notice and opportunity to respond before

imposing sanctions.

Mr. Munford asked whether the last sentence should be retained in the Committee Note. The last sentence reads: "Requests either in briefs or motions for sanctions have become so commonplace that it is unrealistic to expect careful responses to such requests without any indication that the court is actually contemplating such measures." Mr. Munford was concerned that retention of that language might be read as condoning such conduct. Judge Ripple pointed out that the sentence accurately reflects a fundamental concern that motivated the Committee's decision to require notice from the court. He further stated that after the Advisory Committee completes its work, the amendment will be carefully scrutinized by both the Standing Committee and the Judicial Conference. Deletion of the sentence would in effect remove supporting documentation from the papers.

Judge Boggs moved approval of Rule 38 as published. Judge Williams seconded the motion; it passed unanimously.

Item 91-2

The proposed amendments to Rules 40 and 41 lengthen the time for filing a petition for rehearing in civil cases involving the United States.

Two public comments were submitted. Judge Newman, the immediate past Chair of the Advisory Committee, states that the additional time for requesting a rehearing under Rule 40 should be extended only to the United States and not to other parties in a civil appeal involving the United States. Judge Newman also states that he sees no need for Rule 41 to delay the issuance of the mandate until 7 days after the time for seeking rehearing has expired. He suggests that the court should be able to issue the mandate "within 7 days." The NLRB opposes the amendment because it may delay the effectiveness of enforcement orders. Although the law is not clear, the NLRB believes that an enforcement order becomes effective only upon issuance of the mandate and that the amendment would delay the effectiveness of enforcement orders.

Judge Boggs expressed disagreement with both Judge Newman and the NLRB concerning the time for issuing the mandate. He noted that when it is appropriate there are procedures authorizing the issuance of the mandate forthwith. Mr. Kopp agreed that when necessary the court can direct that the mandate issue forthwith. Mr. Kopp stated a preference for a day certain for issuance of the mandate and, therefore, he opposed, the "within 7 days" formulation.

With regard to whether the extension of time should be given only to the government, Mr. Munford pointed out that it would doubtlessly be easier for the clerk's office to administer an even handed rule. A rule giving an extension only to the government would leave the clerk's office in the position of trying to guess whether the government might want to petition for rehearing or whether the mandate should issue. Mr. Kopp pointed out that the

published draft was based on D.C. Cir. R. 15 and 10th Cir. R. 40, both of which extend the time for all parties, not just the United States. While the government would probably not oppose an amendment that extended the time only for the government, he stated that it had never occurred to the Solicitor's Office to suggest that the government operate by one time frame while opposing parties use different time limits.

Judge Logan expressed agreement with Mr. Munford that an unbalanced rule would make it difficult for the clerk's office to know whether to issue the mandate before the government's time expired. He stated his preference for an evenhanded rule and one that fixed a day certain for issuance of the mandate.

Mr. Munford also favored a fixed time period but questioned whether 7 days is the right amount of time. He noted that 7 days is the time period currently provided but that amendments of Rule 41(b) under Item 91-13 will change what a party must show in order to obtain a stay of the mandate. Judge Logan responded that a party has the period for filing the petition for rehearing to consider the reasons why a stay should be entered if rehearing is not granted. In fact, he pointed out, that the same reasons are often part of the petition for rehearing.

Judge Williams expressed his opposition to Judge Newman's suggestions that time be extended only for the government and that the court could issue the mandate within 7 days. Judge Williams said, however, that changing the time in Rule 41 for issuing the mandate from 7 to 14 days might be useful.

Mr. Kopp stated that he thinks 7 days is not a problem or that it is a separate problem from the one under consideration. He noted that as a practical matter ordinarily there is no problem because if a mandate issues and a stay is subsequently granted, the court recalls the mandate. He suggested that if there is a problem, a better approach would be to provide that if an application for a stay is filed, the mandate should not issue until the court acts on the application for stay.

Judge Ripple agreed that the question of whether a mandate should issue within 7 days after the expiration of the time for petitioning for rehearing, or after denial of such a petition is a separate question. The issue under consideration is the amendment extending the time for petitioning when the United States is a party. He suggested that the 7 day time period be treated as a separate suggestion and be placed on the table of agenda items as Item 93-3. The committee concurred and Judge Ripple stated that he would form a subcommittee including Mr. Strubbe, practitioners, and judges.

Judge Logan moved adoption of Rules 40 and 41 as published except that the word "shall" should be changed to "must" and the word "application" to "petition" for certiorari. Mr. Kopp seconded the motion and it was approved unanimously.

Item 91-4

Several amendments to Rule 32, governing the form of documents, were published. Four public comments were received. The Reporter summarized the comments.

One commentator, Judge Newman, supports the effort to standardize type styles but disagrees with the approach taken in the draft. He suggests that the committee consult the new Second Circuit rule. He also disagrees with the suggestion that footnotes be double spaced. Judge Newman also opposes the binding requirement.

One commentator favors the binding requirement but suggests that the use of spiral binding should be specifically mandated.

Two other commentators also oppose double spaced footnotes and made miscellaneous minor objections.

After the Reporter summarized the comments, Judge Ripple suggested considering them one at a time. The Committee began with the type style question. The published rule said that unless a brief is commercially printed, it must be prepared with no more than "11 characters per inch." Mr. Strubbe reported that the clerks' committee had discussed the proposal and thought that 65 characters per line would be preferable because such a standard would permit proportional type.

Mr. Kopp suggested that a better way to permit proportional type would be to require a typeface of 12 point or larger. It was pointed out that with 12 point type it would be necessary to prohibit compaction or compressed type. Mr. Strubbe noted that if the rule sets a limit of 65 characters per line, compacted type would simply result in shorter lines.

Judge Logan stated that he likes printed briefs and would like the rule to permit production of similar briefs on computers. He pointed out that a 65 characters per line standard allows proportional fonts and may improve readability. He noted that the Committee's basic aim has been to prevent people from cheating on the page limits.

Mr. Munford expressed concern about a standard that will not make it clear to a practitioner which button should be pressed on a computer to achieve compliance.

Judge Keeton stated that changing the standard from a number of characters per inch to a number of characters per line simply eliminates the notion that looking at any one inch will determine whether a brief is in compliance. Beyond the fact that such a change would force one to look at a larger unit, he thought that there would be no real difference between the two.

Judge Ripple suggested a straw vote. Four members voted to retain the 11 characters per inch standard. Three members voted to change to 65 characters per line; and no one

voted to send the rule back for further study.

After a short break Judge Ripple resumed the discussion by noting that Supreme Court Rule 33.1(b) prohibits any ". . . attempt to reduce or condense typeface." He inquired whether using similar language either in the text of the rule or in the Committee Note would be useful.

Judge Jolly suggested leaving the rule as published. Judge Logan expressed preference for a standard that would allow use of proportional type. The Committee members discussed the possibility of changing to a number of characters per page or per brief.

Judge Ripple appointed a subgroup, chaired by Judge Jolly, to continue the discussion and return to the Committee with a suggestion. Judge Ripple then asked the Committee to discuss the other comments.

The Committee discussed the issue of double spaced footnotes. Judge Logan moved that the rule be amended to permit single spaced footnotes. Judge Williams seconded the motion. After a brief discussion the motion was amended to add the Supreme Court's language concerning compressed type at the end of line 16 and to add a reference therein to footnotes. The motion passed unanimously.

The Committee then discussed the proposal that a brief or appendix be bound to permit it to lie flat when open. Judge Jolly moved that the provision remain unchanged; the motion was seconded by Mr. Munford. The motion was approved unanimously. The requirement that the case number appear at the top center of the cover and that the attorney's phone number be placed on the front cover were also unanimously approved.

The published proposal stated that the title of the document should "includ[e] the name of the party or parties for whom the document is filed (e.g., Brief for Appellant, J.Doe)." Judge Logan asked whether naming the parties is necessary when a brief is filed for all appellants or all appellees. Mr. Munford suggested that the rule could refer to Civil Rule 10(c). Judge Logan moved that the provision be amended by deleting the words "including the name of" and substituting the word "identifying;" he also suggested deleting all examples. Judge Williams seconded the motion and it was approved by a vote of six in favor and one opposed.

Mr. Spaniol had written prior to the meeting and asked whether the rule should continue to refer to carbon paper. The Committee had discussed that issue at the October meeting and decided to make no changes. Mr. Spaniol had also noted that the rule refers to "parties" proceeding in forma pauperis whereas the statute refers to "persons" proceeding in formal pauperis. Judge Logan and Judge Boggs moved that all such references to parties should be changed to persons. The change was approved unanimously.

One of the commentators noted that the proposed amendment requires a petition for rehearing, a suggestion for rehearing in banc, and any response to such petition or suggestion to be produced in the same manner as a brief, but that the rule did not prescribe the cover color. Judge Ripple moved, and Judge Boggs seconded the motion, that line 58 be amended by inserting the words: "with a cover the same color as the party's principal brief." The motion was approved unanimously.

Judge Ripple noted that the Committee Note makes specific reference to local rules but unless someone objected to the references they would be retained. There were no objections.

That concluded the discussion of Item 91-4 except that the Committee would return later to the discussion of type style.

Item 91-5

Proposed Rule 49 authorizes the use of special masters in the court of appeals. One comment was submitted; the NLRB expresses support for the proposal.

Mr. Munford questioned the numbering of the rule. He asked whether it should come at the end of the rules (and thus after Rule 48, the "Title" rule) or whether it should follow Rule 33. He suggested placement after Rule 33 because in both rules someone other than a judge presides. Judge Ripple thought that placement after Rule 33 would be inappropriate because he would like to avoid any suggestion that the rule on special masters is connected to the rule on appeal conferences. Because the use of appeal conferences for settlement purposes is new and the amended Rule 33 is trying to promote a level of informality, he would like to keep the two concepts separate.

Judge Williams suggested moving Rule 48 to Rule 1(c). Judge Keeton questioned whether such a change could be treated as a technical change and decided that it probably could be so characterized. Mr. McCabe noted that Bankruptcy Rule 1 combines the topics currently covered by Fed. R. App. P. 1 and 48.

Judge Ripple moved the approval in substance of the special master rule. Judge Williams seconded the motion; it was approved unanimously.

Judge Boggs moved that Rule 48 be moved to Rule 1 and made subpart (c) and captioned "Title." Mr. Munford seconded the motion. It was approved unanimously.

Item 91-8

The proposed amendment to Rule 25 provides that whenever service is accomplished by mailing, the proof of service must include the addresses to which the papers have been mailed. No public comments were submitted.

Prior to the meeting, Mr. Munford wrote and inquired why an address is required only when service is accomplished by mail. He noted that when a document is hand delivered, the document is usually delivered to office personnel rather than to the party or the party's counsel personally. Therefore, questions about service can arise even when a document has been hand delivered. In light of that comment, the Reporter had amended the draft to require that a certificate of service include not only the addresses to which papers have been mailed, but also the addresses at which papers have been delivered.

The Committee unanimously approved the change and the Committee consensus was that it was not a "substantial" change and that republication would not be necessary.

Mr. Munford noted that in cases involving many parties inclusion of all the addresses could result in a lengthy certificate of service and that the certificate of service should not count against the page limit for a brief. He suggested that Rule 28(g) should be amended to so provide. He made a motion that the words "proof of service" be inserted in Rule 28(g) following "table of citations." Judge Logan seconded the motion and it was approved unanimously. It was decided that the change could be treated as a technical and conforming amendment.

At 12:00 noon the Committee broke for lunch.

The meeting resumed at 1:00 p.m.

Judge Ripple suggested that the Committee pass a resolution thanking Mr. James Macklin, Jr., the Deputy Director of the Administrative Office who served as the Secretary to the Rules Committees for several years. Mr. Macklin will soon retire and it would be appropriate to thank him for his many years of dedicated service and assistance to the Committee. A motion was made and seconded and unanimously approved.

Item 91-11

The proposed amendment to Rule 25 provides that a clerk may not refuse to file a paper solely because the paper is not presented in the proper form. No comments were submitted but the clerks through Mr. Strubbe registered their opposition to the rule.

Mr. Munford questioned whether the proposed amendment to Rule 25 is consistent with amended Rule 32 which provides that carbon copies may not be filed except by persons proceeding in forma pauperis.

Judge Keeton suggested changing the word "submitted" to "used" at line 7 of the amended draft of Rule 32. Judge Boggs suggested using the word "submitted" rather than "filed" at line 64 of the amended draft of Rule 32. Those changes were approved unanimously.

Judge Boggs then moved approval of Rule 25(a) as published. Judge Jolly seconded the motion and it passed unanimously.

Item 91-12

The proposed Rule 33, published in January, differs substantially from the existing Rule 33. The Reporter summarized the two comments received. Judge Newman suggests that the language of the rule be amended to make it clear that the choice of an in-person or telephone conference is the court's and not the parties'. The Solicitor General's office suggests amending the third paragraph of the Committee Note to make it clear that suits against government officials should be treated like suits against government agencies and to state that attendance of an employee with authority "regarding" the matter at issue is sufficient.

In response to Judge Newman's suggestion the Reporter had inserted the words "as the court directs" at line 19 of the amended draft. Judge Ripple expressed his disapproval of that change. He noted that the rule serves dual purposes. It governs the usual prehearing conference that delineates issues, etc. but it also governs settlement conferences. Those circuits that currently use settlement conferences have adopted measures aimed at keeping the judges distanced from the conference. The language "as the court directs" could give the impression that judges are involved in the process. Judge Logan moved approval of line 19 as published (*i.e.*, without the new language). Mr. Froeb seconded the motion. It was approved unanimously.

With regard to the amendment of the third paragraph of the Committee Note, Mr. Kopp stated that many suits against government agencies also name government officials individually. As published, the Committee Note could give rise to an inference that suits against government officials should be treated differently than suits against agencies. The redrafting was intended to make it clear that a government official may also be represented at an appeal conference by an employee. Second, the Committee Note was changed to provide that when a party is required to attend the conference the court may determine that an employee with authority "regarding" the issue is sufficient rather than requiring attendance of an employee with authority "over" the matter.

The changes to the Committee Notes were moved by Judges Boggs and Logan and approved unanimously.

Item 91-13

The proposed amendments to Rule 41 provide that a motion for a stay of mandate must show that a petition for certiorari would present a substantial question and that there is good cause for a stay.

A comment was submitted by the National Association of Criminal Defense Lawyers.

The Association argues that the 30 day period for a stay is anachronistic because the period for filing a petition for certiorari is now 90 days in both civil and criminal suits.

Judge Boggs and Ripple both stated that in their circuits the practice is to grant 90 day stays and that even if the rule were changed to permit a 90 day stay, it would not be necessary to grant a stay for the full period.

Mr. Munford focused the Committee's attention on lines 21 & 22 which require a motion for a stay to show that the petition for certiorari would present a substantial question and that there is good cause for a stay. He stated that those standards are stricter than they need to be. In many circuits the standard is that the petition would not be frivolous. He pointed out that Fed. R. Civ. P. 62(d) & (e) provide for an automatic stay upon posting a supersedeas bond. He said that he would except stays under Rule 62(d) & (e) from the showing required in the proposed amendment. Judge Ripple responded that a stay pending appeal to the court of appeals (the first appeal and an appeal as of right) is different than a stay after judgment by the court of appeals pending petition for certiorari to the Supreme Court.

Judge Logan questioned whether the standard should be substantial question and good cause (as published) or whether it should be substantial question or good cause. Judge Williams stated that "cause shown" has long been interpreted as involving a balancing of the equities. The greater the irreparable injury, the less substantial the question must be in order for a stay to be appropriate.

Mr. Kopp noted that at the Committee's meeting in October 1992, the consensus was that the proposed amendments did not create a substantive standard that the circuits are bound to follow, rather the intent of the proposed amendments was simply to put counsel on notice regarding the issues that a petition should address. Judge Ripple suggested removing the "see, e.g.," citation from the Committee Note in an effort to make it clear that the rule does not establish a substantive standard. The Committee voted to eliminate the Barnes citation in the Note.

With regard to the suggested change from 30 to 90 days, Mr. Kopp suggested that such a change would need to be published for comment. It was agreed to make that suggestion Item Number 93-4 on the table of agenda items.

Judge Logan moved adoption of the text of Rule 41 as drafted. Mr. Froeb seconded the motion; it passed by a vote of six in favor and one opposed. Mr. Munford stated that his opposition was based upon his belief that the "and" should be changed to "or."

91-22

Rule 9 governing review of a release decision in a criminal case was completely rewritten and published for comment. Two public comments were received. A United

States District Judge suggests that subdivision (c) should refer to 18 U.S.C. § 3145(c) in addition to the sections already cited. The National Association of Criminal Defense Lawyers (NACDL) made several suggestions. First, it suggests that the captions of subdivisions (a) and (b) should be coordinated to clarify whether (a) or (b) applies after a finding of guilt but before sentencing. Second, it suggests that the rule should be amended to make it clear whether a motion for release must be filed first in the district court even after filing a notice of appeal. Third, it suggests omitting the statutory references in subdivision (c) and, if necessary, moving them to the Committee Note. Fourth, it suggests amending the rule to allow a party to supplement the district court's bail record with evidentiary material.

In light of NACDL's first comment the Committee approved several changes:

1. it amended the caption of subdivision (a) to read: "Appeal from an Order Regarding Release Before Judgment of Conviction";
2. on line 24 of the draft prepared for the meeting, the Committee inserted a period after the word "conviction" and deleted the words "or the terms of the sentence";
3. it amended the first paragraph of the Committee Note; in line three after the word "before" the Committee inserted "the judgment of conviction is entered at the time of";
4. following the first sentence of the second paragraph of the Committee Note, the Committee added citations to Fed. R. Crim. P. 32(b); and
5. in the second paragraph of the Committee Note accompanying subdivision (b), the Committee inserted a period at line 4 after the word conviction and deleted the words "or from the terms of the sentence".

In response to NACDL's second suggestion the Committee decided to omit the second sentence (beginning with the word "implicit") of the Committee Note accompanying subdivision (b). The intent of that deletion was to remove any inference that a motion for release must in all instances be made first in the district court. The rule deals only with review of a release decision made by a district court and not with release decisions that may be sought initially in a court of appeals. Therefore, the Committee decided that it would be inappropriate to include any language stating categorically either that a motion must be made, or need not be made, in the district court after the filing of a notice of appeal.

Because the statutory references in subdivision (c) had been added by Congress, the Committee decided that it should not delete them but should add the reference to § 3145(c).

The Committee decided that it would ordinarily be inappropriate to allow a party to supplement the bail record in the court of appeals.

Judge Boggs moved the approval of the published rule with the amendments to the text and notes described above. The motion was seconded by Judge Williams and passed unanimously.

Following a short break, Ms. Sharon Marsh, a printing expert from the Administrative Office joined the Committee briefly to discuss the Rule 32 typeface issues. She suggested that the rule should specify the size of type, amount of spacing, size of paper, and the size of margins.

Item 91-13

The discussion then returned briefly to Item 91-13. The Committee had discussed deleting the citation to Justice Scalia's chambers opinion in the Barnes case. That change was intended to remove the inference that the rule establishes the substantive standard for granting a stay pending the filing of a petition for certiorari to the Supreme Court. Judge Ripple suggested that rather than simply delete the citation, it be replaced with a reference to § 17.19 of Stern & Gressman's treatise on Supreme Court Practice. Judge Williams asked whether it is clear that the standards for the courts of appeals are the same as those used by the Supreme Court. Judge Ripple replied that Stern & Gressman, at page 690, suggests that they are. Judge Logan moved to substitute the cite to Stern and Gressman for the Barnes citation. Mr. Kopp seconded the motion. It passed unanimously.

Item 91-26

The proposed amendment to Rule 28 requires a brief to contain a summary of argument. Three comments were received. One person suggests that the decision should be left to each court and, in those courts that decide not to require a summary, to the parties. Another person suggests that the choice be left to the judgment of individual lawyers. The third commentator suggests that a summary is needed only when a brief exceeds 25 pages.

Judge Logan stated that he did not feel strongly about the issue either way. Judge Boggs expressed his support of the requirement. He pointed out that Supreme Court Rule 24.1(h) requires a summary and he stated that he thinks it would be useful for judges. Mr. Kopp observed that the Committee has been trying to minimize the need for a pressure to have local rules. Because several circuits have local rules requiring a summary of argument, Mr. Kopp favors including the requirement in the national rule. Judge Jolly agreed with Mr. Kopp and additionally stated that a summary is helpful in deciding whether to grant oral argument. Judge Ripple stated that he uses a summary in a variety of ways and finds it very helpful.

Judges Logan and Williams moved adoption of the rule as published. The motion was approved unanimously.

Item 91-27

This item involves amendment of all appellate rules requiring the filing of copies of documents with a court of appeals. The amendments make it clear that a court may require a different number of copies than the number specified in the national rule either by local

rule or by order in an individual case. No comments were submitted and the Committee approved the drafts as published.

Although no comments were received dealing with the number of copies problem, Mr. Spaniol submitted a comment concerning Rule 26.1, one of the rules amended as part of this process. Rule 26.1 requires a corporate disclosure statement to identify all "parent companies, subsidiaries (except wholly owned subsidiaries), and affiliates that have issued shares to the public." Mr. Spaniol noted that the Supreme Court dropped "affiliates" from its list because no one understood what it meant. The Committee briefly discussed the possible meanings of the term "affiliates." Judge Boggs asked whether that change would mean that a litigant would not need to disclose "full brothers or full sisters" by which he means companies that are wholly owned, or virtually wholly owned, by the same parent? Judge Williams noted that the term "affiliate" is used in virtually every antitrust consent decree. Judge Ripple stated that a memorandum would be circulated concerning that subject after the meeting.

Discussion of Item 91-27 concluded the reconsideration of the materials published for comment.

Chief Judge Sloviter, the liaison member from the Standing Committee, joined the Committee during the last discussion. The meeting adjourned for the day at 4:50 p.m. to allow time for the subcommittee on Rule 32 to meet.

The meeting reconvened at 8:30 a.m. on April 21.

II. Items Remanded by the Standing Committee

The Standing Committee had requested that the Advisory Committee reconsider a number of items.

Items 89-5 and 90-1

At its June 1992 meeting, the Standing Committee did not approve the draft amendments to Rule 35 proposed by the Advisory Committee on Appellate Rules. That draft made no substantive changes in Rule 35. It simply included within the text of the rule a warning that the pendency of a suggestion for rehearing in banc does not extend the time for filing a petition for certiorari.

The Standing Committee did not approve the draft because it was persuaded that the Advisory Committee should reconsider the original proposal, *i.e.*, to treat a suggestion for rehearing in banc like a petition for panel rehearing so that a request for a rehearing in banc will also suspend the finality of the court's judgment and thus extend the period in which to file a petition for certiorari. In short, the proposal had been remanded because it only made the trap obvious rather than eliminating it.

The Reporter reviewed the earlier drafts. A December 1991 draft had taken the approach favored by the Standing Committee. That draft did not win Advisory Committee approval. The major stumbling block was that if a request for a rehearing in banc tolls the time for filing a petition for certiorari, there must be a date certain from which the time begins to run anew. Under prevailing practice, a court has no obligation to vote or otherwise act upon a suggestion for rehearing in banc. Therefore, the draft provided that if no vote is taken on a suggestion within 30 days of its filing, the court must either enter an order denying the petition or extending the time for considering it. The Committee had concluded that requiring any sort of action within a time certain (whether it be 30, 60, or 90 days) was undesirable.

After the Reporter concluded her summary of past discussions, Judge Williams asked whether it really would be necessary to require action on a suggestion within a time certain. There is no time limit in the rules within which a court must act on a petition for panel rehearing. A court knows that a petition for panel rehearing must be acted upon and does so in due course. Judge Williams thought that the same approach would work with suggestions for rehearing in banc. Judges Sloviter, Boggs, and Logan all indicated that suggestions for rehearing in banc are decided by their courts as routine matters. A consensus developed that if a change were made so that the pendency of a suggestion for rehearing in banc stayed the mandate and tolled the time for filing a petition for certiorari, the courts would develop a mechanism for disposing of the suggestions.

At that point the December 1991 draft became the focus of discussion. Judge Logan moved that lines 13 through 16 of the draft be omitted. The effect of that deletion would be to allow the circuits to determine how they would handle the internal voting procedures. The motion was seconded by Judge Williams and approved unanimously.

The Committee then discussed lines 24 through 26 and whether a petition for rehearing in banc should be included with a petition for panel rehearing. The existing rule states that a suggestion for rehearing in banc may be combined with a petition for panel rehearing. The draft would have required the two to be combined if both are filed. Judge Logan made a motion to excise that requirement. Judge Jolly seconded the motion and expressed his preference for separate documents. Mr. Munford noted that in the Fifth Circuit, a suggestion for rehearing in banc may be treated as a petition for panel rehearing. Judge Sloviter responded that the suggested change would not preclude that; the change simply means that the rule does not require that the two petitions be combined. The motion carried by a vote of five to three. Judge Williams made a motion that was seconded by Judge Logan to amend the Committee Note to state that a circuit has the option of requiring a separate document. The motion passed unanimously.

Judge Logan then moved approval of the drafts of Rule 35(b) & (c) and Rule 41 as amended by the preceding motions. Judge Williams seconded the motion. Judge Jolly stated that he believes the term "suggestion for rehearing in banc" should be retained to distinguish it from a petition for panel rehearing. Judge Logan responded that calling it a "petition for

rehearing in banc" makes it clear that a response is required from the court. Judge Keeton noted that with the omission of lines 13 through 16, there is no certainty as to what may happen, the petition may languish and the mandate is stayed until disposition of the petition. Judge Jolly pointed out that the problem is more theoretical than actual because whenever a judge is seriously considering voting in favor of rehearing in banc, the judge stays the mandate. Mr. Kopp suggested that the Committee Note point out that Rule 41 provides that the filing of a petition for rehearing in banc stays the mandate and that the court of appeals will need to take final action on the petition but the procedure for doing so is left to local practice. The motion passed by a vote of six to two.

Mr. Munford pointed out that Rule 32(b) uses the term "suggestion for rehearing in banc." Because the amendments just approved changes that term to "petition for rehearing in banc" that reference plus all other cross-references in the rules to "suggestions" for rehearing in banc must be amended.

Item 91-14

This item arose from a Local Rules Project suggestion to amend Rule 21 so that a petition for mandamus does not bear the name of the judge and the judge is represented *pro forma* by counsel for the party opposing the relief. At its December 1992 meeting, the Standing Committee did not approve for publication, the draft amendment of Rule 21 proposed by the Advisory Committee. The Standing Committee asked the Advisory Committee to consider further amendment of Rule 21. The Standing Committee was concerned about two issues. First, some members of the Committee felt strongly that a trial judge should have the option to appear to oppose the relief sought in a petition for mandamus. Second, in many instances a mandamus action is actually adversarial in nature and further changes in the rule might be desirable to emphasize the similarity of mandamus to an interlocutory appeal.

The Reporter summarized the three drafts that were prepared for the meeting. The first draft differed from the one submitted to the Standing Committee in that it would permit the trial judge to respond whenever the court of appeals requires a response. The second draft amends the rule so that the trial judge is not treated as a party but it allows the trial judge to respond and authorizes the court of appeals to order the judge to respond. The third draft was prepared by Judge Easterbrook. The third draft also amends the rule so that the trial judge is not treated as a party but unlike the second draft it permits the trial court judge to participate only if ordered to do so by the court of appeals. The third draft also authorizes a court of appeals to invite an amicus curiae to defend the order in question.

Judge Ripple invited Judge Keeton to add any comments about the Standing Committee discussion. Judge Keeton reported that there are deep divisions of thought on the issue of a trial court judge's appearing before a court of appeals and arguing. But there are also instances in which neither party may want the order to stand and that the position of the court may go unrepresented.

Judge Logan stated that in most instances one party supports the judges action but there are instances in which that is not true. For example, if a district judge refuses to act on a remand from a court of appeals, it is not likely that either party would support the judge's position. In some cases the judge is the proper person to respond to a petition for mandamus and the judge wants to respond.

Judge Williams expressed support for Judge Easterbrook's position in which a judge participates only upon court order. If a judge does not have the option to participate, the judge has a greater incentive to give a written explanation for the judge's conduct at the time he or she acts.

Judge Boggs noted that mandamus cases are of two different types. In some instances the issue is fundamentally substantive and in such instances there is no greater need for the judge's participation than in an appeal. In other instances, the issue involves a question of delay, of the judge's conduct, or of control of the court. In such instances the judge often wants to provide an explanation. The trouble with the judge's participation is that it calls into question the judge's impartial position.

Mr. Froeb favored allowing a judge to appear whenever the judge wishes to do so. He states that sometimes the outcome of a mandamus petition can have a serious effects on the administration of justice. When he served as the chief judge of a trial court, he had occasion to present the trial court's position in writing to a court of appeals. He did not agree that an amicus curiae would be able to adequately represent the court in all instances, and may not be willing to do so for little or no compensation.

Chief Judge Sloviter agreed that are cases where the parties do not have any interest in the outcome of the mandamus. For example, there was a case in her circuit in which the district judge assessed the cost of empaneling jury against the lawyer who failed to give notice that the case had been settled. Because the case had been settled, there was no appeal. But the question of the judge's authority to so assess the cost of the jury was called into question on mandamus. In that case, she asked a law professor to represent the judge's position as an amicus. She observed that the fundamental question is whether the district judge has a right to be a party to the action.

Mr. Munford stated that in his opinion it is unseemly for a judge to be a party in a case. Typically a court will not grant mandamus unless the party has asked for relief in the trial court. At the time that the trial court judge responds to that request, the judge has the opportunity to give reasons for the response. Mr. Munford stated that he thinks that participation by the trial court judge is proper only upon invitation of the appellate court.

Judge Ripple pointed out that if the parties have mutual self-interest, it is possible for them to frame the petition for mandamus so that the court of appeals is not aware of the real issue. It may be important to leave open the possibility of the district judge appearing to clarify the situation.

Judge Williams agreed that a case may be framed before a court of appeals so that a certain angle is obscured but that can happen on appeal as well as on mandamus. Therefore, he said that he does not see anything distinctive about the problem in mandamus cases.

Judge Ripple agreed that in mandamus cases involving substantive matters there is little or no distinction. But when a mandamus case involves case management or procedural issues, only the district court has a global viewpoint and the ability to explain certain actions to the court of appeals.

Chief Judge Sloviter suggested that after the filing of a mandamus petition, it might be appropriate to allow a district court to enter a supplementary opinion explaining its conduct. Allowing the court to file such an opinion would not constitute participation as a litigant.

Judges Jolly and Ripple both expressed the opinion that mandamus is an unusual writ and is not to be considered a substitute for an appeal. It is an action against the judge or against the judge's ruling. It is important that the judge have the opportunity to defend himself or herself.

Mr. Kopp observed that the problem is that mandamus occurs in many different contexts and the context determines the appropriateness of a judge's participation. As a general practice one does not want to encourage a judge to act as a litigant. The difficulty in drafting a rule, is that it cannot cover all the various situations.

Judge Logan expressed a preference for draft two because it neither names nor blames the trial court judge but gives the court the option of responding to the petition for mandamus.

Judge Ripple outlined the various options before the committee and asked for a straw vote. First, the Committee could take no action; Judge Jolly favored that approach. Second, the Committee could work with draft one; no member voted in favor of that approach but Judge Jolly indicated that it would be his second preference. Third, the Committee could work with draft two; five members voted to do so. Fourth, the Committee could work with draft three, the Easterbrook draft; two members voted to do so.

Following the straw vote, the Committee focused upon draft two found at pages 6 and 7 of the memorandum.

With regard to lines 18 through 20 of the draft, it was suggested that the two sentences could be made one by deleting the words "[o]therwise, it must" and substituting the word "or." Upon reflection, however, the Committee concluded that the change would alter the rule substantively. As written, unless the court denies a petition, it must order respondents to answer. If rewritten as suggested, the rule would say, "[t]he court may deny the petition without an answer or order that the respondents answer . . .." That formulation

omits the idea that the court must order a response unless it denies the petition. It was decided to leave the sentences as written.

Judge Jolly noted that lines 15 and 16 require the clerk of the court of appeals to send a copy of a petition for mandamus to the clerk of the trial court. He suggested moving that idea to line 6 and requiring the petitioner to serve the clerk of the district court. Judge Ripple noted that such a change might reintroduce the idea that the judge is a party. But he further, noted that the document would come to the trial court's attention earlier if it were sent to the trial court by the party at the time of filing rather than being sent by the court of appeals after filing. Judge Logan responded that mandamus cannot be granted without ordering a response, so delay is inevitable and the delay involved under the latter approach should not be problematic.

As an alternative, Judge Ripple suggested that a new sentence be inserted in line 7 following the word "court." He suggested that it state: "The party shall also transmit a copy to the clerk of the trial court for the information of the trial judge and certify to the court of appeals that such transmission has been made." A motion was made to delete the underlined language at line 16 and 17 and to add Judge Ripple's sentence at line 7. The motion was seconded and passed unanimously.

Two minor amendments were also approved unanimously. At line 5 the word "therefor" was deleted. At line 19 the word "respondents" was changed to singular.

Finally, the Committee unanimously approved the entire rule as amended with a request that the Standing Committee publish it for comment. Two members of the committee, however, wanted it recorded that they preferred the Easterbrook draft.

Item 91-4

The Committee returned once more to the discussion of the typeface problem in Rule 32. The Committee began by considering a draft prepared by Judge Jolly and his subcommittee. That draft read as follows:

> A brief or appendix produced by the standard typographic process must be printed in 11 point or larger type; ~~those~~ briefs produced by any other process must ~~be printed with~~ not exceed ~~more than~~ an average of 2000 ~~11~~ characters per ~~inch~~ page with double spacing between each line of text. Quotations and footnotes must appear in the same size type as the text. Quotations more than two lines long may be indented and single spaced. Headings and footnotes may be single spaced. At the end of the non standard typographic brief, there must be an attorney's certification of the number of characters produced in the total brief (excluding the table of contents and the lists of cases and authorities).

Judge Jolly also provided a suggested Committee Note.

> Further, it is important that all briefs contain approximately the same average content per page so that no brief achieves an advantage in content based on the method or style of production. At the same time the rule seeks to allow a broad range of easily readable type, including proportional and non proportional fonts. To achieve this end the Committee concluded that a per page character average, including quotes and footnotes, was the most appropriate measurement to apply. Thus, following the close of the brief an attorney will certify the total number of characters produced (excluding the table of contents and the lists of cases and authorities). The Committee wishes to make plain that any typeface used must be easily readable and that no attempt should be made to reduce or condense the typeface in a manner that would increase the content of the document.

The Committee discussion focused upon whether computer programs can provide character counts and how a person using a typewriter rather than a computer would be able to certify the number of characters per page. The Committee also realized that further study would be needed to determine whether 2000 characters per page is the correct number. To easily accommodate the person using a typewriter, the Committee considered using the 11 character per inch standard as an alternative to the number of characters per page.

Judge Keeton indicated that he had been working on an alternative draft. He read his draft, which provided that a brief produced by any means other than standard typographic printing must not exceed on average the same content per page and must include a certification of compliance with this requirement. He suggested that the Committee Note could explain the standard and give examples from different software programs. His intent to avoid the need to change the text of the rule as technology changes.

Judge Keeton agreed to have his proposal typed for consideration by the Committee after the lunch break.

At 12:10 p.m. the Committee broke for lunch.

The meeting resumed at 12:55 p.m.

Item 92-10

At the December 1992 meeting of the Standing Committee, the Advisory Committee on Bankruptcy Rules submitted amendments to Bankruptcy Rule 8002. Those amendments parallel the proposed amendments to Fed. R. App. P. 4(a)(4). When reviewing the language in Bankruptcy Rule 8002, the Standing Committee questioned language appearing in both that rule and Rule 4(a)(4). As a consequence the Standing Committee asked the Advisory Committee on Appellate Rules to review the corresponding sentence of Rule 4(a)(4).

The Advisory Committee was asked whether, at line 87 of Rule 4(a)(4), the rule should require a party to file "a notice, or amended notice, of appeal" rather than simply an "amended notice of appeal." Judge Logan moved approval of the change; the motion was seconded by Judge Ripple. It was approved unanimously.

Item 91-4

The discussion returned to Judge Keeton's draft of Rule 32. The draft read as follows:

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

(1) 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~~ pro se persons proceeding in forma pauperis.

(2) A brief produced by the standard typographic process must be in 11-point or larger type. Quotations and footnotes must be in the same size type as the text.

(3) A brief produced by any other process must not exceed on the average the same content per page and must include a certification of compliance with this requirement. Lines of text must be separated by double spacing. Quotations more than two lines long may be indented and single spaced. Headings and footnotes may be single spaced. Quotations and footnotes must be in the same size type as the text.

(4) All printed matter must ~~appear in at least 11 point type~~ ....

The Committee decided that it would be clearer if the word "process" on line 10 of the draft were changed to the word "printing."

Mr. Munford suggested moving all the requirements for a brief produced by standard typographic printing into paragraph 2, which would mean including page and margin sizes for a printed brief in that paragraph. The Committee agreed and suggested that after the meeting the reporter reorganize the material in subdivision (a).

Judge Sloviter asked whether line 14 is clear enough; specifically, she wondered whether it is clear that one must count footnotes and block quotes in the content per page. Judge Williams suggested that the rule be amended to state that a brief must not exceed on average the same content per page "(including footnotes and quotations)" and the Committee agreed.

Judge Ripple commented that substantively, subpart (a)(3) is still ambiguous. The person preparing a non-printed brief is given a broad standard but does not have detailed instructions. Judge Jolly stated that a practitioner would need to obtain a printed brief and use it for comparison. Judge Keeton stated that he had hoped that the notes would be able to provide concrete illustrations. Judge Ripple continued to believe that the standard in the draft is so broad that the circuits would inevitably adopt local rules to provide guidance to practitioners and, therefore, there is a great risk that there would not be uniform application of the rule.

In light of the difficulty the Committee had during the meeting with the technical aspects of the rule, Judge Ripple asked the Committee to reconsider the approach considered some time ago under which the Administrative Office would publish a list of acceptable typefaces. There was discussion about whether that approach would violate the Rules Enabling Act as well as the question of accessibility to such a list.

Judge Logan made a motion to approve the draft as amended with the understanding that the Reporter would reorganize some of the material. The motion was seconded by Judge Ripple. Judge Jolly asked if the vote could be taken subject to the understanding that if it is possible to count characters per page, that a standard based upon characters per page would be used. With those understandings, the Committee voted unanimously to approve the draft. The Committee believed that the rule should be republished for a period of comment.

Item 92-2

At the Advisory Committee's October 1992 meeting it approved a draft rule that would permit technical amendment of the rules without the need for Supreme Court and Congressional review. At the Standing Committee's December meeting, the chairs and reporters of all of the advisory committees met, compared their various drafts, and agreed upon uniform language. The Reporter for the Standing Committee prepared uniform committee notes.

The Reporter reminded the Committee that the uniform draft is very similar to the October draft and that when the new draft was circulated to the Committee for a mail vote, it was approved unanimously. For informational purposes, the Reporter related that the Advisory Committee on Bankruptcy Rules met recently and failed to approve the technical amendments rule.

In light of the fact that the mail vote unanimously approved the new draft, Judge Ripple stated that unless some member of the Committee called for reconsideration in light of the Bankruptcy Committee's action, there was nothing further for the Committee to do. No member called for reconsideration so the rule was approved.

Because the Committee was awaiting photocopies of the materials for Item 92-1,

Judge Ripple proceeded to consider the next portion of the agenda with a promise to return to Item 92-1 when possible.

III. ACTION ITEMS

Item 92-4

In spring 1992, then Solicitor General Starr requested that the Committee consider amending Rule 35 to make the existence of an intercircuit conflict a ground for seeking a rehearing in banc. Acting Solicitor Bryson wrote to Judge Ripple shortly before this meeting and requested that the Committee take no final action on the suggestion until the new Solicitor General has an opportunity to consider the proposal.

Judge Ripple, however, had invited Mr. Cecil of the Federal Judicial Center to report on the Center's findings from its recent survey. Mr. Cecil reported that the survey of appellate judges revealed that intercircuit conflicts are not at the forefront of the judges' concerns. He further reported that four circuits have local rules that permit the courts to consider inter-circuit conflict as a basis for granting a rehearing in banc. The Ninth is one of those circuits but Professor Hellman's empirical research on the Ninth Circuit indicates that intercircuit conflict is not a prominent factor in granting a rehearing in banc in that circuit. Concerning alternatives to a full in banc that provide some check on the proliferation of intercircuit conflicts, nine circuits circulate opinions to all the judges of the circuit for their comment prior to publication. Some of those circuits require the circulating judge to note intercircuit conflicts so that the existence of the conflict is brought to the attention of the other judges.

Judge Ripple thanked Mr. Cecil and the other researchers at the FJC for their assistance. Judge Ripple also indicated that this item would be considered at the Committee's next meeting.

Item 92-1

This draft, like Item 92-2 dealing with technical amendments, is a uniform draft resulting from the December meeting of chairs and reporters. This draft deals with local rules.

When the draft was circulated by mail for a vote prior to the meeting, one member of the Committee did not approve the draft. Mr. Munford objected to that portion of the new draft that would allow a court to impose sanctions for non-compliance with a directive not found in either a national or local rule, but concerning which the person sanctioned had actual notice. Mr. Munford stated that if a matter is important enough to be sanctionable, it should be placed in a local rule.

Mr. Munford stated that he would prefer to end the rule on line 25 with the words

"local circuit rules." His suggestion would mean that sanctions could only be imposed for noncompliance with a federal statute or rule, or a local circuit rule. In contrast, the draft would permit sanctions for violation of other requirements so long as the violator had actual notice of the requirements.

Judge Ripple noted that the uniform draft does not deal with internal operating procedures. The Advisory Committee's earlier draft stated that any provision regulating practice before a circuit should be placed in a local rule rather than in an internal operating procedure. Internal operating procedures are abused in that way in some circuits. Judge Ripple suggested that the real issue is whether uniformity is sufficiently important to forego tailoring a rule to the particular differences between a court of first instance and an appellate court.

Judge Ripple invited Judge Keeton to speak about the uniformity issue. Judge Keeton stated that from the perspective of both the courts and the bar when the rules committees address the same problem, it is desirable that they use the same language. If the committees intend different things, they should use different language only when they mean to be different. He stated, however, that the Committee should feel free to make whatever recommendation it sees fit.

Judge Logan expressed support for the draft with the possible exception of making the two word changes made by the Bankruptcy Committee so that the two rules would be identical. He noted, however, that internal operating procedures are problematic in many circuits. Several circuits use i.o.p.'s like local rules but are not required to publish or circulate them like local rules.

Mr. Munford expressed disapproval of the final sentence of the Committee Note, lines 38-42. That sentence states: "Furnishing litigants with a copy outlining the court's practices -- or attaching instructions to a notice setting a case for conference or oral argument -- would suffice to give actual notice, as would an order in a case specifically adopting by reference a court's standing order and indicating how copies can be obtained." He pointed out that the last phrase would force a lawyer to somehow obtain a copy of the cross referenced standing orders. The last phrase, in fact, treats what is normally considered constructive notice as actual notice. Judge Jolly and Mr. Kopp moved that the entire sentence be deleted. The motion was approved unanimously.

Because the mail vote approved the draft and no member called for reconsideration of that vote, the draft was approved.

Item 86-23

The Committee was asked to address the problem a prisoner may have in filing timely objections to a magistrate judge's report. The problem is the converse of the one addressed

by the Committee in response to Houston v. Lack. Houston addressed the problem that a *pro se* prisoner has in timely filing documents because a prisoner has no control over when prison officials place the prisoner's mail in the United States mail -- a problem with outgoing mail. The focus of this item is that an incarcerated person also does not have control over when mail is delivered to him or her -- a problem with incoming mail.

The drafts prepared for this meeting provide that service upon institutionalized persons is complete only upon receipt of the document by the inmate.

Following a brief discussion about whether there is any need for such a change, Judge Ripple suggested that the drafts be circulated to the Chief Judges of the circuits and to the Committee of Staff Attorneys, who deal with motions for leave to file out of time, to get their reactions. It was further suggested that the Advisory Committee of Defenders be consulted. The Committee concurred.

Items 86-24 and 92-8

A suggestion was submitted to the Committee that it reexamine the operation of Rule 38 just as the Civil Rules Committee had reexamined Rule 11. Judge Ripple had appointed a subcommittee consisting of Judge Boggs, Mr. Froeb, Judge Hall, and Mr. Munford to consider the suggestion and to lead the discussion.

Judge Boggs reported that subcommittee concluded that further consideration of the topic would not be fruitful at this time. He did state, however, that the subcommittee believed that the area does bear watching and may need to be revisited in the future.

Judge Ripple stated that he would keep the subcommittee in place and ask it to monitor, with the help of the Reporter, the developments in the area of sanctions. That subcommittee would be charged with informing the Committee when, and if, it should address the topic in a more formal way. Judge Boggs agreed to continue to serve as subcommittee chair.

Item 91-28

At the December 1991 meeting Mr. Kopp suggested that Rule 27, which governs motions, needed updating. Mr. Kopp prepared a proposal and supporting memorandum. Because of the complexity of the topic and the lateness of the hour, Judge Ripple suggested that the Committee was not in a position to take up the topic during the meeting. But Judge Ripple appointed a subcommittee to examine the proposal. He asked Judge Williams to chair the subcommittee and Mr. Froeb and Mr. Munford to serve on it; they all agreed. He further requested that the subcommittee circulate the draft to the Chief Judges of the circuits, if the subcommittee thought that was appropriate.

Item 92-3

This item concerns the possible conflict between Rule 4(b) and 18 U.S.C. § 3731. The matter was brought to the attention of the Committee by Judge Logan. The former Solicitor General wrote to the Committee suggesting that the Committee take no further action and allow case law to resolve any remaining problems.

Judge Ripple noted that Rule 4(b) was amended by Congress. The conflicting provision was not a product of the committee process but a direct expression of Congressional intent. Therefore, Judge Ripple stated one could argue that because 4(b) was enacted after § 3731, 4(b) is the most recent expression of Congressional intent and the conflict is more apparent than real.

Mr. Munford observed that the only party that could be injured by the conflict is the government and the government does not want the Committee to act.

Judges Jolly and Boggs moved that the Committee take no further action. The motion was approved unanimously.

Item 92-5

At the Advisory Committee's April 1992 meeting, the Committee reviewed proposed amendments to Rule 25 drafted in response to the Houston v. Lack case. At that time one member of the Committee noted that in order to file a brief using the mailbox rule, Rule 25 requires a party to use "the most expeditious form of delivery by mail, excepting special delivery." Now that the postal service offers overnight mail service, the Committee questioned whether the rule requires the use of that service.

The Reporter prepared a draft amendment to Rule 25 requiring the use of first class mail, which is what the current Supreme Court Rule requires. Mr. Froeb and Mr. Kopp moved that the Committee approve the draft; it was approved unanimously.

Item 92-6

Mr. Greacen, the Clerk of the Fourth Circuit, asked that the Advisory Committee consider eliminating the mailbox rule in Rule 25 for filing a brief or appendix. Following the Reporter's review of the issue, no motion was made; therefore, Judge Ripple stated that the item would be treated as one for which no further action is deemed appropriate.

Item 92-7

Judge Newman of the Second Circuit wrote and suggested that Rule 30 be amended to require that a joint appendix include a copy of the notice of appeal. Judge Newman's letter stated that the notice often needs to be examined to determine the timeliness and scope of the appeal.

Mr. Munford observed that those circuits that want a copy of the notice require it by local rule. The issue, therefore, is whether the requirement should be national.

No member making a motion to adopt the suggestion, Judge Ripple stated that the item would be treated as one for which no further action is deemed appropriate.

Item 92-9

When changing the Bankruptcy Rules to conform to the recently approved changes in Appellate Rule 4(a)(4), a member of the Bankruptcy Advisory Committee noted the need to make a conforming amendment to the rule requiring the preparation of the record on appeal. The Bankruptcy Committee has published such an amendment. The Reporter prepared draft amendments to Fed. R. App. P. 10(b)(1) using the Bankruptcy Rule as a model. The draft provides that if a notice of appeal is suspended because of the filing of a post trial motion, the appellant is not required to order a transcript until after disposition of the last post trial motion.

Mr. Froeb made a motion to approve the draft. The motion was seconded by Judge Williams and approved unanimously.

Item 93-2

The Acting Solicitor General wrote to Judge Ripple noting a technical problem with Rule 8(c). Rule 8(c) provides that a stay in a criminal case shall be had in accordance with the provisions of Rule 38(a) of the Federal Rules of Criminal Procedure. When Rule 8(c) was adopted, Fed. R. Crim. P. 38(a) addressed the rules for obtaining a stay when the sentence in question is death, imprisonment, fine, or probation. Criminal Rule 38 was later amended to address those subjects in separate subsections. Subsection (a) now only covers the death penalty; subsection (b) imprisonment; subsection (c) fines; and subsection (d) probation. Mr. Bryson suggested that the specific cross reference to subdivision (a) be dropped and that Rule 8(c) refer simply to Criminal Rule 38.

Judge Williams made a motion to approve the suggestion; the motion was seconded by Mr. Kopp. The motion was approved unanimously.

Miscellaneous

Judge Ripple reminded the Committee that in late January he had circulated a list of agenda items to determine whether there was any continuing interest in the topics. In response to that memorandum, none of the Committee members wanted to take any further action with regard to Items 91-18 (content of a petition to review a magistrate judge's judgment); 91-19 (uniform docketing statement); 91-20 (amendment of FRAP 26.1); and 91-21 (uniform appendix). However, two members requested further action with regard to Items 91-23 (consolidated brief for each side); 91-24 (page limits or other changes re: amicus

briefs); and 91-25 (contents of a suggestion for rehearing in banc). Judge Ripple stated that the last three items will be placed on the agenda for the Advisory Committee's fall meeting. The first four items will be listed as "no further action deemed appropriate."

IV. DISCUSSION ITEMS

Item 91-3 deals with implementing the authority to define a final decision by rule and to expand by rule the instances in which an interlocutory decision may be appealed. Judge Ripple informed the Committee that he had written to the Chief Judges of the Courts of Appeals asking their advice and that responses from them have begun to arrive. He also had written to the chairs of the AALS Sections on Federal Courts and Civil Procedure asking their advice and requesting that through their newsletters they make their members aware of the Committee's interest in hearing from the academic bar. Judge Ripple also reminded the Committee that the former Solicitor General had conveyed his hope that the Committee would not take an activist role simply because the authority had been granted.

With regard to Items 91-6, concerning the allocation of word processing equipment costs between producing originals and producing copies, and 91-15, concerning a uniform effective date for local rules, Judge Ripple informed the Committee that he would write to the Committee to ascertain if the members wish to keep those items on the docket.

Item 91-17, involving unpublished opinions, will be discussed at the fall meeting to determine whether the Committee wishes to pursue the topic.

Item 92-11 originated with a request from the Solicitor General to examine those local rules that do not exempt government attorneys from joining a court bar or from paying admission fees. Judge Ripple informed the Committee that the Acting Solicitor General has asked that the Committee defer acting on the item until the new Solicitor General has an opportunity to address the issue.

Judge Ripple suggested that the Committee try to meet next September before the Chair of the Committee changes. Such a meeting would give the Committee the opportunity to try to clear a number of remaining items off the docket before the new Chair assumes his or her duties.

The meeting adjourned at 3:00 p.m.

Respectfully submitted,

Carol Ann Mooney /tw

Carol Ann Mooney
Reporter

Rule 27. Motions

(a) *Form and Content of Motions; Response*. -- ~~Unless another form is elsewhere prescribed by these rules, an application for an order or other relief shall be made by filing a motion for such order or relief with proof of service on all other parties.~~

(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 ~~a specific~~ any relevant provision of these rules, ~~governing such a motion,~~ and shall state with particularity the grounds upon which ~~it is~~ the motion is based~~, and shall set forth the order or~~ and the relief sought. If a motion is supported by ~~briefs,~~ 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 may not exceed twenty pages. A reply to a response may 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 the 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 motions, and 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~~. 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) ~~*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 that additional copies be furnished.~~ 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 rules, 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.

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

TO: Members of the Advisory Committee on Appellate Rules

FROM: Kenneth F. Ripple

DATE: February 25, 1993

RE: Agenda Items 92-1 and 92-2

Dear Colleagues:

At our meeting last October we approved a draft rule that would permit technical amendment of the rules without the need for Supreme Court and Congressional review and draft language to be added to Rule 47 governing local rules. Copies of the drafts approved by the Advisory Committee are attached and labeled Appendix A.

It was understood that the Standing Committee planned to use the drafts prepared by each of the Advisory Committees to develop uniform language. In my January 14, 1993 memorandum summarizing the actions taken by the Standing Committee at its December meeting, I noted that the chairs and reporters of all of the committees met, compared language, and agreed upon uniform language. The reporter for the Standing Committee was asked to prepare uniform committee notes.

It is now the task of each Advisory Committee to integrate the agreed upon language into each set of rules and return to the Standing Committee with specific rule amendments.

Enclosed are draft rules that incorporate the uniform language. The committee notes are those drafted by the Reporter for the Standing Committee.

Our agenda for the April meeting is rather full. We have had discussions about several earlier drafts of these rules; therefore, I believe that we should be able to settle these items by mail vote. Ballot sheets are enclosed for each item. If all of the members approve both drafts, we can dispense with discussion of them at the April meeting.

Item 92-1.

If you have any questions, please do not hesitate to contact Professor Mooney. Her phone number is (219) 631-5866 and her fax number is (219) 631-6371.

The draft rule differs from the draft approved by the committee in October in two principal ways:

1. The October draft included a sentence (lines 10-13) stating that "[a]ll generally applicable directions to parties or their lawyers regarding practice must be in local rules rather than internal operating procedures or standing orders." The current draft does not include that sentence.

   The current draft provides, however, that "[n]o sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal statutes, rules, or the local circuit rules unless the alleged violator has actual notice of the requirements." That provision provides a strong incentive for including general directives in local rules whenever possible. It does, however, give the courts of appeals the ability to issue directives on minor matters, such as courtroom protocol, that may be so trivial that the court may prefer not to clutter the rules with them.

   The Committee Note accompanying subdivision (b) also makes it clear that inclusion of general directions in places other than local rules is problematic.

2. The October draft required the circuits to number their local rules to correspond to the related federal rule (lines 13-15). The current draft requires local rules to conform to any uniform numbering system prescribed by the Judicial Conference of the United States. That language is acceptable in each set of rules and it is anticipated that the Judicial Conference will require circuits rules to conform to the Federal Rules of Appellate Procedure.

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

(a) Local Rules. -- Each court of appeals ~~by action of~~ acting by a majority of ~~the circuit~~ its judges in regular active service may, after giving appropriate public notice and opportunity to comment, ~~from time to time~~ make and amend

rules governing its practice. A local rule must be ~~not~~ ~~in~~consistent with, but not duplicative of, Acts of Congress and ~~these~~ rules adopted under 28 U.S.C. § 2072. Local rules must conform to any uniform numbering system prescribed by the Judicial Conference of the United States. The clerk of each court of appeals must send the Administrative Office of the United States Courts a copy of each local rule and internal operating procedure when it is promulgated or amended. ~~In all cases not provided for by rule, the courts of appeals may regulate their practice in any manner not inconsistent with these rules. Copies of all rules made by a court of appeals shall upon their promulgation be furnished to the Administrative Office of the United States Courts.~~

(b) Procedure When There Is No Controlling Law. -- A court of appeals may regulate practice in any manner consistent with federal ~~statutes~~ laws, rules, and ~~with~~ local rules of the circuit. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal statutes, rules, or the local circuit rules unless the alleged violator has actual notice of the requirements.

Bankruptcy change

Committee Note

Subdivision (a). The amendment requires that local rules be consistent not only with the national rules but also with Acts of Congress. The amendment also states that local rules should not repeat national rules. Repetition of a national rule in the text

of a local rule makes the additional local requirement or variation less apparent.

The amendment also requires that the numbering of local rules conform with any uniform numbering system that may be prescribed by the Judicial Conference. Lack of uniform numbering might create unnecessary traps for counsel and litigants. A uniform numbering system would make it easier for an increasingly national bar and for litigants to locate a local rule that applies to a particular procedural issue.

Subdivision (b). The rule provides flexibility to the court in regulating practice when there is no controlling law. Specifically, it permits the court to regulate practice in any manner consistent with Acts of Congress, with rules adopted under 28 U.S.C. § 2072, and with the circuit's local rules.

This rule recognizes that courts rely on multiple directives to control practice. Some courts regulate practice through the published Federal Rules and the local rules of the court. In the past, some courts have also used internal operating procedures, standing orders, and other internal directives. Failure to include directives in local rules can result in lack of notice. Counsel or litigants may be unaware of various directives. In addition, the sheer volume of directives may impose an unreasonable barrier. For example, it may be difficult to obtain copies of the directives. Finally counsel or litigants may be unfairly sanctioned for failing to comply with a directive. For these reasons, this Rule disapproves imposing any sanction or other disadvantage on a person for noncompliance with such an internal directive, unless the alleged violator has actual notice of the requirement.

There should be no adverse consequence to a party or attorney for violating special requirements relating to practice before a particular court unless the party or attorney has actual notice of those requirements. Furnishing litigants with a copy outlining the court's practices -- or attaching instructions to a notice setting a case for conference or oral argument -- would suffice to give actual notice, as would an order in a case specifically adopting by reference a court's standing order and indicating how copies can be obtained.

Item 92-2.

The current draft is very similar to the October draft. The October draft provided that the Judicial Conference could make "nonsubstantive changes essential to conforming these rules with statutory amendments." The current draft substitutes the word "technical" for "nonsubstantive" on the assumption that it is better understood.

Rule 50. Technical and Conforming Amendments

The Judicial Conference of the United States may amend these rules to correct errors in spelling, cross-references, or typography, or to make technical changes needed to conform these rules to statutory amendments.

Committee Note

This rule is added to enable the Judicial Conference to make minor technical amendments to these rules without having to burden the Supreme Court and Congress with reviewing such changes. This delegation of authority will relate only to uncontroversial, nonsubstantive matters.

Re: Item 92-1, the amendment to Rule 47 regarding local rules

I approve the current "uniform" draft. _____

I do not approve the current "uniform" draft. _____

_____

member's signature

Re: Item 92-2, the new technical amendments rule

I approve the current uniform draft. _____

I do not approve the current uniform draft. _____

_____

member's signature

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 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 50. 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, or typography, to make nonsubstantive changes essential to conforming these rules with statutory amendments, or to make other similar technical changes.

Preliminary Draft of Proposed Revision of the Federal Rules of Appellate Procedure Using Guidelines for Drafting and Editing Court Rules

and

Preliminary Draft of Proposed Amendments to Appellate Rules 27, 28, and 32

Request for Comment

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE JUDICIAL CONFERENCE OF THE UNITED STATES

Rule 26.1. Corporate Disclosure Statement*	Rule 26.1. Corporate Disclosure Statement
Any non-governmental corporate party to a civil or bankruptcy case or agency review proceeding and any non-governmental corporate defendant in a criminal case must file a statement identifying all parent companies, subsidiaries (except wholly-owned subsidiaries), and affiliates that have issued shares to the public. The statement must be filed with a party's principal brief or upon filing a motion, response, petition, or answer in the court of appeals, whichever first occurs, unless a local rule requires earlier filing. Whenever the statement is filed before a party's principal brief, an original and three copies of the statement must be filed unless the court requires the filing of a different number by local rule or by order in a particular case. The statement must be included in front of the table of contents in a party's principal brief even if the statement was previously filed. * Italicized text represents proposed amendments that were published for public comment in September 1995. If approved — with or without revision — by the advisory committee, Standing Committee, Judicial Conference, and Supreme Court, the amendments take effect on December 1, 1997, unless Congress acts otherwise.	(a) **Who Must File.** Any nongovernmental corporate party to a proceeding in a court of appeals must file a statement identifying its parent corporation and listing any publicly held company that owns 10% or more of the party's stock. (b) **Time for Filing.** A party must file the statement with the principal brief or upon filing a motion, response, petition, or answer in the court of appeals, whichever occurs first, unless a local rule requires earlier filing. Even if the statement has already been filed, the party's principal brief must include the statement before the table of contents. (c) **Number of Copies.** If the statement is filed before the principal brief, the party must file an original and three copies, unless the court requires a different number by local rule or by order in a particular case.

*(a) **Who Shall File.** Any nongovernmental corporate party to a proceeding in a court of appeals shall file a statement identifying any parent corporation and listing stockholders that are publicly held companies owning 10% or more of the party's stock.* *(b) **Time for Filing.** A party shall file the statement with the principal brief or upon filing a motion, response, petition, or answer in the court of appeals, whichever occurs first, unless a local rule requires earlier filing. Even if the statement has already been filed, the party's principal brief shall include the statement before the table of contents.* *(c) **Number of Copies.** If the statement is filed before the principal brief, the party shall file an original and three copies, unless the court requires the filing of a different number by local rule or by order in a particular case.*	

Committee Note

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Rule 29. Brief of an Amicus Curiae*	Rule 29. Brief of an Amicus Curiae
A brief of an amicus curiae may be filed only if accompanied by written consent of all parties, or by leave of court granted on motion or at the request of the court, except that consent or leave shall not be required when the brief is presented by the United States or an officer or agency thereof, or by a State, Territory or Commonwealth. The brief may be conditionally filed with the motion for leave. A motion for leave shall identify the interest of the applicant and shall state the reasons why a brief of an amicus curiae is desirable. Save as all parties otherwise consent, any amicus curiae shall file its brief within the time allowed the party whose position as to affirmance or reversal the amicus brief will support unless the court for cause shown shall grant leave for later filing, in which event it shall specify within what period an opposing party may answer. A motion of an amicus curiae to participate in the oral argument will be granted only for extraordinary reasons.	(a) **When Permitted.** The United States or its officer or agency, or a State, Territory or Commonwealth may file an amicus-curiae brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only if it is accompanied by the written consent of all parties or by leave of court. (b) **Motion for Leave to File.** The motion must be accompanied by the proposed brief and state: (1) the movant's interest; (2) the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case.

* Italicized text represents proposed amendments that were published for public comment in September 1995. If approved — with or without revision — by the advisory committee, Standing Committee, Judicial Conference, and Supreme Court, the amendments take effect on December 1, 1997, unless Congress acts otherwise.

*(a) **When Permitted.** The United States or its officer or agency, or a State, Territory or Commonwealth may file an amicus-curiae brief without consent of the parties or leave of court. Any other amicus curiae may file a brief only if:* *(1) it is accompanied by written consent of all parties;* *(2) the court grants leave on motion; or* *(3) the court so requests.* *(b) **Motion for Leave to File.** The motion shall be accompanied by the proposed brief, and shall state:* *(1) the movant's interest;* *(2) the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case.*	

(c) Contents and Form. An amicus brief shall comply with Rule 32. In addition to the requirements of Rule 32, the cover shall identify the party or parties supported or indicate whether the brief supports affirmance or reversal. If an amicus curiae is a corporation, the brief shall include a disclosure statement like that required of parties by Rule 26.1. With respect to Rule 28, an amicus brief shall include the following: *(1) a table of contents, with page references, and a table of cases (alphabetically arranged), statutes and other authorities cited, with references to the pages of the brief where they are cited;* *(2) a concise statement of the identity of the amicus and its interest in the case; and* *(3) an argument, which may be preceded by a summary and which need not include a statement of the applicable standard of review.*	(c) **Contents and Form.** An amicus brief must comply with Rule 32. In addition to the requirements of Rule 32, the cover must identify the party or parties supported or indicate whether the brief supports affirmance or reversal. If an amicus curiae is a corporation, the brief must include a disclosure statement like that required of parties by Rule 26.1. An amicus brief need not comply with Rule 28, but must include the following: (1) a table of contents, with page references; (2) a table of authorities — cases (alphabetically arranged), statutes and other authorities — with references to the pages of the brief where they are cited; (3) a concise statement of the identity of the amicus curiae and its interest in the case; (4) an argument, which may be preceded by a summary and which need not include a statement of the applicable standard of review; and (5) a certificate of compliance, if required by Rule 32(a)(7).

*(d) **Length.** An amicus brief may be no more than one-half the maximum length of a party's principal brief.*	(d) **Length.** An amicus brief may be no more than one-half the maximum length of a party's principal brief.
*(e) **Time for Filing.** An amicus curiae shall file its brief, accompanied by a motion for filing when necessary, within the time allowed to the party being supported. If an amicus does not support either party, the amicus shall file its brief within the time allowed to the appellant or petitioner. A court may grant leave for later filing, specifying the time within which an opposing party may answer.*	(e) **Time for Filing.** An amicus curiae must file its brief, accompanied by a motion for filing when necessary, within the time allowed to the party being supported. An amicus curiae who does not support either party must file its brief within the time allowed to the appellant or petitioner. A court may grant leave for later filing, specifying the time within which an opposing party may answer.
*(f) **Reply Brief.** An amicus curiae is not entitled to file a reply brief.*	(f) **Reply Brief.** An amicus curiae is not entitled to file a reply brief.
*(g) **Oral Argument.** An amicus curiae's motion to participate in oral argument will be granted only for extraordinary reasons.*	(g) **Oral Argument.** An amicus curiae's motion to participate in oral argument will be granted only for extraordinary reasons.

Committee Note

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Rule 35. En Banc Proceedings	
*(a) **When Hearing or Rehearing En Banc May Be Ordered.** A majority of the circuit judges who are in regular active service may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc. An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless:* *(1) consideration by the full court is necessary to secure or maintain uniformity of its decisions; or* *(2) the proceeding involves a question of exceptional importance.*	

(b) Suggestion of a party for hearing or rehearing in banc. — A party may suggest the appropriateness of a hearing or rehearing in banc. No response shall be filed unless the court shall so order. The clerk shall transmit any such suggestion to the members of the panel and the judges of the court who are in regular active service but a vote need not be taken to determine whether the cause shall be heard or reheard in banc unless a judge in regular active service or a judge who was a member of the panel that rendered a decision sought to be reheard requests a vote on such a suggestion made by a party.	**(b) Petition for Hearing or Rehearing En Banc.** A party may petition for a hearing or rehearing en banc. (1) The petition must begin with a statement that either: (A) the panel decision conflicts with a decision of the United States Supreme Court or of the court to which the petition is addressed (with citation to the conflicting case or cases) and consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions; or (B) the proceeding involves one or more questions of exceptional importance, each of which must be concisely stated; a proceeding may present a question of exceptional importance if it involves an issue as to which the panel decision conflicts with the authoritative decisions of every other federal court of appeals that has addressed the issue (citation to the conflicting case or cases being required). (2) Except by the court's permission, a petition for an en banc hearing or rehearing must not exceed 15 pages, excluding material not counted under Rule 32. (3) Except by the court's permission, if a petition for a panel rehearing and a petition for rehearing en banc are both filed — whether or not they are combined in a single document — the combined documents must not exceed 15 pages, excluding material not counted under Rule 32.

*(b) **Petition for Hearing or Rehearing En Banc.** A party may petition for a hearing or rehearing en banc.* *(1) The petition shall begin with a statement that either:* *(A) the panel decision conflicts with a decision of the United States Supreme Court or of the court to which the petition is addressed (with citation to the conflicting case or cases) and consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions; or* *(B) the proceeding involves one or more questions of exceptional importance, each of which shall be concisely stated; a proceeding may present a question of exceptional importance if it involves an issue as to which the panel decision conflicts with the authoritative decisions of every other federal court of appeals that has addressed the issue (citation to the conflicting case or cases being required).* *(2) Except by the court's permission, a petition for en banc hearing or rehearing shall not exceed 15 pages, excluding material not counted under Rule 28(g).* *(3) Except by the court's permission, if a petition for a panel rehearing and a petition for rehearing en banc are both filed — whether or not they are combined in a single document — the combined documents shall not exceed 15 pages, excluding material not counted under Rule 28(g).*	

(c) Time for suggestion of a party for hearing or rehearing in banc; suggestion does not stay mandate. — If a party desires to suggest that an appeal be heard initially in banc, the suggestion must be made by the date on which the appellee's brief is filed. A suggestion for a rehearing in banc must be made within the time prescribed by Rule 40 for filing a petition for rehearing, whether the suggestion is made in such a petition or otherwise. The pendency of such a suggestion whether or not included in a petition for rehearing shall not affect the finality of the judgment of the court of appeals or stay the issuance of the mandate.	(c) **Time for Petition for Hearing or Rehearing En Banc.** A petition that an appeal be heard initially en banc must be filed by the date when the appellee's brief is due. A petition for a rehearing en banc must be filed within the time prescribed by Rule 40 for filing a petition for rehearing.
(c) Time for Petition for Hearing or Rehearing En Banc. A petition that an appeal be heard initially en banc shall be filed by the date when the appellee's brief is due. A petition for a rehearing en banc shall be filed within the time prescribed by Rule 40 for filing a petition for rehearing.	
(d) Number of Copies. — The number of copies that must be filed may be prescribed by local rule and may be altered by order in a particular case.	(d) **Number of Copies.** The number of copies to be filed must be prescribed by local rule and may be altered by order in a particular case. (e) **Response.** No response may be filed to a petition for an en banc consideration unless the court orders a response. (f) **Voting on a Petition.** The clerk must forward any such petition to the judges of the court who are in regular active service and, with respect to a petition for rehearing, to any other members of the panel that rendered the decision sought to be reheard. But a vote need not be taken to determine whether the cause will be heard or reheard en banc unless one of those judges requests a vote.

*(d) **Number of Copies.** The number of copies that shall be filed may be prescribed by local rule and may be altered by order in a particular case.* *(e) **Response.** No response may be filed to a petition for en banc consideration unless the court orders a response.* *(f) **Voting on a Petition.** The clerk shall forward any such petition to the judges of the court who are in regular active service and, with respect to a petition for rehearing, to any other members of the panel that rendered the decision sought to be reheard. But a vote need not be taken to determine whether the cause will be heard or reheard en banc unless one of those judges requests a vote.*	

Committee Note

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Rule 41. Issuance of Mandate; Stay of Mandate*	Rule 41. Mandate: Contents; Issuance and Effective Date; Stay
(a) Date of Issuance. — The mandate of the court must issue 7 days after the expiration of the time for filing a petition for rehearing unless such a petition is filed or the time is shortened or enlarged by order. A certified copy of the judgment and a copy of the opinion of the court, if any, and any direction as to costs shall constitute the mandate, unless the court directs that a formal mandate issue. The timely filing of a petition for rehearing will stay the mandate until disposition of the petition unless otherwise ordered by the court. If the petition is denied, the mandate must issue 7 days after entry of the order denying the petition unless the time is shortened or enlarged by order.	(a) **Contents.** Unless the court directs that a formal mandate issue, the mandate consists of a certified copy of the judgment, a copy of the court's opinion, if any, and any direction about costs. (b) **When Issued.** The court's mandate must issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, rehearing en banc, or motion for stay of mandate, whichever is later. The court may shorten or extend the time. (c) **Effective Date.** The mandate is effective when issued.

* Italicized text represents proposed amendments that were published for public comment in September 1995. If approved — with or without revision — by the advisory committee, Standing Committee, Judicial Conference, and Supreme Court, the amendments take effect on December 1, 1997, unless Congress acts otherwise.

(a) The Mandate; Date of Issuance, Effective Date. *(1) Unless the court directs that a formal mandate issue, the mandate consists of a certified copy of the judgment, a copy of the court's opinion, if any, and any direction about costs.* *(2) The court's mandate shall issue 7 days after the time for filing a petition for rehearing expires, unless an order shortens or extends the time, or a party files a petition for rehearing, a petition for rehearing en banc, or a motion for stay of mandate pending petition to the Supreme Court for a writ of certiorari. Unless the court orders otherwise, the timely filing of a petition for rehearing, a petition for rehearing en banc, or the filing of a motion for a stay of mandate pending petition to the Supreme Court for a writ of cetiorari, stays the mandate until the court disposes of the petition or motion. If the court denies the petition for rehearing or rehearing en banc, or the motion for a stay of mandate, the court shall issue the mandate 7 days after entry of the order denying the last such petition or motion, but an order may shorten or extend the time.* *(3) The mandate is effective when issued.*	

(b) Stay of Mandate Pending Petition for Certiorari. — A party who files a motion requesting a stay of mandate pending petition to the Supreme Court for a writ of certiorari must file, at the same time, proof of service on all other parties. The motion must show that a petition for certiorari would present a substantial question and that there is good cause for a stay. The stay cannot exceed 30 days unless the period is extended for cause shown or unless during the period of the stay, a notice from the clerk of the Supreme Court is filed showing that the party who has obtained the stay has filed a petition for the writ, in which case the stay will continue until final disposition by the Supreme Court. The court of appeals must issue the mandate immediately when a copy of a Supreme Court order denying the petition for writ of certiorari is filed. The court may require a bond or other security as a condition to the grant or continuance of a stay of the mandate.	**(d) Staying the Mandate.** (1) **On Petition for Rehearing or Motion.** The timely filing of a petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, stays the mandate until disposition of the petition or motion, unless the court orders otherwise. (2) **Pending Petition for Certiorari.** (A) A party may move to stay the mandate pending the filing of a petition for a writ of certiorari in the Supreme Court. The motion must be served on all parties and must show that the certiorari petition would present a substantial question and that there is good cause for a stay. (B) The stay must not exceed 90 days, unless the period is extended for good cause or a notice from the Supreme Court clerk is filed during the stay indicating that the party who obtained the stay has filed a petition for the writ. In that case, the stay continues until the Supreme Court's final disposition. (C) The court may require a bond or other security as a condition to granting or continuing a stay of the mandate. (D) The court of appeals must issue the mandate immediately when a copy of a Supreme Court order denying the petition for writ of certiorari is filed.

(b) Stay of Mandate Pending Petition for Certiorai. A party may move to stay the mandate pending the filing of a petition for a writ of certiorari in the Supreme Court. The motion shall be served on all parties and shall show that the certiorari petition would present a substantial question and that there is good cause for a stay. The stay cannot exceed 90 days, unless the period is extended for good cause, and it cannot, in either case, exceed the time that the party who obtained the stay has to file a petition for a writ of certiorari in the Supreme Court. But if the clerk of the Supreme Court files a notice during the stay indicating that the party who obtained the stay filed a petition for the writ, the stay continues until the Supreme Court's final disposition. 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 before granting or continuing a stay of mandate.	

Committee Note

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.