ADVISORY COMMITTEE
ON
APPELLATE RULES

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Washington, D.C.
April 3-4, 1997

Agenda - Advisory Committee on Appellate Rules
Meeting - April 3 & 4, 1997

I. Approval of Minutes of April 1996 Meeting

II. Review of 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, published April 1996.

For this discussion you will need the reporter's memorandum summarizing the comments submitted during the publication period, and the marked copy of the restyled rules showing the reporter's recommended changes.

The Advisory Committee must make recommendations to the Standing Committee.

III. Review of the Preliminary Draft of Proposed Amendments to Rules 5, 5.1, and Form 4, published August 1996.

For this discussion you will need the reporter's memorandum summarizing the comments and showing recommended changes.

The Advisory Committee must make recommendations to the Standing Committee.

IV. Preliminary discussion of proposed substantive amendments that were included in the commentary on the published rules.

The Advisory Committee must determine which items should be placed on its agenda for future study.

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Agenda Item I

MINUTES OF THE MEETING OF THE ADVISORY COMMITTEE ON APPELLATE RULES APRIL 15, 1996

Judge James K. Logan called the meeting to order on April 15, 1996, at 8:30 a.m. in the Fairmont Hotel in San Francisco, California. 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. 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. Peter McCabe, the Committee Secretary, and Mr. John Rabiej, Chief of the Rules Committee Support Office, were present. Ms. Judith McKenna of the Federal Judicial Center was in attendance. Chief Justice Pascal Calogero, a member of the Advisory Committee, joined the meeting later in the morning. Mr. Cole Benson, the Supervising Deputy of the Ninth Circuit Clerks, attended as a guest.

Judge Logan noted the recent publication of the restyled rules and thanked all the committee members once again for all their hard work on that project. He announced the public hearings scheduled on July 8 in Washington, D.C. and August 2 in Denver, Colorado. Judge Logan invited all committee members to attend the hearings.

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

Judge Logan then asked the reporter to begin discussion of the proposed rule amendments that had been published in September 1995.

Rule 26.1

Rule 26.1, as published, was divided into three subdivisions to make it more comprehensible. The rule continued to require disclosure of a party's parent corporation but the amendments deleted the requirement that a corporate party identify subsidiaries and affiliates that have issued shares to the public. The amendments, however, added a requirement that the party list all its stockholders that are publicly held companies owning 10% or more of the stock of the party.

Eleven letters commenting on the proposed amendments were received; the letter from the American Bar Association Section of Intellectual Property, however, included separate suggestions from two committees so there was a total of 12 commentators. Of the 12, four supported the amendments, none generally opposed the amendments, but 8 suggested revisions.

The Advisory Committee had specifically requested that the Committee on Codes of Conduct review the proposed amendments. The Committee on Codes of Conduct approved the proposed draft. Given that approval, the new draft prepared by the reporter at the close of the comment period did not make any fundamental changes in the disclosure requirements. Specifically, the requirement that a party disclose "subsidiaries" and "affiliates" was not reinstated even though 2 of the commentators urged reinsertion of that requirement.

The new draft also continued to require disclosure of a stockholder that owns 10% or more of the party's stock if the stockholder is publicly held. One commentator said that this provision "over-extends" the assumption of disqualification because a judge's interest may be extremely minimal. The disqualification statute is, however, 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."

The new draft did not require the party to disclose all of the party's stockholders that are publicly held (as one commentator suggested) but continued 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. The new draft made it clear that the rule applies only when a single corporate stockholder owns at least 10% of the party's stock.

The new draft also required disclosure of "all" of a party's parent corporations rather than "any" parent corporation. The intent of the change was to require disclosure of grandparent and great-grandparent corporations. Corresponding changes were made in the Committee Note.

One of the members stated that the definition of a parent corporation is crucial. Although it was noted that the SEC has a fairly precise definition, the consensus was that in this context it is not necessary to make the definition more scientific by designating the percentage ownership that makes one corporation a parent of another. Nor was there sentiment that the rule needs to be expanded beyond corporations to other organizations. None of the members were familiar with instances in which a judge has been unable to ascertain the judge's interest in limited partnerships, etc.

With regard to the suggestions that the rule should continue to require disclosure of subsidiaries and affiliates, it was noted that none of the persons who suggested retention of that disclosure requirement had been able to identify an instance when failure to provide disclosure would be problematic.

The new draft was approved unanimously. It was agreed that the changes

made after publication were not substantial and that there was no need to republish the rule.

Rule 29

The rule governing amicus briefs was entirely rewritten prior to publication. The former rule granted permission to conditionally file an amicus brief with the motion for leave to file. The published rule required the brief to accompany the motion. In addition to identifying the applicant's interest and the reasons why an amicus brief is desirable, the published rule required that the motion state the relevance of the matters asserted to the disposition of the case. The published rule also specified the contents and form of the brief. The published rule limited an amicus brief to no longer than one-half the maximum length of a party's principal brief.

Seventeen commentators submitted statements about the proposed rule. Of the seventeen, none generally opposed the amendments; 3 supported the amendments without reservation; 13 suggested revisions; and 1 made no substantive comment.

Seven of the commentators who suggested revisions were unhappy with the provision limiting an amicus brief to one-half the length of a party's brief. The new draft prepared at the close of the comment period did not change the limit 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.

Four commentators opposed the requirement that the brief accompany a motion for leave to file. The new draft deleted that requirement so that the cost of preparing a brief need not be incurred unless the amicus knows that it will be permitted to file its brief.

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 published rule dropped the exception based upon consent of all parties, but otherwise left the time for filing the brief unchanged. Four commentators opposed the requirement that the brief be filed within the time allowed the party being supported. Because the Committee had spent considerable time on the timing issues when developing the published amendments, the new draft did not adopt any of the alternative approaches suggested by the commentators and retained the same filing schedule as the published version.

Both the existing and the published rules permitted the filing of an amicus brief by leave of court or when the brief is "accompanied by written consent of all parties." Rather than requiring the applicant to file the written consent of all the parties, the new draft adopted the suggestion that it would be sufficient to submit a statement that all parties consent to the filing of the brief.

In subpart (a) of the new draft the District of Columbia was added to the list of entities allowed to file an amicus brief without consent. The new draft also made it clear in subpart (f) that an amicus may request leave to file a reply.

The Committee began its discussion by considering the length provisions at lines 56-62 of the new draft and the intersection of that provision with the time for filing. One member reiterated some of the arguments advanced by the commentators who urged the Committee to increase the length. He argued that an amicus does not always have an opportunity to review the party's brief; that the party and the amicus may not agree about the way to approach the issues; and, in instances in which the amicus is a better advocate than the party, the amicus brief may become the equivalent of one of the main briefs in the case. He further noted that the length limitation interrelates with whether or not the amicus must file at the same time as the party or is permitted to file later. The shorter limitation is more acceptable if the amicus files after the party being supported

Another member responded that the most helpful amicus briefs are short and to the point.

Two other members responded to the suggestion that a staggered briefing schedule should be considered. They stated that in their experience the party and the amicus ordinarily work cooperatively. They argued, therefore, that the rule should not delay the briefing schedule.

Other members said that they were persuaded by those who argued that if the amicus brief must be short and not repetitious of the party's brief, the amicus should have some short period of time after the party's brief is filed to fine-tune the amicus brief.

A vote was taken on the substantive question of whether an amicus should be permitted to file after the party being supported. The vote was 5 in favor of the staggered schedule and two in opposition. Accordingly the language at lines 66-70 of the redraft was amended to state:

> The brief shall be filed no later than 7 days after the principal brief of the party being supported is filed. An amicus curiae who does not support either party shall file its brief no later than 7 days after the appellant's or petitioner's principal brief is filed.

That new language was approved unanimously. The passive voice — "is filed" — was used deliberately. The filing date of a brief is a bit confusing. A party or amicus can send its brief to a court for filing; although it is timely under Rule 25 if mailed within the filing time, it is not filed until the court receives it. It would be incorrect to say that the brief is due 7 days after "the party files" its brief because filing is done by the court not by the party. It was understood that the amicus may need to contact the court in order to ascertain the filing date.

One member suggested that with a staggered briefing schedule the amicus should be required to effect same day service of the brief on the parties so that the party has sufficient opportunity to address in its responsive brief the issues raised by the amicus. The suggestion was not adopted, however, because same day service on out-of-town parties is possible only by fax and even that may not be possible. Fax machines are not always operational and even when they are, they are often busy.

The language of lines 56-62 was redrafted and unanimously approved. As amended those lines read as follows:

> 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 that is authorized by these rules. If the court grants a party permission to file a longer brief, that extension does not affect the length of an amicus brief.

Lines 73 and 74 of the redraft were amended to read as follows: "Except by the court's permission, an amicus curiae may not file a reply brief." The published draft had said that an amicus "is not entitled to file a reply brief." The "is not entitled" language carried the implication that an amicus could seek permission to file a reply. But with the addition of the introductory phrase — "except by the court's permission" — the opportunity to seek the court's permission is made express and the "may not file" language is appropriate.

The discussion then turned to lines 35-38 of the redraft. The redraft said: "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." (emphasis added). One member suggested replacing the word "or" with "and" so that both types of information are required. In the rare instances in which the amicus does not support any party, the amicus could simply so indicate. That change was approved by acclamation.

Lines 23-27 of the redraft make a post-publication change. The published rule, like the existing rule, said that an amicus may file a brief only with the court's permission or if the brief is accompanied by the written consent of all the parties. Three commentators suggested changing the provision dealing with consent of the parties. The redraft eliminated the need to file the other parties'

written consent and provided that it would be sufficient for the brief to state that all parties have consented to its filing. The Committee accepted that change but amended those same lines to improve the syntax. As amended lines 23-27 read as follows: "Any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing."

The Committee then discussed the time for an amicus to file its motion for leave to file. One member proposed that lines 28 and 29 should state that the motion may be filed on or before the date the amicus brief is due. It was pointed out that in some circuits any such motion is held until the case is assigned to the panel and, therefore, the would-be amicus does not get a response to the motion until after the brief is presented for filing. The Committee decided, by a vote of 5 in favor and 2 abstentions, to return at lines 28-29 and lines 63-64 to the published draft and require that the brief accompany the motion. That means that the motion must be filed no later than the time for filing the brief.

With regard to participation of an amicus in oral argument, the language of lines 76-78 was amended. The Committee agreed that it is common to allow an amicus to participate in oral argument when the party being supported cedes some of its time to the amicus. The Committee, however, wanted to retain court control over the ability of an amicus to participate, rather than permitting an amicus to participate whenever a party is willing to cede some of its time. Leaving the final decision in the court's hands may lessen the ability of an amicus to exert undue pressure on the party. The published rule said that a motion to participate is granted only for "extraordinary reasons." The Committee agreed to change the language to more accurately reflect current practice. As amended subpart (g) says: "An amicus curiae may participate in oral argument only with the court's permission." The reporter was asked to prepare an accompanying change in the Committee Note indicating that unless a party is willing to cede some of its time to the amicus, oral argument by an amicus will only be permitted in extraordinary circumstances.

Rule 35

The proposed amendments to Rule 35 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 in the existing rule stating that a request for rehearing en banc does not suspend the finality of the judgment or stay the mandate was deleted. The term "suggestion" for rehearing en banc was changed to "petition for rehearing en banc."

Fifteen comments on the proposed amendments were received. Six of the

commentators addressed the criteria for granting a rehearing en banc. Because these provisions had been the subject of careful negotiation among the Committee members, the only post-publication changes recommended by the reporter were intended to: 1) make it clear that intercircuit conflict is only one example of a question of "exceptional importance," 2) eliminate any implication that a court should grant en banc reconsideration whenever there is an intercircuit conflict, and 3) avoid the implication that a case cannot present a question of exceptional importance unless it conflicts with every other federal court of appeals.

Justice Calogero, who had experienced travel delays, joined the meeting.

Judge Logan began the discussion with the "spelling issue," that is with the change from "in banc," as used in the existing rule, to "en banc" as used in the published draft. On a vote to retain the "en banc" spelling, 6 members voted in favor of that spelling and one abstained. The Committee generally expressed hope that the spelling question not become an issue that might prevent the rest of the proposed changes from moving forward. The reporter had prepared a new paragraph for insertion in the Committee Note which would explain the reason for the change. The Committee decided that the explanation should be part of the Advisory Committee's report to the Standing Committee, but not part of the Committee Note accompanying the rule.

The Committee then turned its attention to the changes made in part (b)(1)(B) dealing with the "exceptional importance" criteria. The redraft struck the word "every" at the end of line 37, so that the intercircuit conflict example said 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 other federal courts of appeals that have addressed the issue." The published draft had limited the example to instances in which the panel decision conflicts with the authoritative decisions of <u>every</u> other federal court of appeals." The dropping of the word "every" was responsive to a comment that objected to the implication that a court should grant en banc rehearing whenever a panel decision conflicts with the decision of even a single other circuit. It was noted, however, that dropping the word "every" also cuts the other way and may imply the desirability of an en banc hearing even when the panel decision only joins one side of an already existing conflict. The Committee voted unanimously to return lines 37 through 39 to the wording used in the published rule. Those lines having been changed, subparagraph (b)(1)(B) was approved unanimously.

One member was concerned that the rule does not authorize a court to hold an en banc hearing to correct an error. Others responded that a party seeking an en banc hearing for such a purpose argues that the proceeding involves a question of "exceptional importance."

Lines 8-10 were amended to read: "en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or". That change eliminates the phrase "consideration by the full court" which the Committee found inconsistent with the statutory authorization for en banc consideration by less than all the members of a court (i.e. the mini en banc hearings authorized in the Ninth Circuit).

Discussion then turned to lines 47-52 which state that when a party files both a petition for panel rehearing and a petition for rehearing en banc, together they cannot exceed 15 pages even if they are filed separately. It was pointed out that some circuits require the use of two separate documents and in such circuits it would be difficult to include all necessary information in both documents and meet the 15 page limit. The Committee, therefore, unanimously voted to amend line 52 by adding the words "unless separate filing is required by local rule."

There was discussion of the retention of "page" limits in this rule as contrasted with the proposed limits in Rule 32 that are based upon word or character counts. The consensus was that the additional complications of the Rule 32 methods, including attorney certification of the length, are not necessary in this context.

Lines 89-92 of the redraft were amended. The redraft said that a vote need not be taken on a petition for rehearing en banc unless a judge in regular active service or any other member of the panel that rendered the decision calls for a vote on the petition. It was noted that at least one circuit permits a senior judge to call for a vote even though a senior judge cannot vote on the petition. The statute is silent about who can call for a vote on the petition even though the statute prohibits a senior judge from voting on the petition unless he or she was a member of the panel rendering the decision. It is Judicial Conference policy that senior judges should be treated like active judges to the extent consistent with statute. The Committee unanimously approved changing line 91 so that "a judge" can request a vote. It was decided that it was unnecessary to discuss that change in the Committee Note.

With regard to the Committee Note it was decided to delete all references to specific local rules. As local rules change over time, the citations become obsolete.

Also, the portion of the Committee Note explaining subdivision (c), which discusses the interrelationship between the changes in Rule 35 and Supreme Court Rule 13.3, was deleted. The Committee Note, as published, said that the changes in Rule 35 did not mean that the filing of a request for a rehearing en banc would extend the time for filing a petition for writ of certiorari and that amendment of Supreme Court Rule 13.3 would be necessary to accomplish that

objective. The Committee agreed with the commentators who felt that the proposed changes arguably would have that effect. Supreme Court Rule 13.3 says if a "petition for rehearing" is timely filed the time to file a petition for a writ of certiorari runs from the date of the denial of the petition or, if the petition is granted, from the entry of judgment. The Supreme Court Rule further says that a "suggestion . . . for a rehearing en banc is not a petition for rehearing within the meaning of [Rule 13] unless so treated by the United States court of appeals." The Committee believed that the change in name from "suggestion" for rehearing en banc to "petition" for rehearing arguably affected the desired change in the time for filing a petition for certiorari. It was, however, the Committee's intent to inform the Supreme Court that amendment of its Rule 13.3 would help prevent potential confusion.

Rule 41

In keeping with the objective of the amendment to Rule 35 that a request for a rehearing en banc be treated like a request for a panel rehearing, the published amendments to Rule 41 provided 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. The published rule also provided that a mandate is effective when issued. The published rule further provided that the presumptive period for a stay of mandate pending petition for a writ of certiorari would be 90 days.

Nine commentators submitted letters discussing Rule 41. Six of them approved the amendments without reservation. One made no substantive comments. Two suggested revisions.

The post-publication redraft adopted the suggestion that the language of the rule be modified to make it clear that the party, not the Supreme Court Clerk, has the burden of notifying the court of appeals when a petition for certiorari has been filed.

The other suggestion, that the rule should specify when the mandate issues if a petition for rehearing or a petition for rehearing en banc is granted, resulted in an addition to the Committee Note.

Lines 48-57 were amended by the Committee to reflect the fact that ordinarily the court of appeals learns about the filing of a petition of certiorari by telephone conversation with the office of the Clerk of the Supreme Court. The actual notice that a cert petition has been filed is often not received until after the original stay has expired. As amended those line read:

The stay shall not exceed 90 days, unless the period is extended for good cause, or unless the party who obtained the stay files a petition for the writ and so notifies the circuit clerk during the period of the stay.

Rule 41, as amended, was approved for submission to the Standing Committee.

Need for Republication?

Judge Logan then asked whether any of the post-publication changes made to the rules were substantial; if so, those rules must be republished. Only the staggered briefing schedule for amicus brief was discussed as possibly substantial. The Committee consensus, however, was that because the changes made would not extend the briefing schedule, even that change did not require republication.

Timing?

Judge Logan asked the Committee to consider, in light of the recent publication of the restyled rules, the time at which these rules should be moved forward to the Standing Committee and the Judicial Conference.

Judge Logan recommended sending them forward this summer because delaying would put these changes on the same schedule as the restyled rules. There are already 3 rules in the restyled packet that contain substantive changes. If these 4 are delayed, then the packet would contain 7 substantively altered rules. If the restyled packet were to fail, then these 7 rules would be further delayed another year.

Committee reaction was mixed. Several members said that it is easier to have changes come all at once. Another member urged going forward now because we do not know what the reaction will be to the restyled rules. If the restyled rules become very controversial, the substantive changes proposed in the 4 rules dealt with at this meeting may be unduly delayed.

A motion was made to submit the rules to the Standing Committee for its approval but to ask the Standing Committee to hold these rules and send them to the Judicial Conference with the restyled rules. It was noted that there are changes in the 4 rules dealt with at this meeting that are not reflected in the restyled rules. It would be easier to reconcile the rules all at once. Indeed, if these 4 rules were to become effective on December 1, 1997, they would need to be amended again on December 1, 1998, if only to change "shall" to "must." The only urgent problem addressed in the 4 rules is the timing trap created by the current difference between a petition for panel rehearing and a suggestion for rehearing en banc. Even that problem is cured in many circuits by local practice

that automatically treats a suggestion for rehearing en banc as containing a petition for panel rehearing. The motion passed by a vote of 5 to 3.

Form 4

Mr. William K. Suter, the Clerk of the Supreme Court, wrote to the Committee to recommend amendment of Form 4, the affidavit that accompanies a motion to proceed in forma pauperis. Mr. Suter suggested that the form is deficient in several respects. Judge Logan had asked Mr. Fisher to prepare a draft of a more complete form.

The Committee spent only a brief time considering the draft when it decided that it wanted to make more sweeping changes and that attempting to rewrite the form on the floor of the Committee was unwise. It was suggested that Mr. Fisher use the form developed by the IFP pilot project in bankruptcy as a model for a new draft for later consideration. It was also suggested that special effort be taken to use simple, clear language.

Judge Stotler said that there is a need across the judiciary for a generic IFP/CJA form. She was uncertain whether the development of such a form falls within the jurisdiction of the FRAP Advisory Committee or any of the rules committees, but the need exists nonetheless. She further noted that the development of such a form must be undertaken with the understanding that any such form could be fertile ground for discrimination suits and thus one needs to give careful consideration to the information that is actually essential. The project may be a very large one. The CJA form was developed by the Defender Services Committee.

Given the possible delay of this project, Judge Logan introduced the topic of the need for a fall meeting. The Advisory Committee had earlier decided to delay any new projects until at least the completion of the publication period for the restyled rules. Since that period does not conclude until the end of December, Judge Logan and Mr. Rabiej had earlier discussed the possibility of not holding a fall meeting. Would consideration of a new Form 4 create a need for a fall meeting? It was suggested that this sort of item could probably be handled by mail or by conference call. A phone conference was scheduled for May 1 at 4:00 EDT.

Judge Stotler pointed out that amendment of the FRAP forms currently requires compliance with the full Rules Enabling Act procedures followed for amendment of the rules. In contrast, Bankruptcy Rule 9009 confers on the Judicial Conference the power to approve bankruptcy forms without the need for approval from the Supreme Court and Congress. Bankruptcy Rule 9009 says:

Restyled Rules

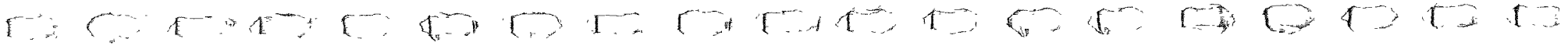
Mr. Rabiej asked the Committee for suggestions of people to whom the restyled rules should be sent.

Judge Williams noted that unless Judge Logan's chairmanship is extended by the Chief Justice, this will be Judge Logan's last meeting. Judge Williams led the Committee in thanking Judge Logan for his leadership and hard work. Judge Stotler, however, expressed her hope that the Chief Justice would extend Judge Logan's term for a year so that he could complete the first cycle of work on the restyled rules.

The meeting adjourned at 4:30 p.m.

Respectfully submitted,

Carol Ann Mooney
Reporter



MINUTES OF THE TELEPHONE CONFERENCE OF THE ADVISORY COMMITTEE ON APPELLATE RULES MAY 1, 1996

Judge James K Logan began the telephone conference at 4:00 EDT on May 1, 1996. In addition to Judge Logan the following Advisory Committee members participated in the conference: Chief Justice Pascal Calogero, Judge Will L. Garwood, Judge Alex Kozinski, Mr. Michael Meehan, Mr. Luther Munford, Mr. John Charles Thomas, and Judge Stephen Williams. Mr. Robert Kopp represented Solicitor General Days. Judge Frank Easterbrook, the liaison member from the Standing Committee, participated as did Mr. Patrick Fisher, representing the circuit clerks. Professor Carol Ann Mooney, the reporter, and Mr. John Rabiej from the Administrative Office also participated.

Proposed Rule 5

As requested at the April meeting the reporter had prepared and circulated a draft Rule 5 that would replace both existing Rules 5 and 5.1. That draft was circulated on April 19. Committee members then submitted suggestions for improvement in the draft and a new draft was circulated on April 29. The draft under discussion was that later draft. A copy of that draft is attached to these minutes.

The Committee members expressed general satisfaction with the basic approach.

It was noted that the caption to the rule was titled "Appeal by Leave" but subdivision (a) was titled "Petition for Permission to Appeal." The consensus was that the rule should consistently use either "leave" or "permission" but not both. By a vote of 5 to 3 it was decided to use "permission."

Discussion then turned to lines 3 through 5. To eliminate the word "may" at the end of line 4 the sentence was rewritten, with unanimous approval, to read as follows:

> "To request permission to appeal when an appeal is within the court of appeals' discretion, a party must file a petition for permission to appeal. "

One member questioned the need for paragraph (a)(3). Paragraph (a)(3) was added to the second draft to deal with the possibility that a problem that existed before the 1967 adoption of Rule 5 might resurface. The problem concerns a district court's amendment of an order to include the § 1292(b) statement when the order originally entered did not include such a statement. The problem was whether the 10-day period for filing an interlocutory appeal should be measured from entry of the original order or from entry of the

amended order. A split in the circuits arose until the 1967 adoption of Rule 5.

Since 1967 Rule 5 has said that if a district court amends an order to contain the statement prescribed by § 1292(b), the petition must be filed within 10 days after entry of the amended order. The April 19 draft did not include that provision on the assumption that with the passage of time and the habits developed under Rule 5 the problem would not resurface. Two members agreed with that approach believing that the chance of the problem returning was remote. Others thought that the addition of (a)(3), while not absolutely necessary, provided helpful clarification and removed a litigable issue. Judge Logan called for a vote on retention of paragraph (a)(3); all members voted in favor of retaining it.

Lines 40 through 43 were amended, with unanimous approval, to improve the flow of the language. As amended they provide that a petition must include a copy of the order complained of and any related opinion or memorandum, "including any stating the district court's permission or finding of any necessary conditions to appeal, if required."

Line 45 of the draft says that a response or a cross-petition must be filed within 7 days after the petition is served. One member suggested that the response time should be 14 days. Another suggested 10 days. Another noted that the respondent has not only 7 days but also all the time the petitioner has. Since most petitions are denied, it was suggested that expanding the response time beyond 7 days would cause unnecessary delay. The consensus was to retain the 7-day response time.

Lines 47 through 49 state that oral argument occurs only if the court orders it. It was suggested that there should be a provision in the rules, perhaps in Rule 34, that oral argument is heard as to the substance of an appeal, but as to all other matters the presumption is that there will be no oral argument. The reporter was asked to add that suggestion to the table of agenda items.

The second draft added language at lines 64-67. Existing Rule 5 says that if permission to appeal is granted no notice of appeal is necessary. The new language says that "the date when the order granting permission to appeal is entered serves as the date of the notice of appeal for calculating time under these rules." Mr. Fisher confirmed that the new language simply clarifies existing practice. The Committee approved the change unanimously and requested the reporter to amend the Committee Note to state that its purpose is simply to clarify existing practice.

Judge Logan had spoken with Judge Stotler that morning. She asked what the Committee would want to do with the proposed Rule 5 if the amendments to

Rule 23 do not move forward at this time. The consensus was that even if the Rule 23 amendments do not go forward, the consolidation of Rules 5 and 5.1 is a good idea and should move forward. In addition the expansion of the rule so that it covers any new type of interlocutory appeal by permission would eliminate the need for future amendments to the Rule.

A subsidiary question is the timing of the publication. Judge Logan asked whether the rule should be published this summer or after the conclusion of the publication period for the style package. It was decided to recommend July publication. With July publication, this change could become effective simultaneously with the restyled rules.

Form 4

As promised at the April meeting Mr. Fisher revised the bankruptcy form used for in forma pauperis (ifp) applications to make the form appropriate for use in the courts of appeals and in the Supreme Court.

One of the first questions was whether the form was too long and complex for the task. It was noted that the CJA form is shorter although much greater sums of money - attorney fees - are at stake. The ifp form is for filing fees, transcripts, and copying costs. It was noted, however, that quite detailed financial information is needed to establish that a person is unable to pay as small a sum as the filing fee. Whereas less detail is needed to establish that a person is unable to pay a larger sum such as attorney fees. While that is logically true, one member still questioned whether the amount of paperwork is justified by the sums of money at stake.

One member suggested that the CJA and ifp forms could be combined. If a person is too poor to pay filing fees, then one should be able to assume that the person is unable to pay attorney fees. Another member, however, felt that the forms should be kept separate because there are many ifp applications but far fewer CJA applications. The suggestion was tabled. It was noted that any such move would need to be coordinated with the Committee on Defender Services as well as with the Advisory Committee on Criminal Rules.

Judge Logan called for a vote on whether to proceed with development of a more detailed Form 4. Four members voted to proceed, 2 opposed proceeding, and 1 abstained.

In the opening paragraphs on the first page it was unanimously decided to amend the language to conform to the statutory language in 28 U.S.C. § 1915(a). It was also decided that both of the opening paragraphs would include the "under

penalty of perjury" language that currently appears only at the end of the form. And question 13 was amended to read: "Please provide any other information that helps to explain why you are unable to pay the docket fee or costs of your appeal."

Throughout the form it was decided that additional space should be provided for information about the spouse's income, assets, expenses, etc.

On pages 2 and 5 the word "prorate" was used. It was decided to change that to "adjust".

On page 3 question 5 was amended to say: "State the amount of cash you have" rather than the amount of "cash on hand".

Mr. Fisher agreed to revise the form to reflect the decisions made during the conference and to circulate it among the members for further comment.

The conference concluded at 6:00 p.m. EDT.

Respectfully submitted,

Carol Ann Mooney
Reporter

Rule 5 Appeal by Leave

(a) Petition for Permission to Appeal.

(1) When granting an appeal is within the court of appeals' discretion, a party may file a petition for permission to appeal. The petition must be filed with the circuit clerk with proof of service on all other parties to the district-court action.

(2) The petition must be filed within the time specified by the statute or rule authorizing the appeal or, if no such time is specified, within the time provided by Rule 4(a) for filing a notice of appeal.

(3) If a party cannot petition for appeal unless a district court first enters an order granting permission to do so or stating that the necessary conditions are present, a district court order may be amended to include the required statement and the time to petition runs from entry of the amended order.

(b) Contents of the Petition; Answer or Cross-Petition.

(1) The petition must include the following:

(A) the facts necessary to understand the question to be presented;

(B) the question itself;

(C) the relief sought;

(D) the reasons why, in the opinion of the petitioner, the appeal should be allowed — including reasons that the appeal is within the grounds, if any, established by the statute or rule claimed to authorize the appeal; and

(E) an attached copy of the order, decree, or judgment complained of and any related opinion or memorandum, including any in which the district court's permission to appeal, if required, is stated.

(2) A party may file an answer in opposition

or a cross-petition within 7 days after the petition is served.

(3) The petition and answer will be submitted without oral argument unless the court of appeals orders otherwise.

(c) **Form of Papers; Number of Copies.** All papers must conform to Rule 32(a)(1). Three copies must be filed with the original, unless the court requires a different number by local rule or by order in a particular case.

(d) **Grant of Permission; Fees; Cost Bond; Filing the Record.**

(1) Within 10 days after the entry of the order granting permission to appeal, the appellant must:

(A) pay the district clerk all required fees; and

(B) file a cost bond if required under Rule 7.

(2) A notice of appeal need not be filed <u>but the date when the order granting leave to appeal is entered serves as the date of</u>

the notice of appeal for calculating time under these rules.

(3) The district clerk must notify the circuit clerk once the petitioner has paid the fees. Upon receiving this notice, the circuit clerk must enter the appeal on the docket. The record must be forwarded and filed in accordance with Rules 11 and 12(c).

Committee Note

The amendment of Federal Rule of Civil Procedure 23, under the power conferred by 28 U.S.C. § 1292(e), prompts the amendment of this Rule 5 and the elimination of Rule 5.1.

In 1992 Congress added paragraph (e) to 28 U.S.C. § 1292. Paragraph (e) says that the Supreme Court has power to prescribe rules that "provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for" in section 1292. Federal Rule of Civil Procedure 23 has been amended to permit interlocutory appeal from an order granting or denying class certification. Such an appeal is permitted in the sole discretion of the court of appeals.

The Committee believes that the amendment of Civil Rule 23 is only the first of what may eventually be several interlocutory appeal provisions. Rather than add a separate rule governing each such appeal, the Committee believes it is preferable to amend Rule 5 so that it will govern all such appeals.

In addition Rule 5.1 has been largely repetitive of

Rule 5 and the Committee believes that its provisions could also be subsumed into Rule 5. Although Rule 5.1 did not deal with an interlocutory appeal, the similarity to Rule 5 was based upon the fact that both rules governed discretionary appeals.

This new Rule 5 is intended to govern all discretionary appeals from district court orders, judgments, or decrees. At this time that includes interlocutory appeals under 28 U.S.C. § 1292(b),(c), and (d) and Federal Rule of Civil Procedure 23(f), and the discretionary appeal under 28 U.S.C. § 636(c) from a district-court judgment entered after an appeal from a judgment entered on direction of a magistrate judge in a civil case. If additional interlocutory appeals are authorized under § 1292(e), the new Rule is intended to govern them if the appeals are discretionary.

Subdivision (a). Paragraph (a)(1) says that when granting an appeal is within a court of appeals' discretion, a party may file a petition for permission to appeal. The time for filing provision states only that the petition must be filed within the time provided in the statute or rule authorizing the appeal or, if no such time is specified, within the time provided by Rule 4(a) for filing a notice of appeal.

Section 1292(b), (c), and (d) provide that the petition must be filed within 10 days after entry of the order containing the statement prescribed in the statute. Existing Rule 5(a) provides that if a district court amends an order to contain the prescribed statement, the petition must be filed within 10 days after entry of the amended order. The new rule similarly says that if a party cannot petition without the district court's permission or statement that necessary circumstances are present, the district court may amend its order to include such a statement and the time to petition runs from entry of the amended order.

The provision that the Rule 4(a) time for filing a notice of appeal should apply if the statute or rule is silent about the filing time was drawn from existing Rule 5.1.

Subdivision (b). The changes made in the provisions

in paragraph (b)(1) are intended only to broaden them sufficiently to make them appropriate for all discretionary appeals.

In paragraph (b)(2) a uniform time — 7 days — is established for filing an answer in opposition or a cross-petition. Seven days is the time for responding under existing Rule 5 and is an appropriate length of time when dealing with an interlocutory appeal. Although existing Rule 5.1 provides 14 days for responding, the Committee does not believe that the longer response time is necessary because an appeal under § 636(c)(5) is a second appeal and the party involved will have had sufficient time to develop a response or cross-petition.

Subdivisions (c) and (d). Subdivision (c) and (d) are substantively unchanged.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURES Agenda Item II
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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

FROM: Carol Ann Mooney, Reporter

DATE: March 12, 1997

SUBJECT: Gap Report concerning the proposed revision of the Federal Rules of Appellate Procedure using guidelines for drafting and editing court rules and the preliminary draft of proposed amendments to Fed. R. App. P. 27, 28, and 32

In April 1996 the Standing Committee published a packet of proposed amendments to the Federal Rules of Appellate Procedure. The period for public comment closed on December 31, 1996. At the Advisory Committee's meeting on April 3 and 4, 1997 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.

The comments submitted on each rule are summarized and followed by a preliminary draft of the Gap Report which at this stage contains my recommendations. The recommended changes are marked in pen on a copy of the published rules. This makes the post-publication recommended changes easy to see and eliminates the need to retype them at this stage. Prior to submission to the Standing Committee, the proposed rules will need to be retyped to the extent the Advisory Committee approves post-publication changes.

Discussion of Rules 5 and 5.1, and of Form 4, all of which were published in August 1996, will be in a separate memorandum.

General Comments on the Proposed Amendments

I. Summary of the Public Comments that Are General in Nature

Fourteen commentators offered general comments on the effort to redraft the rules using the "Guidelines for Drafting and Editing Court Rules." Thirteen of the commentators support the project because of the rules' increased clarity. Only one commentator opposes the project. The opponent is "unconvinced of the utility of this project." The opponent states that, absent proof that the current rules are systemically flawed, those advocating change have the burden of showing the need for change -- a burden that has not, in the opponent's opinion, been met.

One of the 13 supporters of the project urges that once the comprehensive revision is complete, that there be restraint in proposing further amendments unless there is a strong and demonstrable need.

In addition, one commentator asks whether it is appropriate for the rules to adopt the term "circuit clerk." That same commentator suggests the need for consistency in the use of figures or words when the rules refer to numbers.

II. Summary of the Individual Comments that Are General in Nature

1. Honorable Cornelia G. Kennedy
United States Circuit Judge
Theodore Levin U.S. Courthouse
231 West Lafayette Boulevard
Detroit, Michigan 48226

   Judge Kennedy commends the committee for the "extraordinary improvement in clarity it has achieved."

2. Ronald F. Waterman, Esquire
Gough, Shanahan, Johnson & Waterman
P.O. Box 1715
Helena, Montana 59624-1715

   Mr. Waterman applauds the committee's efforts stating that "the revisions to the language of the rules are a considerable improvement and successfully provide for the clarity which the rules should extend to all Federal practitioners."

3. Professor Thomas D. Rowe, Jr.
Duke University School of Law
Box 90360
Durham, North Carolina 27708-0360

Professor Rowe generally approves the restyling.

He suggests that, if possible, the boilerplate language not be repeated as a Committee Note after each rule.

Professor Rowe notes the use of the term "circuit clerk" in the new rules. Although the term is clear and concise, Professor Rowe asks if the clerks are being renamed and whether the rules process has authority to rename them.

Professor Rowe also suggests that there should be consistency in the use of figures or written-out numbers. He points out, for example, that new rule 26(c) on page 75 uses "3 calendar days, but new Rule 26.1(c) on page 77 uses "three copies." Rule 41(b) on page 130 uses "7 days." He suggests spelling out small numbers except when they are cross-references to rules, or the like.

4. Joseph D. Cohen, Esquire
Stoel Rives
Standard Insurance Center
900 SW Fifth, Suite 2300
Portland, Oregon 97204-1268

Mr. Cohen expresses general approval of the stylistic changes and the substantive changes to Rules 27, 28, and 32.

5. John R. Reese, Esquire
McCutchen, Doyle, Brown & Enersen, LLP
Three Embarcadero Center
San Francisco, California 94111-4066

Mr. Reese approves the restyled rules saying that they are "clearer, more concise and certainly more readable."

6. Francis H. Fox, Esquire
Bingham, Dana and Gould LLP
150 Federal Street
Boston, Massachusetts 02110-1726

Mr. Fox approves the restyling efforts. He states that "the new wording and captioning are a big improvement."

7. Walter H. Fleischer, Esquire
1850 M Street, N.W., Suite 800
Washington, D.C. 20036

Mr. Fleischer approves the proposed amendments. He says that it is "a great project with outstanding results."

8. Honorable Thomas M. Reavley
Senior Circuit Judge
903 San Jacinto Boulevard, Suite 434
Austin, Texas 78701

Judge Reavley approves the proposed amendments. He says that the "language is clearer and the new organization will be very helpful to the users."

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

Mr. Lacovara generally endorses the effort to clarify the structure and organization of the Appellate Rules and to use clear and consistent language. In addition, once the comprehensive revision is complete, he urges the committee to exercise restraint in proposing further amendments unless there is a strong and demonstrable need.

10. Paul W. Mollica, Esquire
Presiding Member, Federal Courts Committee
Chicago Council of Lawyers
One Quincy Court Building, Suite 800
220 South State Street
Chicago, Illinois 60604

The Federal Courts Committee says that the redraft of the appellate rules is "meticulous and worthy" but it is "unconvinced of the utility of this project." The committee believes that the existing appellate rules function quite well and absent proof that the current rules are systemically flawed the burden is on those who advocate change. The committee states that only time will reveal the pitfalls that lie in a redrafted rule. They note specific changes that could engender confusion.

11. John Mollenkamp, Esquire
Blanchard, Robertson, Mitchell & Carter P.C.
P.O. Box 1626
Joplin, Missouri 64802

Mr. Mollenkamp says the stylistic changes are much needed and will be particularly helpful to practitioners who appear in the United States Court of Appeals infrequently.

12. Andrew Chang, Esquire
Chair, The Committee on Appellate Courts
The State Bar of California
555 Franklin Street
San Francisco, California 94102-4498

The committee fully supports the nonsubstantive style revisions.

13. Elizabeth A. Phelan
Holland & Hart
Post Office Box 8749
Denver, Colorado 80201-8749
(on behalf of the firm's appellate practice group)

They "wholeheartedly endorse the revisions proposed pursuant to the uniform drafting guidelines. The revisions have greatly simplified the text of the Rules, making the Rules direct and easy to understand."

14. William C. Wood, Jr., Esquire
Nelson Mullins Riley & Scarborough, L.L.P.
Post Office Box 11070
Columbia, South Carolina 29211
(on behalf of the Practice and Procedure Committee of the South Carolina Bar)

The committee applauds the efforts to clarify the language of the Appellate Rules. The committee believes that "the revisions and amendments will make practice before the federal appellate courts easier for all persons seeking redress before those courts."

15. Honorable John C. Godbold
Senior United States Circuit Judge
P.O. Box 1589
Montgomery, Alabama

Judge Godbold praises that the restylization of the appellate rules as "an admirable and highly significant achievement." He says that "[i]t exemplifies a change in focus from the viewpoint of the writer to embrace the process of communication to the reader."

Comments on Proposed Amendments to Rule 1

I. General Summary of Public Comments on Rule 1

There was only one commentator. The commentator offers no general comment on the amendment but specifically questions the use of the term "filing" in (a)(2).

II. Summary of Individual Comments on Rule 1

1. Professor Thomas D. Rowe, Jr.
Duke University School of Law
Box 90360
Durham, North Carolina 27708-0360

Professor Rowe asks whether the reference in (a)(2) to "*filing* a motion or other document" is really the same as the old rule's "*making* of a motion or application"? He notes that new Rule 27(a)(1) says "[a]n application for an order or other relief is made by motion" and lacks old Rule 27(a)'s reference to a motion's being "made by *filing* a motion."

Gap Report

I spoke with Professor Ed Cooper, Reporter for the Advisory Committee on Civil Rules, and he says that he also recommends "making." Civil Rule 7 governs the "making" of a motion and requires a motion to be in writing, state the grounds therefor, etc. Civil Rule 5 governs the "filing" of papers.

Note, however, that FRAP 4(a)(4)(A)(vi) refers to "filing" a Civil Rule 60 motion no later than ten days after entry of judgment. Therefore, I recommend that FRAP 1 refer to "making or filing"

Comments on the Proposed Amendment to Rule 2

I. General Summary of Public Comments on Rule 2

There was only one commentator on Rule 2. The commentator suggests further stylistic improvement.

II. Summary of Individual Comments on Rule 2

1. Stanley P. Wilson, Esquire
McMahon, Surovik, Suttle, Buhrmann, Hicks & Gill
First National Bank Building, Suite 800
400 Pine Street
Abilene, Texas 79601

Mr. Wilson suggests amending Rule 2 to state:

> To expedite its decision, or for other good cause, a court of appeals may, in a particular case, with or without a party's motion, suspend any provision of these rules and may, except as otherwise provided in Rule 26(b), order such proceedings as it may direct.

Gap Report

I recommend adopting part of Mr. Wilson's suggested style revisions.

Comments on the Proposed Amendments to Rule 3

I. General Summary of the Public Comments on Rule 3

Six comments on Rule 3 were received. One commentator expresses general support for the two substantive changes -- that a court order is required to consolidate appeals, and that, when an inmate files a notice of appeal by depositing the notice in the institution's internal mail system, the clerk must note the docketing date on the notice. Another commentator supports the latter change, and has no strong objection to the former but hesitates to endorse it because it removes an option currently available to parties.

Three commentators state that the proposed amendments to 3(b) may blur the distinction between "joint" and "consolidated" appeals.

Another commentator suggests a stylistic change.

II. Summary of Individual Comments on Rule 3

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

Mr. Lacovara suggests changing the word "notwithstanding" to either "despite" or "even if" in 3(d)(3) and throughout the rules.

2. Paul W. Mollica, Esquire
Presiding Member, Federal Courts Committee
Chicago Council of Lawyers
One Quincy Court Building, Suite 800
220 South State Street
Chicago, Illinois 60604

The Federal Courts Committee notes that existing 3(b) observes a distinction between actions that are "joined" (merged into a single action) and those that are "consolidated" (proceeding together but retaining separate identities). Draft Rule 3(b)(2) blurs the distinction by using "joined or consolidated" in the

conjunctive. The committee believes that this could cause confusion.

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

The committee supports both proposed substantive changes. (1 - that a court order is required to consolidate appeals; 2 - that when an inmate files a notice of appeal using the institution's internal mail system, the clerk must note the docketing date)

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

The committee comments on two substantive changes in Rule 3.

1. The proposed amendments require that consolidation be accomplished by court order (as opposed to stipulation) and require a court order to join appeals after separate notices of appeal have been filed. The revisions are designed to clarify the actual status of the respective appeals. The committee has no strong objection to this amendment given that it will clarify the status of appeals and given the courts' preference for consolidation/joinder, which should result in the routine granting of consolidation orders. However, because the amendment removes an option currently available to the parties, the committee feels some hesitancy to endorse it.
2. The committee endorses the change that requires the court clerk to note the "docketing" date when an inmate files a notice of appeal by depositing the notice in a prison's internal mail system.

5. David S. Ettinger, Esquire
Chair, Appellate Courts Committee
Los Angeles County Bar Association
P.O. Box 55020
Los Angeles, California 90055-2020

The committee suggests amending (b)(2). The proposed rule is confusing because it fails to distinguish between a joint appeal and a consolidated appeal.

The committee suggests that (b)(2) be modified so that after the word "joined" add "(if from a single judgment or order)"; and after the word "consolidated" add "(if from separate judgments or orders)".

6. Cathy Catterson, Clerk of Court
United States Court of Appeals
121 Spear Street
P.O. Box 193939
San Francisco, California 94119-3939
(forwarding the comments of individual members of the Ninth Circuit Advisory Committee)

The commentator notes that redrafted 3(b) may create an ambiguity about the difference between joint and consolidated appeals. Although (b)(1) treats joint appeals separately and notes that they proceed "as a single appellant," subdivision (b)(2) refers to appeals that may be "joined or consolidated" on court order. Injecting joint appeals in (b)(2) without further reference to (b)(1) suggests that both devices are the same. The Committee Note clarifies the matter, but the commentator asks whether a better drafting job would make the distinction clear on the face of the rule.

Gap Report

I recommend:

1. amending (b)(2) to clarify the distinction between joint and consolidated appeals, and
2. adopting Mr. Lacovara's stylistic change in (a)(3).

Comments on Proposed Amendments to Rule 3.1

None

Gap Report

Section 207 of the Federal Courts Improvement Act of 1996 abolished the first appeal to a district court followed by a discretionary appeal to the court of appeals. I recommend rewriting the rule as follows:

Rule 3.1. Appeal from a Judgment of a Magistrate Judge in a Civil Case

An appeal under § 636(c)(3) must be taken in the same way as an appeal from any other district-court judgment.

There may still be cases in the system in which the parties consented, prior to the statutory change, to reference to a magistrate judge with the understanding that there would be an appeal on the record to the district judge. Those parties may still be able to appeal to the district court and thereafter petition for leave to appeal to the court of appeals. The continued existence of Rule 3.1(a), however, is not necessary for such appeals to proceed in the same fashion as they would have prior to the statutory amendment. Rule 3.1(a) did not create any special procedures. The statutory provisions in section 636(c)(4) and (5) contained the same information.

A new Committee Note will be necessary. I have prepared a new note; it follows Rule 3.1 in the rules packet.

Comments on the Proposed Amendments to Fed. R. App. P. 4

I. General Summary of Public Comments on Rule 4

Nine comments on Rule 4 were received.

None of the commentators expressed either general approval or disapproval of the proposed amendments; instead, they offered comments on specific provisions.

One commentator notes that 4(a) no longer says what happens if a notice of appeal is mistakenly filed in the appellate court. The commentator suggests that the Committee Note explain, if appropriate, the practice of sending the notice to the district court with a notation of the date it was received by the court of appeals, that the notice will be treated as filed in the district court on that date, and that the deletion is not intended to change that practice.

One commentator says that proposed 4(a)(5) may work an unintended substantive change. The current rule says that the time to appeal may be extended if a party so moves "not later than 30 days" after expiration of the time prescribed by 4(a). The proposed rule says "within 30 days." The commentator suggests returning to "no later than."

There are differing opinions on the amendment to (a)(6) that would preclude reopening the time for appeal if the movant received notice of entry of judgment from "the court," whereas under the existing rule only notice from a party or from "the clerk" bars reopening. Two commentators oppose the change. Both commentators note that Fed. R. Civ. P. 77(d) requires the "clerk" to serve notice of entry of orders and judgments. One of the two says it is ill-advised to encourage or sanction the giving of notice by court personnel other than the clerk; the other says the change makes little sense. A third commentator "does not object to the modification" because if notice is received from the court in some manner, not necessarily from the clerk, the parties should be held to the same standard of diligence.

There is also a difference of opinion over the change in 4(b) that permits the government to appeal within 30 days after the later of the entry of judgment or the filing of "the last defendant's" notice of appeal. One commentator specifically supports the change. Another commentator opposes it believing that in multi-defendant cases the change could substantially delay the finality of the judgment -- perhaps even beyond the time that a defendant completes the custodial portion of his or her sentence.

Two commentators specifically support the changes in 4(b)(4) that permit an

extension of time for "good cause" as well as for excusable neglect, and that clarify that a "finding" of excusable neglect or good cause is sufficient.

Two commentators oppose the change in (c) that would require an inmate to use the special internal mail system for legal mail, if there is one. Another commentator expresses specific support for the change in (c) that would measure the time for other parties to appeal from the "docketing" of an inmate's appeal rather than from the court's "receipt" of the notice of appeal.

Two commentators suggest stylistic amendments, and one of the two suggests a cross-reference. The other says that he does not understand existing 4(a)(4) and he similarly does not understand proposed 4(a)(4)(B).

One commentator suggests that the rule should clarify whether a cross-appeal is necessary to preserve an issue not addressed by the appellant. Another suggests that the time computation problem discussed in the Committee Note be eliminated by amending Fed. R. App. P. 26(a) so that it is consistent with Fed. R. Civ. P. 6(a). A third commentator suggests that 4(a)(5) should not permit extensions of time for filing a notice of appeal upon a motion filed *ex parte*. Because all of these changes would be a new substantive amendments, they are inappropriate to make at this stage and the Advisory Committee should consider whether the suggestions should be placed on the agenda for future consideration.

II. Summary of Individual Comments on Rule 4

1. Douglas B. McFadden, Esquire
McFadden, Evans & Still, P.C.
1627 Eye Street, N.W., Suite 810
Washington, D.C. 20005

Rule 4 should state whether a cross-appeal is necessary to preserve an issue not addressed by the appellant. He specifically mentions the difficulty that arises when an issue was before the district court but not decided by it.

2. Professor Thomas D. Rowe, Jr.
Duke University School of Law
Box 90360
Durham, North Carolina 27708-0360

Professor Rowe suggests that 4(a)(1)(B)'s "within 60 days after entry" would be better if it concluded with the addition of "of the judgment or order appealed

from."

Professor Rowe also suggests that 4(b)(4)'s "a period not to exceed" might be shortened to "no more than".

3. Francis H. Fox, Esquire
Bingham, Dana and Gould LLP
150 Federal Street
Boston, Massachusetts 02110-1726

Mr. Fox suggests that the heading of new Rule 4(a)(3) should be "Multiple Appeals" rather than using the term "cross appeals." The text encompasses successive notices of appeal without regard to whether there is hostility between the previous appellant and the new appellant.

Mr. Fox also suggests retaining the phrase "findings of fact under Rule 52(b)" in Rule 4(a)(4)(A)(ii), rather than the new phrase "factual findings under Rule 52(b)." Requiring a judge to make "findings of fact" may convey a more serious mission than requiring that findings have some factual content.

Mr. Fox also states that he does not understand the last paragraph of old Rule 4(a)(4), on page 10, and he similarly does not understand new Rule 4(a)(4)(B). He also notes that he does not know what the phrase "in whole or in part" does in (B)(i). He says that the prematurely filed notice of appeal will be effective to save the appeal, in whole or in part, once a pending motion has been decided; but then (B)(ii) requires another notice of appeal where the particular motion has amended something. He says that one would think the amended something would be part of the judgment or order that has already been appealed "in whole or in part" by (B)(i).

Both old Rule 4(a)(5) and new 4(a)(5) allows the district court to extend the time for filing a notice of appeal upon a motion filed *ex parte*. Although the new rule makes no substantive change in this respect, he suggests that one should be made. He says that "it is extraordinary that I could win a case and not even know that the other side has filed a motion to extend the time within which to appeal."

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

The exceptions to the 30-day timetable for filing a notice of appeal listed in 4(a)(1)(A) should include paragraph (B) as an exception, because it creates a class of "civil case" - those involving the government - in which a party has 60 days from judgment to file a notice of appeal.

5. Andrew Chang, Esquire
Chair, The Committee on Appellate Courts
The State Bar of California
555 Franklin Street
San Francisco, California 94102-4498

Existing Rule 4(a)(6) permits a district court to reopen the time for appeal only when the moving party did not receive notice of the entry of judgment "from the clerk or any party within 21 days of its entry." The proposed amendments would require the district court to find that the movant did not receive notice "from the district court or any party within 21 days after its entry." The committee opposes the change. Civil Rule 77(d) requires the "clerk" to serve notice of entry of orders and judgments. The committee says it is ill-advised to encourage or sanction the giving of notice by employees of the court other than the clerk and that 4(a)(6) should remain consistent with Civil Rule 77.

The committee supports the change in 4(b) that permits the government to appeal within 30 days after the later of the entry of judgment or the filing of "the last defendant's" notice of appeal.

The committee also supports the changes to Rule 4(b)(4) that would permit extension of time for "good cause" and that would permit extensions upon a "finding" of excusable neglect or good cause.

The committee opposes the change in subdivision (c) that would require an inmate to use the special internal mail system for legal mail, if there is one. The committee says that the purpose of the subdivision is to provide incarcerated individuals unrestricted access to pursue their appellate rights and mandating the use of a particular system severely punishes those who do not, "particularly those inmates who for whatever reason are less likely to understand the requirement, such as inmates who are illiterate or have language difficulties."

6. Laurence S. Zakson, Esquire
The Committee on Federal Courts
The State Bar of California
555 Franklin Street
San Francisco, California 94102-4498

In 4(a)(4)(A)(vi) Mr. Zakson points out that there is a substantive change. The provision states that when a party files a motion for relief from judgment under Civil Rule 60, the time for filing a notice of appeal is extended if the Rule 60 motion is filed within ten days of entry of judgment. The Civil and Appellate Rules, however, have different methods of computing time, *see* Fed. R. Civ. P 6(a) and Fed. R. App. P. 26(a). The amended rule, in Mr. Zakson's opinion, makes it clear that the ten days referred to is computed pursuant to the Civil Rules.

Paragraph (a)(6) deals with reopening the time to file an appeal. The existing rule provides that only notice from a party or from "the clerk" bars reopening while the new language precludes reopening if the movant has received notice from "the court." The committee does not object to the modification because it does not appear to impact substantive rights; where notice is received in some manner from the court but not necessarily the clerk, parties should be held to the same standards of diligence.

Currently there is an ambiguity in 4(b). When the government is entitled to appeal, it may do so within 30 days after entry of judgment or "the filing of a notice of appeal by any defendant." The term "any defendant" creates an ambiguity when there are multiple defendants. The amended rule will permit the government to appeal within 30 days after the later of "entry of judgment or the filing of "the last defendant's notice of appeal." The committee objects to the change because in multi-defendant cases, the change could substantially delay the finality of the judgment. The committee provides the following example.

> Defendant A pleads guilty early on and is sentenced to six months in custody. She prevails on most of the sentencing issues and chooses not to appeal. She commences her prison term which would have been longer if the government had prevailed on one or more of the sentencing issues. Her co-defendant, B, does not plead guilty and proceeds to trial which does not occur until a year later. B is convicted and eventually sentenced to a year in custody. B appeals her conviction and sentence. The current proposal may permit the government to appeal A's sentence as long as the notice of appeal is filed within 30 days of the notice of appeal filed by B, *i.e.* six months <u>after</u> A completes the custodial portion

of her sentence.

The committee endorses the changes in (b)(4) that would permit the court to extend the time for appeal for "good cause" as well as excusable neglect and that clarify that a "finding" of excusable neglect or good cause is sufficient.

The committee endorses the change in (c) that would measure the time for other parties to appeal from the "docketing" of an inmates appeal filed under (c) rather than from the "receipt" of the notice of appeal. Because "docketing" is an easily and precisely identified event, the change eliminates uncertainty and does not impact substantive rights.

7. Elizabeth A. Phelan
Holland & Hart
Post Office Box 8749
Denver, Colorado 80201-8749
(on behalf of the firm's appellate practice group)

The proposed amendments to Rule 4(a)(5) may work an unintended substantive change. The language is changed so that the time to appeal may be extended if "a party so moves within 30 days after the time prescribed by this Rule 4(a) expires." The existing rule says that the motion must be filed "not later than 30 days after expiration of the time prescribed by this Rule 4(a)." They are concerned that the change may be read so that the motion must be filed within the 30-day period after the time for appeal expires, rather than at any time during the time for appeal plus 30 days thereafter. They suggest that 4(a)(5)(A)(I) be amended to read, "a party so moves *not later than* 30 days after the time prescribed by this Rule 4(a) expires.

8. David S. Ettinger, Esquire
Chair, Appellate Courts Committee
Los Angeles County Bar Association
P.O. Box 55020
Los Angeles, California 90055-2020

With regard to the fact that the Civil and Appellate Rules compute time differently, the committee recommends that Appellate Rule 26(a) be amended to conform with Civil Rule 6(a), or in the alternative that 4(a)(4)(vi) be amended by adding "(as computed under rule 6 of the Federal Rules of the Civil Procedure)" after "10 days".

In (a)(4)(B)(ii) the use of the term "the motion" without describing which

motion is confusing. The committee recommends deleting "the motion " and replacing it with "any motion listed in Rule 4(a)(4)(A)".

Proposed (a)(6) would bar reopening of the time for appeal if the party received notice from the district court or a party. The committee believes this will create confusion concerning what constitutes notice of entry and the responsibility of the clerk to give such notice. Because the clerk is required to enter the judgment and to give notice of the entry, the committee states that the proposed change makes little sense and recommends that "district court" be changed to "district clerk".

The committee opposes the requirement that an inmate be required to use a system designed for legal mail, if one exists. The committee does not believe that an inmate should be burdened with additional requirements.

9. Cathy Catterson, Clerk of Court
United States Court of Appeals
121 Spear Street
P.O. Box 193939
San Francisco, California 94119-3939
(forwarding the comments of individual members of the Ninth Circuit Advisory Committee)

The commentator notes that 4(a) eliminates any reference to what happens if a notice of appeal is mistakenly filed in the appellate court. Does it change what will occur? If the purpose is to avoid cluttering the rules with references to what happens if a party mistakenly fails to follow the rules, should the Committee Note make some reference to the practice so that parties are not misled into believing there is a change in practice, and so that those who are unaware of current practice are advised.

Rule 4(a)(4)(B) may inject an ambiguity into whether an amended notice must be filed. The ambiguity arises because (B)(I) now provides that an early notice "becomes effective" when the order disposing of the last remaining motion is entered, and then (B)(ii) states that once the order disposing of the motion is entered the challenging party must file a notice or amended notice. One might read the rule to suggest that because you filed an earlier notice that is now "effective" that notice qualifies as the notice required by (B)(2). The commentator suggests rephrasing the rule to clarify that the earlier filed notice is ineffective, but upon the district court's action on the pending motion, the party can either file a new notice or simply amend the earlier one.

Gap Report:

1. The restyled rule moves treatment of a mistaken filing in the court of appeals from (a) to (d). The move is appropriate because it makes the provision applicable to both civil and criminal appeals.

2. I have included a cross-reference to (a)(1)(B) in (a)(1)(A).

3. Because the language of 4(a)(4) has been reworked with great care over a long period of time, I hesitate to do much to 4(a)(4)(B), other than the clarifying cross-reference. I have, however, attempted to make the language closer to the parallel language in 6(b)(2)(A)(ii) which may be a bit clearer.

4. I can't remember why we changed in (a)(5)(A)(i) from "not later than" to "within." Without that memory, Ms. Phelan seems right that "within" is better. Extensions, especially for good cause, could appropriately be applied for prior to expiration of the prescribed time for filing a notice of appeal.

5. I recommend retaining the (a)(6) amendment that would preclude reopening the time for appeal if the movant receives notice of entry of judgment from "the court."

6. Mr. Zakson describes a potential problem arising from (b)(1)(B)(ii). I tentatively suggest amending that provision to state that government must file its notice of appeal within 30 days after "the filing of a notice of appeal by the defendant or, if there were multiple defendants, the filing of the last notice of appeal filed by any of the defendants who were tried together and whose judgments were entered on the same day." I also recommend amending the Committee Note, at p. 17 of the rules packet, to reflect that change.

7. I also have not changed the requirement in (c) that an inmate use the system established for "legal mail" if there is one.

8. I recommend adopting some, but not all of the style suggestions.

Comments on Proposed Amendments to Rule 5

None

Comments on Proposed Amendments to Fed. R. App. P. 5.1

None

Comments on Proposed Amendments to Fed. R. App. P. 6

I. General Summary of Public Comments on Rule 6

Three comments on Rule 6 were received.

None of the commentators expressed either general approval or disapproval of the proposed amendments; instead, they offered comments on specific provisions.

Two of the commentators suggest stylistic revisions.

Two commentators suggest substantive changes. One suggestion is to require the appellant to serve the statement of issues on other parties, not just on the appellee. The other suggestion is that the rule should state who decides which exhibits are too bulky or heavy for routine transmission to the court of appeals, and at what time arrangements must be made for sending such exhibits to the court of appeals. Because both of these changes would be new substantive amendments, they are inappropriate to make at this stage and the Advisory Committee should consider whether the suggestions should be placed on the agenda for future consideration.

II. Summary of Individual Comments on Rule 6

1. Professor Thomas D. Rowe, Jr.
Duke University School of Law
Box 90360
Durham, North Carolina 27708-0360

Professor Rowe questions the use of bullets in 6(b)(2)(B)(iii).

2. Francis H. Fox, Esquire
Bingham, Dana and Gould LLP
150 Federal Street
Boston, Massachusetts 02110-1726

New Rule 6(b)(2)(B)(i) requires the appellant, under certain circumstances, to serve a statement of issues "on the appellee." Mr. Fox suggests that the statement of issues should be served on all other parties. He also asks whether the same change should be made with regard to the appellee's duty under (B)(ii).

3. Cathy Catterson, Clerk of Court
United States Court of Appeals
121 Spear Street
P.O. Box 193939
San Francisco, California 94119-3939
(forwarding the comments of individual members of the Ninth Circuit Advisory Committee)

Rule 6(b)(2)(C) states that unless directed to do so by a party or the circuit clerk, the clerk "must" not send documents of unusual bulk to the court of appeals. The commentator suggests that the word "will" should be substituted for "must" because the rule is simply informing appellants about what to expect from the clerk.

The commentator also suggests that the rule should provide guidance about when arrangements should be made for transportation of unusually bulky or heavy exhibits, and about who decides which exhibits are bulky or heavy.

Gap Report

The only change I recommend is to change "must" to "will" in (b)(2)(C).

Comments on Proposed Amendments to Rule 7

None

Gap Report

No post-publication changes recommended.

Comments on Proposed Amendment to Fed. R. App. P. 8

I. General Summary of the Public Comments on Rule 8

Three comments on Rule 8 were received.

None of the commentators expressed either general approval or disapproval of the proposed amendments; instead, they offered comments on specific provisions.

Two of the commentators suggest stylistic revisions.

One commentator suggests substantive changes. The commentator suggests requiring a party appealing from a Bankruptcy Appeal Panel (B.A.P.) to first seek a stay from the B.A.P. The commentator also suggests adding a reference in (a)(2) to the B.A.P. Because these changes would be a new substantive amendments, they are inappropriate to make at this stage and the Advisory Committee should consider whether the suggestions should be placed on the agenda for future consideration.

II. Summary of Individual Comments on Rule 8

1. Professor Thomas D. Rowe, Jr.
Duke University School of Law
Box 90360
Durham, North Carolina 27708-0360

Professor Rowe suggests that in 8(a)(1)(C) would it be better to say "while an appeal is pending" than "during the pendency of an appeal."

2. David S. Ettinger, Esquire
Chair, Appellate Courts Committee
Los Angeles County Bar Association
P.O. Box 55020
Los Angeles, California 90055-2020

The first sentence in (b) would be better placed in (a)(2)(E). If moved, a portion of subdivision (b)'s title: "Stay May be Conditioned Upon Filing a Bond" would have to be eliminated.

3. Cathy Catterson, Clerk of Court
United States Court of Appeals
121 Spear Street
P.O. Box 193939
San Francisco, California 94119-3939
(forwarding the comments of individual members of the Ninth Circuit Advisory Committee)

The commentator asks whether (a)(1) should be amended to require a party appealing from a Bankruptcy Appellate Panel to first seek a stay from the B.A.P.

The commentator also suggests that there should be a reference in (a)(2) to the B.A.P.

Gap Report

1. Mr. Ettinger's suggestion, to move the first sentence of (b) and make it (a)(2)(E) seems logical. I recommend moving it and amending the heading of (b).

2. I recommend Professor Rowe's style suggestion re: (a)(1)(C).

Comments on Proposed Amendments to Rule 9

I. General Summary of the Public Comments on Rule 9

Only one comment on Rule 9 was received. The commentator notes that some of the word changes in the proposed amendments may change meaning and suggests further amendments.

II. Summary of Individual Comments on Rule 9

1. David S. Ettinger, Esquire
Chair, Appellate Courts Committee
Los Angeles County Bar Association
P.O. Box 55020
Los Angeles, California 90055-2020

Currently (a)(1) requires an appellant who questions the factual basis for an order regarding release to file a transcript of the release proceedings or "an explanation of why a transcript has not been obtained." The amended rule says that the appellant must file a transcript or "explain why a transcript was not obtained." The committee says that requiring an appellant to "file. . . an explanation" provides clearer direction than requiring the appellant to "explain." The committee recommends amending the sentence to state:

> "An appellant who questions the factual basis for the district court's order must file a transcript of the release proceedings or an explanation of why a transcript was not obtained."

Existing paragraph (a)(3) provides that a court of appeals *or a judge thereof* may order a defendant's release pending disposition of the appeal. The proposed revision says that "the court of appeals or a circuit judge" may order release. The existing rule implies that only a judge of the court to which the appeal is taken may order pre-disposition release, but the proposed revision could permit even a judge from a different court of appeals to do so. The committee suggests that (a)(3) be changed to read as follows:

> "The court of appeals or any of its circuit judges may order the defendant's release pending the disposition of the appeal."

Gap Report

I recommend adoption of Mr. Ettinger's style suggestions.

Comments on Proposed Amendments to Rule 10

None

Gap Report

No post-publication changes recommended.

Comments on Proposed Amendments to Fed. R. App. P. 11

I. General Summary of Comments on Rule 11

Three comments on Rule 11 were received.

None of the commentators expressed either general approval or disapproval of the proposed amendments; instead, they offered comments on specific provisions.

One commentator, Judge Reavley, suggests a combination of stylistic and substantive changes. He suggests that a court of appeals should be able both to prescribe the manner in which the record is assembled and also to direct that the district court retain parts of the record.

Two of the commentators suggest stylistic revisions.

II. Summary of Individual Comments on Rule 11

1. Professor Thomas D. Rowe, Jr.
Duke University School of Law
Box 90360
Durham, North Carolina 27708-0360

Professor Rowe questions the use of bullets in 11(g). He notes that unlike 6(b)(2)(B)(iii), the use of bullets in 11 is not undertaken because the sub-sub-part has already been extended so far.

2. Francis H. Fox, Esquire
Bingham, Dana and Gould LLP
150 Federal Street
Boston, Massachusetts 02110-1726

Mr. Fox suggests amending the first sentence in 11(c). He suggests adding the word "that" after "order" and before "the" in the second and deleting the word "to" from the third line. He notes that as published the phrasing is incorrect - "The parties may stipulate the district clerk to retain".

3. Honorable Thomas M. Reavley
Senior Circuit Judge
903 San Jacinto Boulevard, Suite 434
Austin, Texas 78701

Judge Reavely suggests amendment Rule 11(b) to read as follows:

(2) District Clerk's Duty to Forward

(a) When the record is complete, the district clerk must assemble and index the entire record in a form convenient to appellate study. The court of appeals may direct the form of assembly and may provide that the district clerk retain possession of parts of the record.

(b) When the record is assembled as directed by the court of appeals, it must be sent promptly to the circuit clerk by the district clerk.

(c) If the exhibits to be sent to the circuit clerk are unusually bulky or heavy, a party must arrange with the clerks in advance for their transfer and receipt.

Gap Report

1. Judge Reavely's suggestions are largely covered by 11(b), therefore, I recommend only one word change in (b) to conform with the proposed change to Rule 6 (p. 27).
2. I recommend adoption of Mr. Fox's style suggestion re: (c).

Comments on Proposed Amendments to Rule 12

None

Gap Report

No post-publication changes recommended.

Comments on Proposed Amendments to Rule 13

None

Gap Report

No post-publication changes recommended.

Comments on Proposed Amendments to Rule 14

None

Gap Report

No post-publication changes recommended.

Comments on Proposed Amendments to Fed. R. App. P. 15

I. General Summary of Comments on Rule 15

Three comments on Rule 15 were received.

None of the commentators expressed either general approval or disapproval of the proposed amendments; instead, they offered comments on specific provisions.

One commentator, Mr. Fox, notes that the proposed amendments may make unintended substantive changes. As amended 15(b)(2) says that judgment will be entered if "the respondent fails to answer in time," whereas the current rule requires "filing" an answer within the stated time. He recommends retaining the "filing" requirement. As amended 15(c)(1) says that at the time of filing a petition for review, the petitioner must already have served the other parties. The existing rule requires service "at or before the time of filing." Mr. Fox would again retain the original language.

Another commentator suggests a substantive change. Many appeals from agencies arise out of rulemaking proceedings. In such instances, it is not clear who is a party to the agency proceeding for the purpose of the 15(c)(1) requirement to serve the petition on all parties "admitted to participate in the agency proceedings." The commentator suggests amending Rule 15 to incorporate the solution adopted by D.C. Cir. R. 15(a). Because this change would be a new substantive amendment, it is inappropriate to make at this stage and the Advisory Committee should consider whether the suggestion should be placed on the agenda for future consideration.

Two of the commentators suggest stylistic revisions.

II. Summary of Individual Comments on Rule 15

1. Professor Thomas D. Rowe, Jr.
Duke University School of Law
Box 90360
Durham, North Carolina 27708-0360

Professor Rowe says that 15(a)(2)(A) is a run-on sentence and would work better if there were a long dash, instead of a comma, between "petition" and "using" in the third line.

Professor Rowe suggest shortening 15(b)(2)'s "after the date when the application for enforcement is filed" to "after filing of the application for enforcement". In either formulation, he suggests inserting a comma before "the" in the second line.

2. Francis H. Fox, Esquire
Bingham, Dana and Gould LLP
150 Federal Street
Boston, Massachusetts 02110-1726

Mr. Fox suggests amending 15(a)(2)(A) on p. 46. He says there should be a period after the word "petition" in the third line of (A) and that the next word ("using") should be capitalized. Alternatively, the comma should be replaced by a semicolon.

Mr. Fox says that 15(b)(2) makes a minor substantive change. The old rule said that if a respondent fails to "file" an answer within the stated time, judgment will be awarded. The new rule says that judgment will enter if "the respondent fails to answer in time." He suggests that the rule should retain the filing requirement.

Mr. Fox also notes that 15(c)(1) is slightly changed. The old rule required service "at or before the time of filing a petition for review." The new rule says that a petitioner must already have served a copy on other parties at the time of filing. He would retain the original requirement.

3. Jack N. Goodman, Esquire
National Association of Broadcasters
Vice President/Policy Counsel
Legal Department
1771 N Street, N.W.
Washington, D.C. 20036-2891

Mr. Goodman points out that many appeals from agencies arise out of informal rulemaking proceedings. In such instances, it is not clear who is a party to the agency proceeding for the purpose of the 15(c)(1) requirement to serve the petition on all parties "admitted to participate in the agency proceedings." Mr. Goodman notes that the D.C. Circuit solved the problem in D.C. Cir. R. 15(a) which provides that "in cases involving informal rulemaking . . . a petitioner or appellant need serve copies only on the respondent agency, and on the United States if required by statute." He suggests incorporation of such a provision in the federal rule.

Gap Report

1. I recommend a change of punctuation in (a)(2)(A) and (b)(2).

2. I recommend a change in (c)(1) based upon Mr. Fox's observation that the proposed rule worked a substantive change - and the Committee Note says that none was intended.

3. Mr. Goodman's suggestion is substantive; should it be placed on the agenda?

Comments on the Proposed Amendments to Rule 16

I. General Summary of the Comments on Rule 16

Only one comment on Rule 16 was received. The commentator suggests a stylistic change.

II. Summary of the Individual Comments on Rule 16

1. Francis H. Fox, Esquire
Bingham, Dana and Gould LLP
150 Federal Street
Boston, Massachusetts 02110-1726

The first sentence of Rule 16(b) could be read as allowing the court to "direct" the parties to stipulate. Mr. Fox says that what is meant is only that the court can correct a mistake and so can the parties, by stipulation. He prefers the old version.

Gap Report

No post-publication changes recommended.

Comments on Proposed Amendments to Rule 17

I. General Summary of Public Comments on Rule 17

There was only one comment on Rule 17. It supports the change to 17(b) that permits an agency to file less than the entire record even when the parties do not agree about which parts should be filed.

II. Summary of Individual Comments on Rule 17

1. Andrew Chang, Esquire
Chair, The Committee on Appellate Courts
The State Bar of California
555 Franklin Street
San Francisco, California 94102-4498

The committee supports the change to 17(b) that permits an agency to file less than the entire record even when the parties do not file a stipulation designating which parts of the record should be forwarded.

Gap Report

No post-publication changes recommended.

Comments on Proposed Amendments to Rule 18

I. General Summary of Public Comments on Rule 18

There was only one comment on Rule 18. The commentator asks whether the absence of a reference to Rule 8(b) regarding sureties is intended to create a substantive distinction between Rule 18 and Rule 7, which does contain a reference to 8(b).

II. Summary of Individual Comments on Rule 18

1. David S. Ettinger, Esquire
Chair, Appellate Courts Committee
Los Angeles County Bar Association
P.O. Box 55020
Los Angeles, California 90055-2020

The committee notes that unlike Rule 7, subdivision (b) does not reference Rule 8(b) regarding sureties. The committee asks whether a substantive distinction is intended.

Gap Report

I recommend adding a sentence identical to the one in Rule 7. Is this a substantive change that needs to be published? I don't think so; it has probably been previously implied.

Comments on Proposed Amendments to Rule 19

None

Gap Report

No post-publication changes recommended.

Comments on Proposed Amendments to Rule 20

None

Gap Report

No post-publication changes recommended.

Comments on Proposed Amendments to Fed. R. App. P. 21

I. General Summary of Public Comments on Rule 21

Three comments on Rule 21 were received.

None of the commentators expressed either general approval or disapproval of the proposed amendments; instead, they offered comments on specific provisions.

All three commentators suggest stylistic revisions. In addition, one of the commentators suggests a change in the cross-reference in 21(d).

II. Summary of the Individual Comments on Rule 21

1. Honorable Cornelia G. Kennedy
United States Circuit Judge
Theodore Levin U.S. Courthouse
231 West Lafayette Boulevard
Detroit, Michigan 48226

Judge Kennedy states that Rule 21 is unclear about whether a district judge can be a respondent in a mandamus action. The confusion arises from using the verb "respond" in paragraph (b)(4) when talking about the trial judge. Judge Kennedy suggests amendment (b)(4) to say either that the trial judge may be invited to "reply" or "address the petition."

2. Professor Thomas D. Rowe, Jr.
Duke University School of Law
Box 90360
Durham, North Carolina 27708-0360

Professor Rowe suggests that there are two places in 21(b)(4) where "trial court judge" should be "trial-court judge".

Professor Rowe suggests that in 21(c) "of those" at the end of the second line may be superfluous; and "such application" in the sixth line may be stiff and would be better written as "such an application".

3. David S. Ettinger, Esquire
Chair, Appellate Courts Committee
Los Angeles County Bar Association
P.O. Box 55020
Los Angeles, California 90055-2020

Proposed (b)(5) states: "If briefing or oral argument is required, the clerk must advise the parties, and when appropriate, the trial court judge or amicus curiae." The committee states that the provision is ambiguous as to when briefing or oral argument is "required." The provision also does not give the clerk specific directions nor is it clear when advisement to the trial-court judge or amicus curiae is "appropriate." The committee suggests that (b)(5) be amended to read as follows:

> "The court of appeals may invite or order briefing, oral argument, or both from the parties and the trial court judge and from an amicus curiae. The clerk must advise the persons to whom the orders and invitations are directed of the dates by which briefs must be filed and the date of oral argument."

Proposed subdivision (d) provides that "[a]ll papers must conform to Rule 32(a)(1)." The committee suggests that the reference should be to Rule 32(c) or that there be no reference at all and that the scope of Rule 21(d) be limited to the number of copies required.

III. Internal Comments

1. At last summer's Standing Committee meeting someone pointed out that there is a language inconsistency between Rules 5 and 21(d) concerning the number of copies.

2. Joe Spaniol suggests that the term "trial judge" is preferable to "trial court judge" which appears at (a)(1), line 6; (b)(4), lines 2 and 3; (b)(5), line 3; and (b)(7), line 2.

3. Joe Spaniol suggests that in 21(c), line 1, the word "An" should be added at the beginning of the first sentence to read "An application . . . "

4. Joe Spaniol says that in 21(d) the second sentence should be changed to read the same as the second sentence in Rule 5(c) and Rule 5.1(c). [Note he submitted this comment prior to the publication of revised Rule 5, but the language is the same.] He also says that 27(d)(3) should be changed so that "3" is "three" and

is consistent with the other rules.

Gap Report

1. I recommend use of the term "trial-court judge." Using "trial judge" may be confusing because the mandamus may not arise from decisions connected with a trial.

2. I recommend adoption of Judge Kennedy's word change in (b)(4).

3. I do not recommend adoption of Mr. Ettinger's version of (b)(5). I think that in combination with (b)(1) and (b)(4), (b)(5) is clear enough.

4. I recommend adoption of Professor Rowe's and Joe Spaniol's style suggestions in (c) and (d).

Comments on the Proposed Amendments to Rule 22

I. General Summary of Public Comments on Rule 22

Three comments on Rule 22 were received. All three note the inconsistencies between Rule 22, even as amended by Congress, and the new statutory provisions governing habeas applications. Even though amendment would require substantive changes, it may be necessary to make them at this time.

II. Summary of the Individual Comments on Rule 22

1. Honorable Thomas M. Reavley
Senior Circuit Judge
903 San Jacinto Boulevard, Suite 434
Austin, Texas 78701

Judge Reavley asks whether Rule 22 should incorporate the new statutory provisions on successive habeas applications.

2. Cathy Catterson, Clerk of Court
United States Court of Appeals
121 Spear Street
P.O. Box 193939
San Francisco, California 94119-3939
(forwarding the comments of individual members of the Ninth Circuit Advisory Committee)

The commentator notes the apparent inconsistencies between the newly amended statute and the rule.

3. Walter Dellinger
Acting Solicitor General
United States Department of Justice

Solicitor Dellinger recommends that Rule 22 be amended to conform to changes in the law made by the Anti-Terrorism and Effective Death Penalty Act of 1996. Specifically, he recommends that Rule 22 be amended as follows:

1. to require a federal prisoner proceeding under § 2255 to obtain a certificate of appealability;
2. to change the caption of 22(b)(1) so that the term "Certificate of Probable Cause" is replaced with "Certificate of Appealability;"

3. to amend 22(b)(3) to provide that a certificate of appealability is not required when a state or its representative or the United States or its representative appeals; and
4. to clarify that a district judge may issue a certificate of appealability.

With regard to the last issue, whether a district judge may issue a certificate of appealability, there has already been considerable litigation.

It is necessary at this time to work from Rule 22 as it was amended by Congress last year, rather than from the published text. The existing rule now says:

Rule 22. Habeas Corpus and Section 2255 Proceedings

(a) **Application for the Original Writ.** An application for a writ of habeas corpus shall be made to the appropriate district court. If application is made to a circuit judge, the application shall be transferred to the appropriate district court. If an application is made to or transferred to the district court and denied, renewal of the application before a circuit judge shall not be permitted. The applicant may, pursuant to section 2253 of title 28, United States Code, appeal to the appropriate court of appeals from the order of the district court denying the writ.

(b) **Certificate of Appealability.** In a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court, an appeal by the applicant for the writ may not proceed unless a district or a circuit judge issues a certificate of appealability pursuant to section 2253(c) of Title 28, United States Code. If an appeal is taken by the applicant, the district judge who rendered the judgment shall either issue a certificate of appealability or state the reasons why such a certificate should not issue. The certificate or the statement shall be forwarded to the court of appeals with the notice of appeal and file of the proceedings in the district court. If the district judge has denied the certificate, the applicant for the writ may then request issuance of the certificate by a circuit judge. If such a request is addressed to the court of appeals, it shall be deemed addressed to the judges thereof and shall be considered by a circuit judge or judges as the court deems appropriate. If no express request for a certificate is filed, the notice of appeal shall be deemed to

constitute a request addressed to the judges of the court of appeals. If an appeal is taken by a State or its representative, a certificate of appealability is not required.

Rewriting the rule using the restyled version as a guide results in the following:

Rule 22. Habeas Corpus and Section 2255 Proceedings

(a) **Application for the Original Writ.** An application for a writ of habeas corpus ~~shall~~ ought to be made to the appropriate district court. If ~~application is~~ made to a circuit judge, the application ~~shall~~ will ordinarily be transferred to the appropriate district court. If a district court denies an application ~~is~~ made ~~to~~ or transferred to ~~the district court and denied~~ it, renewal of the application before a circuit judge ~~shall not be permitted~~ is not favored. The applicant may, ~~pursuant to section 2253 of title 28, United States Code~~ under 28 U.S.C. § 2253, appeal to the ~~appropriate~~ court of appeals from the ~~order of the~~ district court's order denying the writ.

(b) **Certificate of Appealability.**

(1) ~~In a habeas corpus proceeding in which~~ If the detention complained of arises ~~out of~~ from process issued by a ~~S~~ state court, the applicant cannot take an appeal ~~by the applicant for the writ may not proceed~~ unless a district or circuit judge issues a certificate of appealability ~~pursuant to section 2253 of title 28, United States Code~~ under 28 U.S.C. § 2253(c). If an ~~appeal is taken by the~~ applicant files a notice of appeal, the district judge who rendered the judgment ~~shall~~ must either issue a certificate of appealability or state ~~the reasons~~ why ~~such~~ a certificate should not issue. The district clerk must send the certificate or ~~the~~ statement ~~shall be forwarded~~ to the court of appeals with the notice of appeal and the file of the district court proceedings ~~in the district court~~. If the district judge has denied the certificate, the applicant ~~for the writ~~ may ~~then~~ request ~~issuance of the certificate by~~ a circuit judge to issue the certificate.

(2) ~~If such a~~ A request ~~is~~ addressed to the court of appeals~~, it shall be deemed addressed to the judges thereof and shall~~ may be considered by a circuit

judge or judges, as the court ~~deems appropriate~~ prescribes. If no express request for a certificate is filed, the notice of appeal ~~shall be deemed to~~ constitutes a request addressed to the judges of the court of appeals.

(3) ~~If an appeal is taken by a State or its representative,~~ ~~a~~ A certificate of appealability is not required when a state or its representative appeals.

That redraft, however, does not cure the inconsistencies between Rule 22 and the statutory provisions. For instance, although the caption to Rule 22 includes reference to § 2255, the text of the rule does not refer to § 2255 proceedings. That probably can be addressed by further amending (b)(1) and (3) as follows (the newest additions are shaded):

(b) Certificate of Appealability.

(1) ~~In a habeas corpus proceeding in which~~ If the detention complained of arises ~~out of~~ from process issued by a ~~S~~ state court , or in a 28 U.S.C. § 2255 proceeding, the applicant cannot take an appeal ~~by the applicant for the writ may not proceed~~ unless a district or circuit judge issues a certificate of appealability ~~pursuant to section 2253 of title 28, United States Code~~ under 28 U.S.C. § 2253(c). If an ~~appeal is taken by the~~ applicant files a notice of appeal, the district judge who rendered the judgment ~~shall~~ must either issue a certificate of appealability or state ~~the reasons~~ why ~~such~~ a certificate should not issue. The district clerk must send the certificate or ~~the~~ statement ~~shall be forwarded~~ to the court of appeals with the notice of appeal and the file of the district court proceedings ~~in the district court~~. If the district judge has denied the certificate, the applicant ~~for the writ~~ may ~~then~~ request ~~issuance of the certificate by~~ a circuit judge to issue the certificate.

(2) ~~If such a~~ A request is addressed to the court of appeals, ~~it shall be deemed addressed to the judges thereof and shall~~ may be considered by a circuit judge or judges, as the court ~~deems appropriate~~ prescribes. If no express request for a certificate is filed, the notice of appeal ~~shall be deemed to~~

constitutes a request addressed to the judges of the court of appeals.

(3) ~~If an appeal is taken by a State or its representative, a~~ A certificate of appealability is not required when a state or its representative or the United States or its representative appeals.

There still remains the even more difficult question of which judges have authority to issue a certificate of appealability. Section 2253(c) says that a "circuit justice or judge" has authority to issue a certificate of appealability. That language can be read to mean "circuit justice or circuit judge" or the term "circuit" can be read as applicable only to "justice," in which case a circuit justice, a circuit judge, and a district judge all have authority to issue the certificate. In contrast, Rule 22 (as amended by Congress) permits both district and circuit judges to issue certificates of appealability but makes no mention of the "circuit justice." In three recent cases, three circuits have said that a district judge has authority to issue a certificate. Therefore, I recommend further amendment of (b)(1) as follows:

(b) Certificate of Appealability.

(1) ~~In a habeas corpus proceeding in which~~ If the detention complained of arises ~~out of~~ from process issued by a ~~S~~ state court or in a 28 U.S.C. § 2255 proceeding, the applicant cannot take an appeal ~~by the applicant for the writ may not proceed~~ unless a circuit justice or a circuit or district ~~district or circuit~~ judge issues a certificate of appealability ~~pursuant to section 2253 of title 28, United States Code~~ under 28 U.S.C. § 2253(c). If an ~~appeal is taken by the~~ applicant files a notice of appeal, the district judge who rendered the judgment ~~shall~~ must either issue a certificate of appealability or state ~~the reasons~~ why ~~such~~ a certificate should not issue. The district clerk must send the certificate or ~~the~~ statement ~~shall be forwarded~~ to the court of appeals with the notice of appeal and the file of the district-court proceedings ~~in the district court~~. If the district judge has denied the certificate, the applicant ~~for the writ~~ may ~~then~~ request ~~issuance of the certificate by~~ a circuit judge to issue the certificate.

None of the foregoing addresses the special habeas procedures for capital cases, the one-year deadline for filing habeas petitions, the limits on successive petitions, or the restricted review of state prisoner petitions if the claims were adjudicated on the merits in the state courts. Because these new provisions came into the law as part of the Antiterrorism and Effective Death Penalty Act, they were not previously addressed by the rule, and probably cannot be handled as part of the style revision.

Comments on Proposed Amendments to Rule 23

I. General Summary of Public Comments on Rule 23

Only one comment on Rule 23 was received. The comment merely notes a typographic error in the Committee Note.

II. Summary of Individual Comments on Rule 23

1. Professor Thomas D. Rowe, Jr.
Duke University School of Law
Box 90360
Durham, North Carolina 27708-0360

There is a typographical error in the third line of the last paragraph of the note. The "it" should be "its."

Gap Report

The only post-publication change recommended is correction of the typographical error in the Committee Note.

Comments on Proposed Amendments to Rule 24

There were no public comments.

III. Internal Comments

1. Joe Spaniol points out inconsistent language in 24(a)(5) and (b). One says "prescribed by" and the other says "prescribed in."

Gap Report

I recommend changing the term "prescribed in" in (a)(5) to "prescribed by."

Comments on Proposed Amendments to Rule 25

I. General Summary of Public Comments on Rule 25

Three comments on Rule 25 were received.

None of the commentators expressed either general approval or disapproval of the proposed amendments; instead, they offered comments on specific provisions.

One commentator states that changing (a)(2)(B)(ii) from "3 calendar days" to "3 days" does not make it clear that Saturdays, Sundays, and legal holidays are not counted. The commentator suggests further clarification.

One commentator opposes the change in (a)(2)(C) that would require an inmate to use a prison's mail system that is designed specifically for legal mail, if one exists.

One commentator states that 25(c) creates an incoherent standard for determining what method must be used to serve papers on an opposing party. Another commentator recommends that 25(c) be amended to delete the term "calendar days" so that the provisions of Rule 26 (under which weekends and legal holidays are not counted for any time period less than 7 days) apply to the service by commercial carrier.

One commentator suggests extending the "mailbox rule" to petitions for rehearing. Because this change would be a new substantive amendment, it is inappropriate to make at this stage and the Advisory Committee should consider whether the suggestion should be placed on the agenda for future consideration.

II. Summary of Individual Comments on Rule 25

1. Paul W. Mollica, Esquire
   Presiding Member, Federal Courts Committee
   Chicago Council of Lawyers
   One Quincy Court Building, Suite 800
   220 South State Street
   Chicago, Illinois 60604

   The committee states that 25(c) creates an incoherent standard for determining what method must be used to serve papers on an opposing party.

2. Laurence S. Zakson, Esquire
The Committee on Federal Courts
The State Bar of California
555 Franklin Street
San Francisco, California 94102-4498

The proposed amendment to 25(a)(2)(B)(ii) deletes the word "calendar" for purposes of determining whether a brief or appendix is timely filed with the court when it is dispatched to a commercial carrier for delivery to the court. The deletion invokes the provisions of Rule 26 under which Saturdays, Sundays and legal holidays are not counted for any time period less than 7 days. The committee recommends that a similar deletion of the "calendar days" requirement be made for purposes of service on counsel under Rule 25(c).

3. David S. Ettinger, Esquire
Chair, Appellate Courts Committee
Los Angeles County Bar Association
P.O. Box 55020
Los Angeles, California 90055-2020

The committee believes that simply changing (a)(2)(B)(ii) from "3 calendar days" to "3 days" does not make it clear that Saturdays, Sundays, and legal holidays are not counted. To make it clear, the committee recommends that the rule refer to "3 court days" with a definition of "court day," or that the phrase be "within 3 days, excluding Saturdays, Sundays, and legal holidays."

The committee suggests that the mailbox rule should be extended to petitions for rehearing.

With regard to (a)(2)(C) the committee opposes requiring an inmate to use the legal mail system. (It opposes the parallel change in Rule 4.)

Gap Report

No post-publication changes recommended for the following reasons:

1. I do not think it is necessary to amend the rule to make it clear that the change in (a)(2)(B)(ii) from "3 calendar days" to "3 days" means that weekends and holidays are not counted. Rule 26(a) and the Committee Note to Rule 25 make it sufficiently clear. The Committee has previously discussed whether we should similarly change 25(c) so the "3 calendar days" becomes "3 days." The previous decision was negative. That decision was tied to a clarifying

amendment made in 26(c) which provides that unless a party receives a paper on the date it is served, three "calendar" days are added to the time within which the served party must respond.

2. I do not recommend abandoning the requirement that an inmate use the mail system designed specifically for legal mail, if one exists. Such systems often record the date of receipt, information that is useful to the court.

3. The standard in 25(c) for determining the method of service was purposely drafted so that there is not a hard and fast rule about when service must be by the same method used for filing. Short of doing so, I don't see any obvious way to improve it.

Comments on the Proposed Amendments to Rule 26

I. General Summary of Public Comments on Rule 26

Three comments on Rule 26 were received.

None of the commentators expressed either general approval or disapproval of the proposed amendments; instead, they offered comments on specific provisions.

One commentator believes that the (b)(1) cross-reference to Rule 4 is a useful, but substantive, amendment. As a substantive amendment, the Committee Note should mention it.

One commentator suggests retaining language in (a) that makes it clear that if the last day of a time period is a weekend, holiday, or day on which the clerk's office is inaccessible, "the period runs until the end of the next day which is not one of the aforementioned days."

One commentator recommends creating consistency between the Civil and Appellate Rules concerning the computation of time. (This commentator made the same recommendation when commenting on Rule 4.) Because this change would be a new substantive amendment, it is inappropriate to make at this stage and the Advisory Committee should consider whether the suggestion should be placed on the agenda for future consideration.

II. Summary of Individual Comments on Rule 26

1. Francis H. Fox, Esquire
Bingham, Dana and Gould LLP
150 Federal Street
Boston, Massachusetts 02110-1726

Mr. Fox says that the parenthetical reference in 26(b)(1) to Rule 4 is useful but is a somewhat substantive clarification of the interplay between the two rules and the Committee Note should point it out.

Mr. Fox also notes that the "petition for allowance" presently found in 26(b) has been dropped. He also notes that 26(b)(1) now reads in part "a petition for permission or leave to appeal." Because the previous version just referred to "permission to appeal" he asks what "or leave" adds.

2. David S. Ettinger, Esquire
Chair, Appellate Courts Committee
Los Angeles County Bar Association
P.O. Box 55020
Los Angeles, California 90055-2020

As with Rule 4, the committee recommends creating consistency between the Civil and Appellate Rules concerning the computation of time.

3. Cathy Catterson, Clerk of Court
United States Court of Appeals
121 Spear Street
P.O. Box 193939
San Francisco, California 94119-3939
(forwarding the comments of individual members of the Ninth Circuit Advisory Committee)

The commentator notes (with neither approval nor disapproval) that (a) extends application of the national rule on computing time to "any local rule." The commentator also notes that subdivision (a) no longer includes language making it clear that if the last day of a time period is a weekend, holiday, or day on which the clerk's office is inaccessible "the period runs until the end of the next day which is not one of the aforementioned days." The commentator suggests retaining that language because it adds clarity.

III. Internal Comments

1. Luther Munford raises a question about the interaction between 26(a) and 26(c).

When action must be taken within a prescribed period following service, Rule 26(c) adds three calendar days to the period unless the paper is delivered on the date of service stated in the proof of service.

When any period prescribed or allowed is less than 7 days, 26(a) says that intermediate Saturdays, Sundays, and legal holidays do not count.

Is the 3-day extension in 26(c) such a period?

Gap Report

1. It does not seem necessary to amend (a)(3) to state that if the last day of a time period is a weekend, holiday, or day on which the clerk's office is inaccessible "the period runs until the end of the next day which is not one of the aforementioned days." That is implicit.

2. I do not believe that the (b)(1) cross-reference to Rule 4 is substantive and, therefore, do not believe that it requires mention in the Committee Note.

3. If Rules 5 and 5.1 are merged, as the Advisory Committee suggested in the packet published in summer of 1996, there will only be a "petition for permission" (no "petition for allowance" nor even "petition for leave" as in Rule 5.1 of the style revision). Therefore, I recommend amending (b)(1) to delete reference to a petition for leave to appeal.

4. The word "calendar" was inserted in 26(c) in an effort to make it clear that intermediate Saturdays, Sundays, and legal holidays do count. The Advisory Committee followed the lead of the D.C. Circuit which had held that the 3-day period in 26(c) was calendar days, meaning that the 26(a) computational method did not apply for purposes of 26(c). That change became effective December 1, 1996. Luther's questions suggests that the change is not clear enough.

Comments on Proposed Amendments to Rule 26.1

None

Gap Report

1. The changes noted in (a) are the result of comments submitted following the September 1995 publication of this rule. The amendments suggested in the September 1995 publication, and the Advisory Committee's post-publication recommendations, have been not been formally approved by the Standing Committee (although a straw vote taken in July 1996 disclosed no opposition to them) and the changes were not forwarded to the Judicial Conference. The Advisory Committee chose to delay forwarding the changes until the close of the comment period on the style packet.

   Because there were no comments on Rule 26.1 as it appeared in the style packet, no further amendments of the text are recommended.

   A copy of the Gap Report (following the summer 1995 publication) submitted to the Standing Committee in July 1996 follows this page. Because the Standing Committee has not formally approved the changes published in September 1995, or the post-publication changes recommended by the Advisory Committee, the Gap Report probably needs to be carried forward as part of this report.

2. Because there were no comments on Rule 26.1 as it appears in the style packet, I do not recommend any post-publication changes except to substitute for the Committee Note appearing in the style packet, the Committee Note developed in connection with the process described above.

   The Committee Note is inserted into the rules packet following Rule 26.1. I have made slight changes in the Committee Note so that it is consistent with the rest of the notes in the style packet. The changes are shaded for your convenience.

Excerpts from June 1996 Report to the Standing Committee

Gap Report on Rule 26.1

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 must 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 must 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 must 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 must 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.

Public Comments on 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 was a total of 12 commentators. Of the 12, four supported the amendments, none generally opposed the amendments, but 8 suggested revisions.

The comments were as follows:

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 at least 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 wrote to Judge Logan after last summer's Standing Committee meeting. He was 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.

Gap Report on Rule 26.1

Changes were made at lines 11 and 12. Mr. Lacovara's suggestion was adopted so that it is clear the rule applies only when a single corporate stockholder owns at least 10% of a 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. The Committee Note explains that change.

In addition a stylistic change was made in subdivision (c).

Comments on Proposed Amendments to Fed. R. App. P. 27

I. General Summary of Public Comments on Rule 27

Eight comments on Rule 27 were received.

Two of the commentators express general approval of the proposed amendments; another lists virtually all of the substantive amendments and expresses approval of them. None of the commentators expressed general disapproval of the proposed amendments; instead, they offered comments on specific provisions.

One commentator suggests that (a) should retain the explicit requirement that a motion must include proof of service "on all other parties."

One commentator suggests amending (a)(2)(B) to permit affidavits, supporting papers, etc. to be filed after the motion if they are not available at the time of the motion.

One commentator states that 27(a)(3)(A) fails to specify who must give notice, and to whom, when a procedural order is granted. Another commentator would amend (a)(3)(A) to provide 21 days for a response to a dispositive motion, but retain the 10-day limit for all other motions.

One commentator opposes the amendment to (a)(4) that allows a moving party to file, as of right, a reply to a response to a motion. The commentator states that most appellate motions are procedural and a reply is neither needed nor desired by the court. Another commentator supports the amendment because a moving party should have an opportunity to reply to unexpected arguments made in the opposing party's response, but the commentator does not believe that it is necessary to permit 10-page replies.

One commentator notes that the use of both 10-day and 5-day periods in the same rule [(a)(3) and (4)] may cause confusion because different methods of computing time are used for each period. Weekends and holidays are counted for the 10-day period. But they do not count for the 5-day period, making the period in reality never less than 7 days.

One commentator suggests amending (b) to permit appellate commissioners to rule on procedural motions. Because this change would be a new substantive

amendment, it is inappropriate to make at this stage and the Advisory Committee should consider whether the suggestion should be placed on the agenda for future consideration. Another commentator opposes the change in (b) that provides that timely opposition filed after a procedural motion is granted does not constitute a request to reconsider and that such a motion must be filed.

One commentator wants clarity about what is meant by "binding" and would oppose requiring anything more sophisticated than stapling.

One commentator believes that language changes in (c) shift the emphasis from the non-finality of a single judge's action and the party's right to have such a ruling reviewed by a panel of the court, to the court's power to review such actions.

One commentator suggests that Rule 27 use word and character limits rather than page limits.

II. Summary of Individual Comments on Rule 27

1. Honorable Cornelia G. Kennedy
United States Circuit Judge
Theodore Levin U.S. Courthouse
231 West Lafayette Boulevard
Detroit, Michigan 48226

   The proposed amendments transpose the last sentence of subpart (c) from "[t]he action of a single judge may be reviewed by the Court" to "[t]he Court may review the action of a single judge. Judge Kennedy says that the transposition places the emphasis on the Court's power rather than on the non-finality of a single judge's action and the party's right to have the ruling reviewed by a panel of the court.

2. Ronald F. Waterman, Esquire
Gough, Shanahan, Johnson & Waterman
P.O. Box 1715
Helena, Montana 59624-1715

   Agrees with the proposed amendments.

3. Paul W. Mollica, Esquire
Presiding Member, Federal Courts Committee
Chicago Council of Lawyers
One Quincy Court Building, Suite 800
220 South State Street
Chicago, Illinois 60604

The committee states that 27(a)(3)(A) fails to specify who must give notice to whom before a motion for a procedural order is granted.

4. Richard A. Rossman, Esquire
Pepper, Hamilton & Scheetz
36th Floor, 100 Renaissance Center
Detroit, Michigan 48243-1157
on behalf of State Bar of Michigan, United States Courts Committee

The United States Courts Committee recommends amendment of 27(a)(4) which allows a moving party to file, as of right, a reply to a response to a motion. The committee does not believe that routine replies are necessary. Most appellate motions are procedural in nature and in most cases a reply is neither needed nor desired by the court. To accommodate the few instances in which a reply would be appropriate, the committee suggests amending (a)(4) to allow a party to seek leave of court, within five days after service of the response, to file a reply.

The committee notes that 27(d) requires that a motion be bound, but says that what is meant by binding is unclear. If stapling is sufficient, the rule should make that clear. If something more sophisticated is intended, the committee opposes the requirement because the trouble and expense would be unreasonable especially for the routine procedural motions that constitute the bulk of appellate motion practice.

5. Andrew Chang, Esquire
Chair, The Committee on Appellate Courts
The State Bar of California
555 Franklin Street
San Francisco, California 94102-4498

The committee supports the change to (a)(1) which requires motions to be in writing but permits a court to entertain an oral motion and does not impact the use of telephonic motions for extensions to file briefs.

The committee supports the proposed changes to (a)(2) which:

a. make it clear that appellate motions should consist of one document - no proposed orders or notices of motion;
b. require that all legal argument be contained in the body of the motion; and
c. require a copy of the lower court's order be appended when the motion seeks substantive relief.

The committee supports the changes in (a)(3)(4) which:

a. increase the time for filing a response to a motion;
b. make it clear that a motion for a procedural order may be decided before a response is due; and
c. allow a party to seek affirmative relief in a response and allow a reply.

The committee supports the clarification that a timely response filed after a motion is granted does not constitute a motion for reconsideration.

The committee supports the format requirements and limitations in subdivision (d).

The committee also supports the clarification in (e) that there is no right to oral argument.

6. David S. Ettinger, Esquire
Chair, Appellate Courts Committee
Los Angeles County Bar Association
P.O. Box 55020
Los Angeles, California 90055-2020

The committee suggests amending (a)(2)(B)(iv) to provide:

> "In exigent circumstances the court may allow any necessary affidavit, supporting paper, or copy of trial court order or agency decision to be served and filed after the motion provided that any necessary missing document is supplied forthwith as soon as it is available."

The committee notes that (a)(3) uses one time limit (10 days) that does count weekends and holidays, and another (5 days) that does not. This may cause confusion that could be remedied by changing Appellate Rule 26 to comport with Civil Rule 6 or by making the reply time 7 days so that both time periods would include weekends and holidays. The committee notes that the 5-day deadline is never less than 7 days and may be more if a holiday intervenes.

The committee suggests that subdivision (b) might, in addition to allowing the court to authorize its clerk to act in its stead, allow appellate commissioners to rule on procedural motions. The committee states that the Ninth Circuit routinely employs an appellate commissioner to rule on procedural motions.

The committee questions the use of page limits in (d)(2) in light of Rule 32's word and character limits. The committee suggests that motions should have limits similar to those in Rule 32 and suggests that the motion and opposition could be limited to 2/3 the length of a principal brief, and a reply could be limited to 1/3.

7. Cathy Catterson, Clerk of Court
United States Court of Appeals
121 Spear Street
P.O. Box 193939
San Francisco, California 94119-3939
(forwarding the comments of individual members of the Ninth Circuit Advisory Committee)

The commentator suggests retaining the explicit requirement that a motion must include proof of service "on all other parties."

The commentator opposes the provision in 27(b) stating that "timely opposition filed after [a procedural] motion is granted in whole or in part does not constitute a request to reconsider, vacate, or modify the disposition; a motion requesting that relief must be filed." That provision is contrary to current ninth circuit practice and requires the preparation of unnecessary and often redundant filings. The commentator notes that the court is not required to state whether it acted before it received and reviewed any response and that will cause confusion and the filing of unnecessary reconsideration motions.

With regard to (d)(2) the commentator agrees that a moving party should have an opportunity to reply to unexpected arguments made in the opposing party's response, but questions whether the 10 pages is unnecessarily generous.

8. Robin E. Jacobsohn, Esquire
Co-Chair, Section on Courts, Lawyers and the Administration of Justice
The District of Columbia Bar
1250 H. Street, N.W., Sixth Floor
Washington, D.C. 20005-5937

The section generally agrees with the proposed amendments to the rule but strongly urges on additional change. The section proposes that the time to respond to dispositive motions be twenty-one days (rather than ten), but that the time to respond to other motions would continue to be ten days.

III. Internal Comments

1. Joe Spaniol says that in (d)(1)(A), the second sentence should be changed to be consistent with the second sentence in Rule 32(a), "The paper must be opaque and unglazed."

Gap Report

1. Paragraph (a)(1) dropped the requirement that a motion be accompanied by proof of service on all other parties because Rule 25 already requires that of all papers filed with the courts of appeals.

2. I do not recommend amending (a)(2)(B)(iv) to allow later filing of supporting papers in "exigent circumstances." Exigent circumstances can be handled individually.

3. The Advisory Committee discussed at length whether there should be different time limits for "dispositive" motions as distinguished from others and decided not to do so. The time for filing a response was expanded from 7 to 10 days because the rule applies to substantive motions as well as to procedural motions. I do not recommend reopening that issue.

4. Mr. Mollica's comment about (a)(3)(A) reveals, I think, a flaw in the published language. He says that 27(a)(3)(A) "fails to specify who must give reasonable notice to whom before the granting of a motion for a procedural order." I believe that notice is required only for motions under Rules 8, 9, 18, and 41, not for procedural motions. I suggest subdividing the third sentence of (a)(3)(A) into two parts, (i) and (ii).

As for the specific point raised by Mr. Mollica, the weakness is one that exists in the current rule and was not created by the restyling. I tentatively recommend adding "by the court to all other parties" to the end of (a)(3)(A). That may not be sufficient in that a single judge may act, for example to grant a stay. If a single judge may dispose of the motion, should a single judge be able to give notice to the other parties and then act?

5. Paragraph (a)(4) raises two issues.
   a. Whether the routine granting of an opportunity to reply is necessary. Paragraph (a)(4) does not authorize replies to the extent suggested by Mr. Rossman. Paragraph (a)(4) authorizes a reply only when a response is filed. For most routine procedural motions there will be no response and, therefore, no reply. I recommend no change.
   b. Whether the time for replying should be changed from 5 to 7 days. Mr. Ettinger points out that the 10-day time in (a)(3)(A) for responding is computed one way, and the 5-day time in (a)(4) for replying is computed another. Because of the different methodology, the 5-day time will always be at least 7 days (weekends are not counted). Because the 5-day period is really at 7 days and because a 7-day period would be computed in the same way as the 10-day period (intervening weekends and holidays are counted), I recommend changing the reply time to 7 days. (In fact because of the different methodologies a 7-day period can be shorter than a 5-day period. Assume the response is filed on Monday in a week in which Friday is a holiday. Under a 5-day limit, the reply would not be due until the following Tuesday - 8 days later. Under a 7-day limit, the reply would be due the following Monday - 7 days later.)

6. I concur with Judge Kennedy that transposing the last sentence of (c) slightly changes its emphasis, but I don't think there is any substantive change and do not recommend returning to the old language.

7. The stapling issue in (d)(1) has been addressed by a small addition to the Committee Note. The (d)(2) page limits are clearly maximums and not minimums.

8. The Advisory Committee explicitly decided to use page limits rather than word and character limits because motions have not presented the same difficulties as briefs.

Comments on Proposed Amendment to Fed. R. App. P. 28

I. General Summary of Public Comments on Rule 28

Seven comments on Rule 28 were received.

Three commentator express general approval of the amendments; one of them however, suggests clarification on one point. None of the commentators express general disapproval of the amendments.

One commentator suggests that the table of authorities should authorize the use of *passim* when an authority is cited throughout the brief.

One commentator says it is a mistake for (a) to require that the description of the proceedings in the court or agency below precede the description of the facts of the case. The commentator suggests that the rule leave the order of these two sections to the judgment of counsel.

One commentator suggests that (a)(5) should not require a summary of argument if the argument is relatively short.

One commentator suggests that (j) should be amended so that the letter referencing new authorities can include a brief explanation of the new authority and a statement of its significance. Another commentator suggests requiring that a copy of the case be attached to the letter.

One commentator suggests making it clear that in completing the certification, counsel may rely on the counting provision of the particular software used to prepare the brief.

One commentator makes stylistic suggestions.

II. Summary of the Individual Comments on Rule 28

1. Ronald F. Waterman, Esquire
Gough, Shanahan, Johnson & Waterman
P.O. Box 1715
Helena, Montana 59624-1715

Mr. Waterman agrees with the proposed amendments.

2. Professor Thomas D. Rowe, Jr.
Duke University School of Law
Box 90360
Durham, North Carolina 27708-0360

Professor Rowe questions the use of bullets in 28(e). He notes that unlike 6(b)(2)(B)(iii), the use of bullets in 28(e) is not undertaken because the sub-sub-part has already been extended too far. He further notes that because the bullets introduce a list of examples, they seem appropriate.

Professor Rowe asks whether "reserved" new Rule 28(g) should include a cross-reference to Rule 32 so that it is not necessary to look to the Committee Note to ascertain where the length restrictions are now located.

3. Jack N. Goodman, Esquire
National Association of Broadcasters
Vice President/Policy Counsel
Legal Department
1771 N Street, N.W.
Washington, D.C. 20036-2891

Rule 28(a)(3) continues the present requirement of a table of authorities with reference to the pages where the authorities are cited. Mr. Goodman suggests authorizing the use of *passim* when an authority is cited throughout the brief.

Rule 28(j) maintains the rule that a letter citing supplemental authorities may not include argument, and may only reference arguments in the brief or that were made orally to which the new authority is pertinent. Mr. Goodman states that the relevance of the new authority is not always immediately obvious and, therefore, it would be better to permit a brief explanation of the new authority and a statement of its significance.

4. Paul Alan Levy, Esquire
Public Citizen Litigation Group
1600 20th Street, N.W.
Washington, D.C. 20009-1001

Regarding (a)(4), (6), and (7) Public Citizen says it is a mistake to require that the description of the proceedings in the court or agency below must always precede the description of the facts of the case. Public Citizen says that it is usually better to discuss the facts first which allows the "proceedings below" section to describe not only the procedural context of the rulings below but also the reasoning of those decisions. The suggestion is that the rule leave the order of these two sections to the judgment of counsel.

Regarding (a)(5) Public Citizens suggests that a summary of argument is unnecessary if the argument is relatively short. The D.C. Circuit requires a summary only if the argument section exceeds 15 printed or 20 typed pages. Public Citizen suggests amending the rule to include such an exception.

5. Andrew Chang, Esquire
Chair, The Committee on Appellate Courts
The State Bar of California
555 Franklin Street
San Francisco, California 94102-4498

The committee supports the changes necessary to make Rule 28 consistent with Rule 32.

6. Cathy Catterson, Clerk of Court
United States Court of Appeals
121 Spear Street
P.O. Box 193939
San Francisco, California 94119-3939
(forwarding the comments of individual members of the Ninth Circuit Advisory Committee)

The commentator asks whether it would be helpful to the court to require a party who submits a letter citing supplemental authorities to include a copy of the cases.

7. Robin E. Jacobsohn, Esquire
Co-Chair, Section on Courts, Lawyers and the Administration of Justice
The District of Columbia Bar
1250 H. Street, N.W., Sixth Floor
Washington, D.C. 20005-5937

The section generally agrees with the proposed revisions of Rule 28 but says that the requirement that a brief be accompanied by a certification of compliance, unless it falls within one of the "safe harbors," needs clarification. If the certification requirement is retained, it must be made clear that counsel may rely on the counting provisions of the particular software used to prepare the brief.

Gap Report

Of the several suggested changes, I recommend adopting only the one that would require copies of the supplemental authorities to be attached to the letter sent to the court. The suggestion that the letter should be permitted to include a brief explanation of the new authority and a statement of its significance would be a significant substantive change that would need prior publication and comment.

Comments on Proposed Amendments to Rule 29

I. General Summary of Public Comments on Rule 29

Three comments on Rule 29 were received.

None of the commentators expressed either general approval or disapproval of the proposed amendments; instead, they offered comments on specific provisions.

One commentator opposes limiting an amicus brief to one-half the length of a party's principal brief.

One commentator suggests amending the rule to permit a state agency or state officer to file an amicus brief without consent of the parties or leave of court. Because this change would be a new substantive amendment, it is inappropriate to make at this stage and the Advisory Committee should consider whether the suggestion should be placed on the agenda for future consideration.

One commentator suggests stylistic revisions.

II. Summary of Individual Comments on Rule 29

1. Professor Thomas D. Rowe, Jr.
Duke University School of Law
Box 90360
Durham, North Carolina 27708-0360

Professor Rowe suggests that a comma be placed after "Commonwealth" in the third line to maintain parallelism with the comma after "agency" in the second line.

2. David S. Ettinger, Esquire
Chair, Appellate Courts Committee
Los Angeles County Bar Association
P.O. Box 55020
Los Angeles, California 90055-2020

The committee opposes limiting an amicus brief to one-half the length of a party's principal brief. An amicus brief is needed when a party inadequately addresses an issue or fails to analyze the broader impact of a position. Limiting

amicus input thwarts the ultimate goal of assisting the court by presentation of alternative viewpoints.

3. Cathy Catterson, Clerk of Court
United States Court of Appeals
121 Spear Street
P.O. Box 193939
San Francisco, California 94119-3939
(forwarding the comments of individual members of the Ninth Circuit Advisory Committee)

The commentator suggests that the Advisory Committee consider amending the rule to provide that a state agency or state officer has a right to file an amicus brief without first obtaining consent of the parties or leave of court.

Gap Report

1. All but one of the changes noted throughout the rule are the result of comments submitted following the September 1995 publication of this rule. The amendments suggested in the September 1995 publication, and the Advisory Committee's post-publication recommendations, have been not been formally approved by the Standing Committee (although a straw vote taken in July 1996 disclosed no opposition to them) and the changes were not forwarded to the Judicial Conference. The Advisory Committee chose to delay forwarding the changes until the close of the comment period on the style packet.

   Although there were three comments on Rule 29 as it appeared in the style packet, only one of them (Professor Rowe's) has been incorporated in the marked version prepared for your consideration.

   A copy of the Gap Report (following the summer 1995 publication) submitted to the Standing Committee in July 1996 follows this page. Because the Standing Committee has not formally approved the changes published in September 1995, or the post-publication changes recommended by the Advisory Committee, the Gap Report probably needs to be carried forward as part of this report.

2. As stated above, I do recommend only one minor change in the text of the rule following publication of the style packet. However, it will be necessary to substitute for the Committee Note appearing in the style packet, the Committee Note developed in connection with the process described above.

The Committee Note is inserted into the rules packet following Rule 29. I have made slight changes in the Committee Note so that it is consistent with the rest of the notes in the style packet. The changes are shaded for your convenience.

Excerpts from June 1996 Report to the Standing Committee

Gap Report on Rule 29

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 by leave of court or if the brief states that all parties have consented to its filing.

(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.

(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 and 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; 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 authorized by these rules for a party's principal brief. If the court grants a party permission to file a longer brief, that extension does not affect the length of an amicus brief.

(e) **Time for Filing.** An amicus curiae must file its brief, accompanied by a motion for filing when necessary, no later than 7 days after the principal brief of the party being supported is filed. An amicus curiae who does not support either party must file its brief no later than 7 days after the

appellant's or petitioner's principal brief is filed. A court may grant leave for later filing, specifying the time within which an opposing party may answer.

(f) **Reply Brief.** Except by the court's permission, an amicus curiae may not file a reply brief.

(g) **Oral Argument.** An amicus curiae may participate in oral argument only with the court's permission.

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 and 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 changed. An amicus brief must be filed no later than 7 days after the principal brief of the party being supported is filed.

Occasionally, an amicus supports neither party; in such instances, the amendment provides that the amicus brief must be filed no later than 7 days after the appellant's or petitioner's principal brief is filed. Note that in both instances the 7-day period runs from when a brief is filed. The passive voice — "is filed" — is used deliberately. A party or amicus can send its brief to a court for filing and, under Rule 25, the brief is timely if mailed within the filing period. Although the brief is timely if mailed within the filing period, it is not "filed" until the court receives it and file stamps it. "Filing" is done by the court, not by the party. It may be necessary for an amicus to contact the court to ascertain the filing date.

The 7-day stagger was adopted because it is long enough to permit an amicus to review the completed brief of the party being supported and avoid repetitious argument. A 7-day period also is short enough that no adjustment need be made in the opposing party's briefing schedule. The opposing party will have sufficient time to review arguments made by the amicus and address them in the party's responsive pleading. The timetable for filing the parties' briefs is unaffected by this change.

A court may grant permission to file an amicus brief in a context in which the party does not file a "principal brief;" for example, an amicus may be permitted to file in support of a party's petition for rehearing. In such instances the court will establish the filing time for the amicus.

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). The language of this subdivision stating that an amicus will be granted permission to participate in oral argument "only for extraordinary reasons" has been deleted. The change is made to reflect more accurately the current practice in which it is not unusual for a court to permit an amicus to argue when a party is willing to share its argument time with the amicus. The Committee does not intend, however, to suggest that in other instances an amicus will be permitted to argue absent extraordinary circumstances.

Public Comments on Rule 29

Fifteen letters commenting on proposed Rule 29 were submitted. Two of the letters contained separate suggestions from two persons or committees so there was a total of 17 commentators. Of the 17 commentators, none generally opposed the amendments; 3 supported the amendments without reservation; 13 suggested revisions; and 1 made no substantive comment.

The comments were as follows:

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.

Gap Report on Rule 29

In subdivision (a) the District of Columbia was added to the list of entities allowed to file an amicus brief without consent. The suggestion was adopted that a

statement that all parties have consented to the filing of the brief should be sufficient and it is not necessary to file the written consent of all the parties.

Subdivision (c) was amended so that the cover must identify the party supported and indicate whether the brief supports affirmance or reversal. In the rare instance in which the amicus does not support any party, the amicus can simply so indicate.

In subdivision (d) the limit on the length of an amicus brief is unchanged 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.

Subdivision (e) was changed permit an amicus to file its brief up to 7 days after the principal brief of the party being supported is filed.

Subdivision (f) makes it clear that an amicus may request leave to file a reply.

In subdivision (g) the language stating that an amicus will be granted permission to participate in oral argument "only for extraordinary reasons" has been deleted. The change reflects more accurately current practice in which it is not unusual for a court to permit an amicus to argue when a party is willing to share its argument time with the amicus.

Stylistic changes also were made.

Comments on Proposed Amendments to Rule 30

I. General Summary of Public Comments on Rule 30

There was only one comment on Rule 30. Rule 31 permits an unrepresented party who is proceeding in forma pauperis to file only four copies of the party's brief. Rule 30, however, has no such special provision and requires all parties to file ten copies of the appendix. The commentator suggests amending Rule 30 so that a party proceeding in forma pauperis need only file four copies of the appendix.

II. Summary of Individual Comments on Rule 30

1. Paul Alan Levy, Esquire
Public Citizen Litigation Group
1600 20th Street, N.W.
Washington, D.C. 20009-1001

Public Citizen notes that Rule 30 does not limit the number of copies of the appendix that must be filed by a party proceeding in forma pauperis. In contrast, only an original and three copies of the brief are required from an unrepresented party proceeding in forma pauperis. Public Citizen suggests that Rules 30 and 31(b) should be consistent.

III. Internal Comments

1. Joe Spaniol and Judge Parker both say that in (a)(2) the first sentence should be changed to the singular: "A memorandum of law in the district court should not be included in the appendix unless it has independent relevance."

Gap Report

1. I recommend amending the number of copies provision, (a)(3), so that it is consistent with 31(b).

2. I also recommend the style change in (a)(2).

Comments on the Proposed Amendments to Rule 31

I. General Summary of Public Comments on Rule 31

Three comments on Rule 31 were received.

None of the commentators expressed either general approval or disapproval of the proposed amendments; instead, they offered comments on specific provisions.

One commentator suggests that all parties proceeding in forma pauperis, whether represented by counsel or not, should be required to file only four copies of the brief and appendix.

Both of the other commentators suggest substantive amendments. One suggests that a court of appeals should be permitted to "modify" rather than simply "shorten" the time for briefs to be filed. The change would permit a court to shift the briefing schedule. The other commentator suggests that it is no longer necessary to require service of two copies of a brief on counsel for each party to an appeal. Because both of these changes would be new substantive amendments, it is inappropriate to make them at this stage and the Advisory Committee should consider whether the suggestions should be placed on the agenda for future consideration.

II. Summary of Individual Comments on Rule 31

1. Jack N. Goodman, Esquire
National Association of Broadcasters
Vice President/Policy Counsel
Legal Department
1771 N Street, N.W.
Washington, D.C. 20036-2891

Mr. Goodman suggests that 31(a) be amended to permit a court of appeals to "modify" rather than simply "shorten" the time for briefs to be filed. The change would permit a court to shift the briefing schedule, as the D.C. Circuit does (the briefing schedule is determined by the date set for oral argument).

2. Paul Alan Levy, Esquire
Public Citizen Litigation Group
1600 20th Street, N.W.
Washington, D.C. 20009-1001

Rule 31(b) allows a party proceeding in forma pauperis to file limited copies of the party's brief only when the party is unrepresented. Public Citizen believes that the exception should apply to all parties proceeding in forma pauperis. Lawyers should not be discouraged from representing IFP clients on appeal by the requirement that the lawyers bear extra out-of-pocket expenses. Public Citizen notes that this suggestion has particular significance for the appendix which may be much longer than the brief.

3. Laurence S. Zakson, Esquire
The Committee on Federal Courts
The State Bar of California
555 Franklin Street
San Francisco, California 94102-4498

Since there is no reason to assume that a party filing a typewritten brief is necessarily proceeding in forma pauperis, the rule is amended to state what it means -- an unrepresented party proceeding in forma pauperis may file only four copies of its brief and serve a single copy on each of the parties. The committee supports the proposed amendment. In addition, it asks whether it continues to be necessary or appropriate in other instances to require service of two copies of a brief on counsel for each party to the appeal. The committee suggests that like the exception for "typewritten" briefs, this requirement may be anachronistic. They urge its amendment.

Gap Report

1. I do not recommend permitting a court of appeals to "modify" rather than simply "shorten" the time for filing briefs. The term "modify" is very broad and would include, of course, authority to lengthen the briefing by local rule, something the Advisory Committee did not want to permit.

2. The Advisory Committee specifically decided to make the provision granting a party proceeding IFP permission to file only four copies of the brief applicable only to unrepresented parties.

3. I recommend amendment of the language of 31(b) so that is it consistent with Rule 30(a)(3).

Comments on Proposed Amendment to Fed. R. App. P. 32

I. General Summary of Public Comments on Rule 32

Thirteen comments on Rule 32 were received.

None of the commentators expressed either general approval or disapproval of the proposed amendments; instead, they offered comments on specific provisions.

One commentator suggests that (a)(2) should establish the color for a petition for rehearing, or rehearing en banc, for a response to either, and for a supplemental brief.

One commentator suggests that the provision in (a)(3) requiring a brief to be bound in a manner that permits it to "lie reasonably flat when open" is unclear about whether Velo-binding is acceptable and says that either the rule or Committee Note should list the acceptable and unacceptable methods of binding.

Two commentators say that the typeface requirements in (a)(5) are unduly detailed and technical. Another specifically objects to the provision in (a)(6) that forbids the use of bold type for emphasis.

Six commentators object to the complexity of the length limitations in 32(a)(7)(B) and (C).

1. One would retain the current page limits.
2. One would retain the current page limits but would add the proposed limitations on paper size, line spacing, and type style and size.
3. One would limit principal briefs to 30 pages and reply briefs to 15 pages. He would, however, retain the limitation on the number of words, characters, and lines per page and would retain the certificate of compliance required in 7(C).
4. Another objects to counting lines, words, or characters, but admits that some of his colleagues would prefer a word limit to the current page limit.
5. One commentator focuses upon the variation in word and character counts that can result from using different word processing software. The commentator also says that the line limitations for monospaced briefs would result in a shorter brief than the current rule. The commentator (similarly to 1 and 3 above) would use a page limitation with margin restrictions, a minimum point size, and specific acceptable typefaces.
6. One says only that it should be rewritten to be "simpler" and "more understandable to the practitioner" and so that it will "facilitate compliance."

One commentator, however, specifically "does not oppose" the length limitations

because one would have the option of using either the page limits in (a)(7)(A) or the type-volume limitations in (a)(7)(B), and because the certificate of compliance is required only if (a)(7)(B) is used. One commentator is concerned that the proposed rule does not state that a party may file a motion to exceed the length limits.

One commentator notes that (a)(7)(B)(i) is not clear about how the word and character counts interact. The commentator suggests amending the rule to give counsel the option of complying with either the word or the character limitation.

One commentator asks whether it is necessary for (a)(7)(B)(ii) to exclude statements concerning oral argument since no such statements are required.

One commentator says that the certificate of compliance is a "demeaning obligation." Another says that the rule should make it clear that counsel may rely on the count provided by the word processing software used to prepare the brief.

Three commentators applaud the provision in 32(d) that requires a court to accept a brief that conforms to Rule 32. Two of them would urge extension of the same principle to Rules 28 through 31. Another commentator would amend the language of 32(d) to make it clear in the text of Rule 32 that a local rule or order in a particular case may waive but not add to the requirements concerning the form of documents.

One commentator suggests style revisions.

II. Summary of Individual Comments on Rule 32

1. Ronald F. Waterman, Esquire
Gough, Shanahan, Johnson & Waterman
P.O. Box 1715
Helena, Montana 59624-1715

Mr. Waterman would strike 32(a)(7)(B) and (C) because they are too complex and impose too great a burden upon court personnel. He would simply limit principal briefs to not more than 30 pages and reply briefs to not more than 15 pages. He would retain, however, even for 30-page briefs a limitation on the number of words, characters, and lines per page and would retain the certificate required in 7(C).

2. Francis H. Fox, Esquire
Bingham, Dana and Gould LLP
150 Federal Street
Boston, Massachusetts 02110-1726

Rule 32(a)(2) apparently deals only with covers for briefs. Yet (2)(E) refers twice to "document" and the Committee Note uses the word "document" several times. Rule 32(a)(3) and (a)(4) also use the word "document." Mr. Fox suggests that it would be better to avoid using the word document. He notes that 32(b) covers appendices and 32(c) deals with "other papers."

3. Walter H. Fleischer, Esquire
1850 M Street, N.W., Suite 800
Washington, D.C. 20036

Mr. Fleischer suggests changing to the second sentence of 32(d) to:

> By local rule or order in a particular case a court of appeals may waive but not add to the requirements of this rule as to the form of documents.

He believes that this would add clarity so that the "one direction only" is in the rule itself rather than only in the Committee Note.

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

Mr. Lacovara objects to both the tone and content of Rule 32(a)(7)(B). He objects to the counting of lines, words, or characters on a page. He believes that to the extent that lawyers lack the discipline or skill to prepare a concise brief, the existing page limits - coupled with uniform specification of minimum type size and margins - are sufficient constraints. He notes, however, that several of his colleagues would find the word limit preferable to the current page limit, but none supports the character counting. He also states that the certificate of compliance is a "demeaning obligation." He states that the certification requirement elevates the limitations to a status of unique dignity and significance that they do not deserve. He suggests contrasting the certification requirement with Civil Rule 11(b) which declares that the act of presenting a paper to the court constitutes the lawyer's certification that it is a professionally responsible submission.

5. Paul W. Mollica, Esquire
Presiding Member, Federal Courts Committee
Chicago Council of Lawyers
One Quincy Court Building, Suite 800
220 South State Street
Chicago, Illinois 60604

The committee welcomes the provision in 32(d) that requires a court to accept, without regard to local requirements, a brief that conforms to Rule 32. The committee applauds the move toward uniformity and urges at a minimum that it also apply to Rules 28 through 31 which also deal with the form and content of briefs.

6. Paul Alan Levy, Esquire
Public Citizen Litigation Group
1600 20th Street, N.W.
Washington, D.C. 20009-1001

Regarding 32(a)(2) Public Citizen suggests that there be a national rule establishing the color of a petition for rehearing (or rehearing en banc) and of the response if one is ordered. It also suggests specifying a color for supplemental briefs.

Public Citizen objects to the provision in (a)(6) that forbids the use of bold type for emphasis.

Regarding (a)(7)(B)(i) Public Citizen notes that the rule does not make clear how the word and character counts interact. Public Citizen suggests amending the rule to give counsel the option of complying with either the word or the character limitation.

The currently proposed rules do not require a statement concerning oral argument and such statements may even be preempted by 32(d). Public Citizen, therefore, asks why (a)(7)(B)(iii) excludes such a statement from the word count.

Public Citizen specifically applauds the 32(d) preemption of local rules that establish format requirements that are more stringent than the national rule.

7. Francis T. Carr, Esquire
Kenyon & Kenyon
One Broadway
New York, New York 10004

Mr. Carr objects to the "reduction in page length," the "type-volume limitation," and the certificate of compliance; he prefers page limitations. The other limitations are too rigid and "require the attention of a mathematician."

8. John Mollenkamp, Esquire
Blanchard, Robertson, Mitchell & Carter P.C.
P.O. Box 1626
Joplin, Missouri 64802

Mr. Mollenkamp notes that (a)(1)(B) requires text to be reproduced "with a clarity that equals or exceeds the output of a laser printer." The rule may soon be based upon obsolete technology or it may require an unnecessarily high quality output a laser printer technology improves. He suggests removing any reference to specific technology, leaving the circuits to designate minimum print quality by reference to a list of acceptable brands of computer printer or by designation of a minimum resolution (either of which could be changed more easily than the federal rules).

9. Richard A. Rossman, Esquire
Pepper, Hamilton & Scheetz
36th Floor, 100 Renaissance Center
Detroit, Michigan 48243-1157
on behalf of State Bar of Michigan, United States Courts Committee

The committee opposes the 32(a)(7) change in length limitations of briefs and proposes retaining the current 50 and 25-page limits along with the new proposed limitations on paper size, line spacing, and type style and size. The committee opposes the word or character limitations because compliance with them would increase the time and expense of practitioners and of court enforcement. The rule may stimulate motions to strike by counsel who believe that their opponents' briefs do not comply; there may be disputes regarding word counting. Compliance problems may be raised when the deferred appendix procedure is used or required (as it is in the sixth circuit). When the final brief with appendix references is completed, changes in word or character counts may be caused by changes in record references and may cause a final brief to be out of compliance. The committee believes that the burden will outweigh the marginal increase in readability that the rule changes may

promote.

10. Andrew Chang, Esquire
Chair, The Committee on Appellate Courts
The State Bar of California
555 Franklin Street
San Francisco, California 94102-4498

The committee does not object to the proposed changes regarding reproduction, covers, binding, paper size, line spacing, and margins. But the committee says that some of the typeface requirements in 32(a)(6) are unduly detailed. The committee points specifically to the requirement that a font include serifs, and to the provision to that permits italics but not underscoring for emphasis.

The committee does not oppose the provisions concerning the length of briefs because the rule provides the option of using either the page limits in (a)(7)(A) or the "type-volume limitations" in (a)(7)(B), and because a certificate of compliance is required only if (a)(7)(B) is used.

The committee is concerned that the proposed rule does not state that a party may file a motion to exceed the length limits. The committee notes that present Rule 28(g) signals that such motions are permissible by introducing the current limits with the caveat: "[e]xcept by permission of the court. . . . "

The committee supports the provision in 32(d) that ensures that a brief that complies with the national rule can be filed in every circuit.

11. Elizabeth A. Phelan
Holland & Hart
Post Office Box 8749
Denver, Colorado 80201-8749
(on behalf of the firm's appellate practice group)

They are concerned that the word, character, and line limitations of proposed Rule 32(a)(7)(B)(I) will be difficult for the courts to implement, will cause confusion for counsel, and will permit the gamesmanship the Advisory Committee is seeking to preclude. They believe that the problems created by the limitations far outweigh the benefits.

They cite as an example the fact that a 50-page brief counted using WordPerfect 5.1 showed 13,381 words, but the same brief counted using Word for Windows 7.0 had 14,068 words -- a 687-word difference. The difference arises from the

way the two different software packages count punctuation and numbers. They predict that practitioners may write briefs in a manner that produces the lowest possible word count (e.g. using numerical symbols rather than words for numbers) and use software that yields the lowest word count, and that software companies will design their word-counting functions accordingly. All of which would, in their opinion, eventually render the certificate required by 32(a)(7)(C) of dubious value.

They have similar concerns about character counting. They found that the same software package yielded different character counts depending on the typeface used.

They find the line limitation for monospaced briefs also troubling. They assert that 1,300 lines -- 26 per page in a 50-page brief -- is actually a shorter brief than now permitted. A brief that complies with current Rule 32(a) may have 28 lines of double-spaced text.

They also oppose the safe-harbor provision because it limits briefs to 30 pages. They believe that it will seldom, if ever, present a viable alternative.

They propose that Rule 32(a) be amended to limit the length of briefs by:
1. using a page limitations and margin restrictions;
2. specifying a minimum point size; and
3. specifying acceptable typefaces for briefs.

If the point size remains at 14 point, they assert that the page limitation will need to be greater than 50 to avoid reducing the overall length limitation.

12. David S. Ettinger, Esquire
Chair, Appellate Courts Committee
Los Angeles County Bar Association
P.O. Box 55020
Los Angeles, California 90055-2020

With regard to the (a)(3) requirement that a brief be bound so that it "permits the document to lie reasonably flat when open" the committee is concerned about Velo-Binding and the fact that what is "reasonably flat" may be in the eye of the beholder. The rule is not clear about whether Velo-Binding is acceptable. The committee suggests that either the rule or the Committee Note should list the acceptable and unacceptable methods of binding.

13. Robin E. Jacobsohn, Esquire
Co-Chair, Section on Courts, Lawyers and the Administration of Justice
The District of Columbia Bar
1250 H. Street, N.W., Sixth Floor
Washington, D.C. 20005-5937

The section states that the proposed provisions concerning the length of briefs are "overly detailed and confusing." The section points to use of terms such as "serifs" and "sans-serif" type, "plain roman" type, and to the provision requiring that text clarity must "equal or exceed the output of a laser printer." The section suggests that the rule be rewritten "to be simpler, to address the issues of legibility and brief length in a way that is more understandable to the practitioner, and written in a way to facilitate compliance."

The section also states that the if certification of compliance is retained, the rule should be clarified to ensure that counsel may rely on the count provided by the software utilized to prepare the brief because the count mechanisms of various programs are not uniform.

III. Internal Comments on Rule 32

1. Judge Frank Easterbrook says that the Seventh Circuit parallel to proposed Rule 32 is being amended on an expedited basis because the type-volume limitations were set on the assumption that word-processing programs treat spaces and punctuation as characters. That was true when the language was drafted, but it is not true today. The Seventh Circuit's rule governing type-volume limitations now provides:

> A principal brief is acceptable if it contains no more than the greatest of 14,000 words, 75,000 characters (excluding punctuation and spaces), or 90,000 characters (including punctuation and spaces). A brief using a monospaced face also is acceptable if it does not contain more than 1,300 lines of text.

The Seventh Circuit has also amended its rule to require that the certificate of compliance state "the name and version of the word-processing system employed."

2. Alan Sundberg, a member of the Standing Committee, has suggested a new penultimate paragraph for the Committee Note to subdivision (a). It would say:

> The sanction for violating the certificate of compliance provisions of subparagraph (c) shall be to strike [or "shall be limited to striking"] the brief where the certificate is either omitted or incorrect.

Gap Report

1. Length Limitations

The largest number of comments concern the length limitations in (a)(7). This ground has been covered several times (I think this is the fourth publication of proposed amendments to Rule 32) and a return to page limits is unlikely. The provisions are probably as simple as they can be and still do the job intended.

Although the variations in word counts cited by Ms. Phelan from Holland & Hart permit approximately five percent variation between the two software systems, the current page limit permits 40 percent or more variation. As Judge Easterbrook points out the variation in character count can be even higher than five percent because some packages count punctuation and spaces and some do not. I recommend, therefore, amending the character counting limits in the same way as the new Seventh Circuit Rule.

I agree with Public Citizen that the interrelationship between the word and character counts is not clear. Although the new 7th Circuit Rule addresses that problem by stating that a brief may contain no more than the "greatest of" the limits established, I have difficulty understanding how to apply that provision. I propose using bullets to separate the three alternatives in (7)(b)(i).

Although one commentator does not think that (7) makes it clear that one can rely upon the word-processing software used to prepare the brief, I think it is made sufficiently clear by (8).

I do not believe there is any problem with the 1,300 line limit for monospaced briefs. The claim that the proposed 1,300 line limit for monospaced briefs shortens briefs as compared to the current limit must be based upon a different assumption than the Advisory Committee has been using. The Advisory Committee has used a 50-page monospaced brief as its baseline. If one uses the 1" side margins and the 3/4" top and bottom margins currently provided for in Rule 32 when using 8-1/2" by 11" paper, and uses courier font with 10 characters per inch, my software package (WordPerfect 6.1 for Windows) yields only 24 lines per page. If I reduce the courier font to 11 point (the smallest size permitted under the current rule), I get more than 10-1/2 characters per inch, but I do get 26 lines per page. To get more than 26 lines, I would need to use a smaller point size, a different font that is in fact smaller although it is 11 point, or reduce the line spacing to something smaller than double spacing.

2. Typeface and Type Styles

Although three commentators object either to the level of detail in (a)(5) and (a)(6), the Advisory Committee has worked on these provisions to strip them down to essentials and to make them as reader-friendly as possible. In the end, some persons may need to read the explanations in the Committee Note or resort to their dictionaries (my Random House *American College Dictionary* that I have been using since 1968 defines "serif" and gives examples, and defines "roman" type with examples).

3. I recommend changing the word "document" to brief throughout subdivision (a) in both the text of the rule and in the Committee Note. I believe the word "document" was used because many of the provisions in (a) are applicable to preparation of the appendix and to other documents. However, subdivision (a) refers in many instances to a "brief" and it is probably better to be consistent. I do not think consistent use of the word "brief" will cause any confusion in applying the provisions to other documents.

4. I tentatively recommend Mr. Fleischer's suggested amendment of 32(d) intended to make it clear on the face of the rule that local variations concerning for are "one direction only." A court may "waive" requirements in 32(d), but may not add to them. My recommendation is tentative only because I am uncertain whether the word "waive" is broad enough to encompass a court's saying, for example, that although it is unnecessary to use 14 point type, nothing under 12 point will be accepted. I think "waive" is sufficient. Any argument that the court not only waived, but also added (the 12 point minimum) should be dismissed as silly. Are there any other problems?

5. Establishing cover colors for other documents and making the national Rules 28, 29, 30, and 31 preemptive of any local rules are substantive amendments that should be considered for inclusion on the agenda for later study.

6. Mr. Sundberg's suggestion for revision of the Committee Note concerns sanctions for omitting or submitting an incorrect certificate of compliance. The topic has not previously been addressed either by the Advisory Committee or the Standing Committee.

7. When Rules 26.1, 29, 35, and 41 were published several comments were submitted that urged amendment of the rules to permit, or preferably require, use of recycled paper, specifically non-chlorine bleached recycled paper, and double-sided copying. At that time, the Advisory Committee committed to reconsider those issues in connection with Rule 32. Copies of those comments,

as summarized for the June 1996 report to the Standing Committee, follow this rule.

Both Rules 27(a)(1)(A) 32(a)(1)(A) permit the use of "light" paper; white is not required. Presumably, the term "light" permits, but does not require, the use of non-chlorine bleached recycled paper.

Some of you will recall that one published iteration of Rule 32 would have required double-sided copying; there was substantial opposition from members of the judiciary who said that the blank sides are used for note taking. There were also several commentators who opposed double-sided copying because they feared the "bleed through" would adversely affect legibility; others pointed out that in order to avoid that problem heavier paper stock would need to be used and there might be no real environmental savings.

Excerpts from June 1996 Report to the Standing Committee

Proposed amendments to Federal Rules of Appellate Procedure 26.1, 29, 35, and 41 submitted for approval by the Standing Committee with a request for delayed transmittal to the Judicial Conference.

These proposed amendments were published for comment by the bench and bar in September 1995. The period for public comment closed on March 1, 1996. Thirty letters were received from commentators. Twenty-six letters commented on particular rules and are discussed below following the text of the relevant proposed amendment. Four letters contained only general statements regarding all published rules. One other letter contained a general comment in addition to comments regarding particular rules. The general comments were as follows:

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.

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.

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.

The first four "general" comments are addressed to the use of recycled paper and double-sided copying. They seem most relevant to Rule 32 (currently republished with the restyled rules). They are summarized here because they were submitted in response to this packet of rules. The comments will be retained for consideration at the close of the comment period for the restyled rules.

Comments on Proposed Amendments to Rule 33

None

Gap Report

No post-publication changes recommended.

Comments on Proposed Amendments to Rule 34

I. General Summary of Public Comments on Rule 34

Five comments on Rule 34 were submitted.

None of the commentators expressed either general approval or disapproval of the proposed amendments; instead, they offered comments on specific provisions.

Three commentators would omit the first sentence of (a). One commentator does so because the sentence invites parties to volunteer statements concerning the need for oral argument. The others do so because the new language may undercut the presumption in favor of oral argument.

One commentator would omit the third exception because the first two provide sufficient, but not excessive, flexibility to dispense with oral argument.

Two commentators object to deleting the word "recently" from (a)(2). The commentators believe that the change may cause an undesirable substantive change because it may permit courts of appeals to further restrict oral argument. A third commentator supports deleting the word "recently" but says that it may be a substantive change and should be noted as such in the Committee Note.

One commentator says that the court should be required to inform the parties when the court decides to submit a matter without oral argument and that the parties should, thereafter, be permitted to explain why oral argument should be permitted.

II. Summary of Individual Comments on Rule 34

1. Walter H. Fleischer, Esquire
1850 M Street, N.W., Suite 800
Washington, D.C. 20036

Mr. Fleischer suggests omitting the first sentence or placing it after (a)(3) and revising it to state:

> by local rule or order in a particular case a court of appeals may allow the parties to file a statement explaining why oral argument should be permitted.

He notes that the published first sentence invites parties to volunteer statements concerning the need for oral argument and that they might become routine. The

redraft would leave it to each circuit to decide whether it wants such statements, but because Rule 2 empowers the circuits to do so, Mr. Fleischer would simply omit the first sentence.

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

Mr. Lacovara suggests deleting the third exception - that "the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument." The first two exceptions provide sufficient, but not excessive, flexibility to dispense with oral argument.

Mr. Lacovara suggests dropping the new introductory sentence to 34(a): "Any party may file a statement explaining why oral argument should be permitted." He thinks that the new language poses the risk of undercutting the presumption in favor of oral argument. The language suggests that the parties have the burden of persuasion to show that oral argument should be permitted, which flies in the face of the existing rule that requires the court to afford oral argument unless the panel finds that one of the criteria exists for dispensing with argument. Anything short of full-scale discussion of the need would also be meaningless rote. As an alternative, he suggests a procedure by which counsel could respond to a tentative decision of the panel to dispense with oral argument.

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

Present 34(a)(2) permits a court of appeals to dispense with oral argument if the "dispositive issue or set of issues has been recently authoritatively decided." The amended rule deletes the word "recently." The committee believes this may work an undesirable substantive change in that it may permit courts of appeals to further restrict oral argument.

The committee supports, however, the elimination of references to local rules, however, because it supports a national standard governing the availability or oral argument.

4. David S. Ettinger, Esquire
Chair, Appellate Courts Committee
Los Angeles County Bar Association
P.O. Box 55020
Los Angeles, California 90055-2020

The committee is concerned that the statement in proposed subdivision (a) that "[a]ny party may file a statement explaining why oral argument should be permitted," could be read to impose the burden on parties to affirmatively request oral argument. The committee suggests deleting that sentence and beginning (a) with the statement, "Oral argument must be allowed in every case unless . . ."

The committee also says that the rule should require a court to inform the parties when the court decides to submit a matter without oral argument; the rule also should allow, after such notice has been given, the parties to request that oral argument be permitted nonetheless. Specifically, the committee suggests that the following language be added to (a) or (b):

> "When a case has been classified by the court for submission without oral argument, the Circuit Clerk must give the parties written notice of such action. The parties may within 10 days from the date of the Circuit Clerk's letter file a statement explaining why oral argument should be permitted."

The Committee also is concerned that deletion of the word "recently" from (a)(2) may allow a court to forego oral argument whenever the issue at hand has previously been decided -- no matter how many years ago.

5. Cathy Catterson, Clerk of Court
United States Court of Appeals
121 Spear Street
P.O. Box 193939
San Francisco, California 94119-3939
(forwarding the comments of individual members of the Ninth Circuit Advisory Committee)

The commentator says that deleting the word "recently" from (a)(2) is appropriate, but that it may be substantive and amendment of the Committee Note should be considered.

III. Internal Comments

1. Luther Munford notes that Rule 34 does not say when or how a statement regarding oral argument is to be filed. He suggests alternative methods of cleaning this up:
   a. We could restore the reference to local rules and leave it as a matter to be handled by individual circuits.
   b. We could amend the federal rule. He offers as a model Fifth Cir. R. 28.2.4, which provides:

      > Request for Oral Argument. Counsel for appellant shall include in appellant's brief (as a preamble thereto) a short statement of the reasons why oral argument would be helpful, or a statement that appellant waives oral argument. Appellee shall likewise include in appellee's brief a statement of why oral argument should or need not be had. The court will accord these statements, due, though not controlling, weight in determining whether oral argument will be heard in the case.

   Unlike some of the commentators, Luther believes it would be wasteful for the court to provide notice if a case has been screened for decision without argument and to allow the parties at that point to say whether or not they want argument. Luther says it is more efficient for the court to know what the parties think when the court is screening the case.

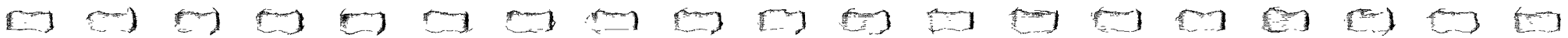
Gap Report

1. The only change I recommend is to amend the first sentence of subdivision (a) to direct inclusion of any statement about oral argument as a preamble to the party's brief. As written the appellant could include the statement in either the principal brief or the reply brief. I agree with Mr. Munford that it is more efficient for the court to know what the parties think about the need for oral argument when the court is screening the case. The rest of subdivision (a) makes it clear that the burden is not on the appellant to prove the need for oral argument.

   If the Committee wants to separate the first sentence from the rest of (a), the first sentence could be removed from subdivision (a) and made subdivision (d). That would, however, disturb the internal logic of the rule which is arranged chronologically.

2. The Committee Note indicates that the Committee believes that continued presence of the word "recently" in the second exception is misleading.

3. Omission of the third exception would be a major substantive change that is not appropriate at this time.



Comments on the Proposed Amendments to Rule 35

I. General Summary of Public Comments on Rule 35

Four comments on Rule 35 were submitted.

None of the commentators expressed either general approval or disapproval of the proposed amendments; instead, they offered comments on specific provisions.

One commentator recommends that the Advisory Committee amend Rules 35 and 40 to include specific reference to the tolling effect of a petition for rehearing en banc, or that the Committee urge the Supreme Court to amend its rules so that it is clear that the filing of a petition for rehearing en banc tolls the time for filing a petition for certiorari.

One commentator notes that because a petition for rehearing en banc will suspend the finality of the court's judgment, the petition must come to some kind of formal closure. If requiring routine votes is impracticable, the commentator suggests that the rule instruct the clerk to enter an order denying the petition when the petition for panel rehearing is denied, if there is one, or at the end of some defined period unless a judge has called for a vote on the petition.

Two commentators suggest stylistic changes.

II. Summary of Individual Comments on Rule 35

1. Jack N. Goodman, Esquire
National Association of Broadcasters
Vice President/Policy Counsel
Legal Department
1771 N Street, N.W.
Washington, D.C. 20036-2891

Mr. Goodman says that the reference in the last sentence of 35(f) to "those judges" is ambiguous and could be construed to refer only to the judges on the panel rather than to any of the judges who received the petition.

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

Rule 35(f) retains the existing principle that a vote is not required when a party seeks a hearing or rehearing en banc. Mr. Lacovara suggests that such passivity may no longer work in light of the amendments that would treat en banc requests as "petitions." Because such a petition will suspend the finality of the court's judgment for various purposes and the mandate will not issue until 7 days after entry of an order denying a petition, a petition for rehearing en banc must come to some kind of formal closure. He suggests that if requiring routine votes would not be practical, the petition could be treated as denied when panel rehearing is denied, or if no panel rehearing is sought, the rule could instruct the clerk to enter an order denying the petition at the end of a defined period (perhaps 21 days) unless a judge has called for a vote.

3. Paul Alan Levy, Esquire
Public Citizen Litigation Group
1600 20th Street, N.W.
Washington, D.C. 20009-1001

Public Citizen recommends that the Advisory Committee amend Rules 35 and 40 to include specific reference to the tolling effect of a petition for rehearing en banc, or that the Advisory Committee urge the Supreme Court to amend its rules so that it is clear that the filing of a petition for rehearing en banc tolls the time for filing a petition for certiorari.

4. Cathy Catterson, Clerk of Court
United States Court of Appeals
121 Spear Street
P.O. Box 193939
San Francisco, California 94119-3939
(forwarding the comments of individual members of the Ninth Circuit Advisory Committee)

The commentator suggests amending (b)(1)(B) as follows:

> "the proceeding involves one or more questions of exceptional importance, each of which must be ~~concisely~~ stated concisely."

III. Internal Comments

1. Joe Spaniol says that in (b)(1)(B), line 8, the word "federal" is not correct. He suggests striking it or changing it to read "United States court of appeals."

2. Judge Parker suggests amending (b)(1)(B) by moving the example ("a panel decision [that] conflicts with the authoritative decisions of every other federal court of appeals that has addressed the issue") to the Committee Note.

3. Judge Parker also suggests amending (f) by substituting the word "a" for "any such" at the beginning of the second line.

Gap Report

1. All but two of the changes noted in the rule are the result of comments submitted following the September 1995 publication of this rule. The amendments suggested in the September 1995 publication, and the Advisory Committee's post-publication recommendations, have been not been formally approved by the Standing Committee (although a straw vote taken in July 1996 disclosed no opposition to them) and the changes were not forwarded to the Judicial Conference. The Advisory Committee chose to delay forwarding the changes until the close of the comment period on the style packet.

   A copy of the Gap Report (following the summer 1995 publication) submitted to the Standing Committee in July 1996 follows this page. Because the Standing Committee has not formally approved the changes published in September 1995, or the post-publication changes recommended by the Advisory Committee, the Gap Report probably needs to be carried forward as part of this report.

2. The two additional changes recommended at this time are Joe Spaniol's and Judge Parker's style suggestions (in (b)(1)(B), and (f)).

   The language of (b)(1)(B) (especially of the exception) and the placement of that language was the subject of careful negotiation within the Committee. In fact, the inclusion of the language was done at the urging of two different Solicitor Generals, under two different Presidents. I do not recommend movement of that language to the Committee Note.

3. As stated in the Committee Note to Rule 35, it clearly is the intent of the Advisory Committee to eliminate the trap that concerns Public Citizen. At one time the Committee Notes to both Rule 35 and Rule 41 indicated that the

Advisory Committee believed that the Supreme Court would need to amend Sup. Ct. R. 13.3 in order to eliminate the trap. However, more recently the Advisory Committee has concluded that the Rule 35 change of terminology from "suggestion for rehearing en banc" to "petition for rehearing en banc" will itself eliminate the trap. That conclusion is based on the language of Sup. Ct. R. 13.3 which says:

> ". . . But if a petition for rehearing is timely filed in the lower court by any party, the time to file the petition for a writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) runs from the date of the denial of the petition for rehearing or, if the petition for rehearing is granted, the subsequent entry of judgment. A suggestion made to a United States court of appeals for a rehearing en banc is not a petition for rehearing within the meaning of this Rule unless so treated by the United States court of appeals."

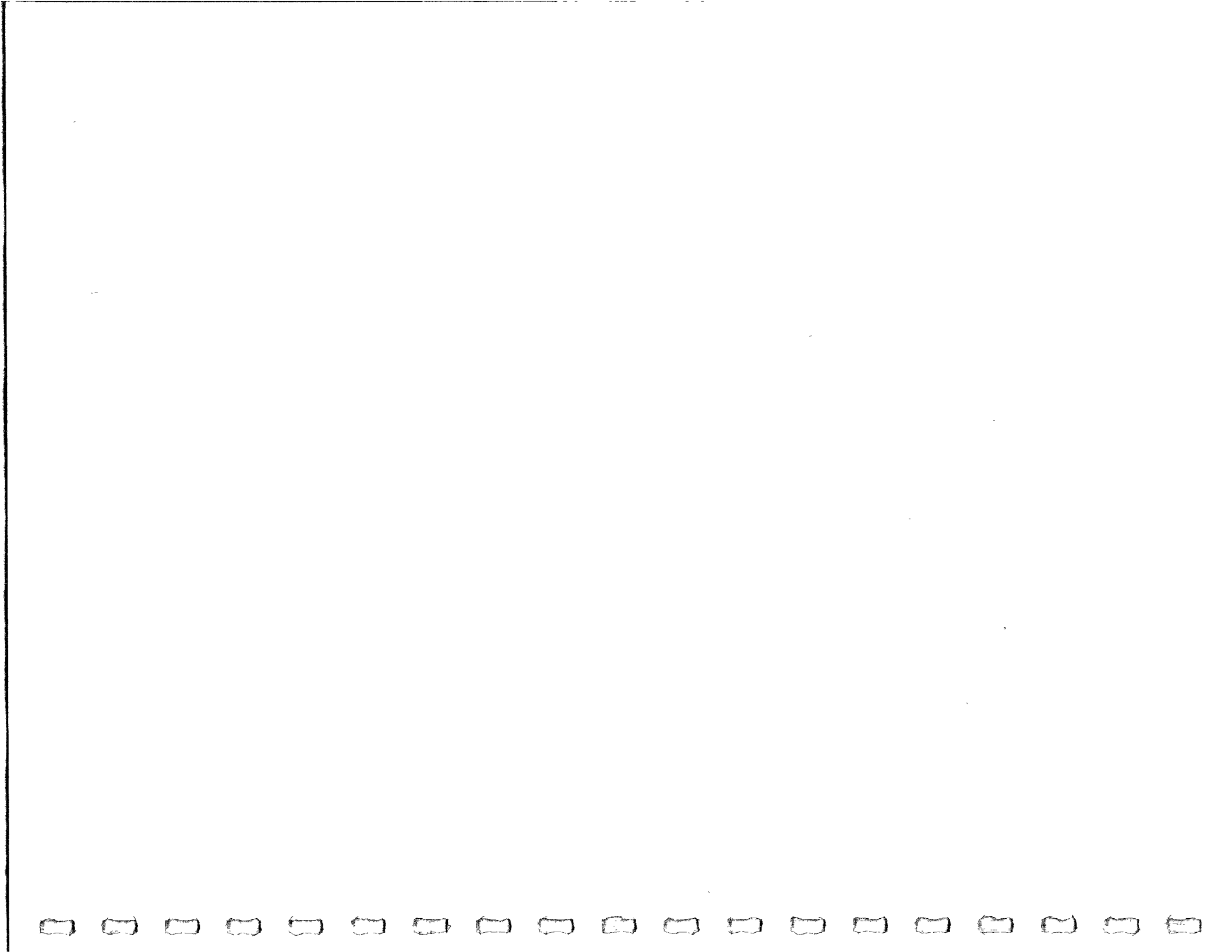
It may be that the terminology change alone is sufficient, but there is room for confusion. If the Advisory Committee decides to rely upon the terminology change, the Committee Note will need to be amended as I indicate in the note.

4. The remaining suggestions are either addressed in the Committee Note or were addressed by amendments made following the close of the earlier comment period. I do recommend one additional change, that the Committee Note appearing in the style packet be replaced by the Committee Note developed in connection with the earlier publication of substantive amendments to the rule.

The Committee Note is inserted into the rules packet following Rule 35. I have made changes in the Committee Note so that it is consistent with the rest of the notes in the style packet and changes indicating that the terminology change should eliminate the trap. The changes are shaded for your convenience.

Excerpts from June 1996 Report to the Standing Committee

Gap Report on Rule 35



Rule 35. ~~Determination of Causes 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~~ en banc consideration ~~by the full court~~ is necessary to secure or maintain uniformity of the court's ~~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 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 court of appeals that has addressed the issue.

(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 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 unless separate filing is required by local rule.

~~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 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 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~~ 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 case will be heard or reheard en banc unless a judge 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 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 limitation on the number of cases the Supreme Court can hear, 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.

Some circuits have had rules or internal operating procedures that recognize a conflict with another circuit as a legitimate basis for granting a rehearing en banc. 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 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 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 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 several circuits. 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. 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 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.

Public Comments on Rule 35

Fourteen letters commenting upon the proposed amendments to Rule 35 were received. One letter from an A.B.A. section, however, contained comments from two of the section's committees. There were, therefore, fifteen commentators. Of the fifteen commentators none expressed general opposition to the changes. Eight expressed general approval of the amendments, but 4 of the 8 suggested some revisions. Seven others also suggested revisions.

The comments were as follows:

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 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. 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 <u>every</u> 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 . . . .

Gap Report on Rule 35

Two changes were made 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. In keeping with that change, the parenthetical (appearing in the published draft) requiring citation to conflicting cases was deleted.
2. The rule attempts to eliminate any suggestion that a court should grant en banc reconsideration whenever there is an intercircuit conflict. New language emphasized that a party may assert that the existence of intercircuit conflict gives rise to a question of exceptional importance.

Paragraph (b)(3) was amended so that if a local rule requires a party to file separate petitions for panel rehearing and petitions for rehearing en banc, the party is not limited to a total of 15 pages.

Subdivision (f) was amended to say that "a judge" may call for a vote on a petition for en banc consideration.

Stylistic changes were also made.

The Committee retained the "en banc" spelling despite some objections. Although 28 U.S.C. § 46 has used "in banc" since 1948, even statutory usage is inconsistent. Pub. L. No. 95-486, 92 Stat. 1633 authorizes a court of appeals having more than 15 active judges to perform its "en banc" functions with some subset of the court's members. The "en banc" spelling is overwhelmingly favored by courts. A computer search conducted in 1996 found that more than 40,000 circuit court cases have used the term "en banc" compared with just under 5,000 cases (11%) that have used the term "in banc." When the search was confined to cases decided after 1990, the pattern remained the same — 12,600 cases using "en banc" compared to 1,600 (11%) using "in banc." The Supreme Court has used "en banc" in 959 of its opinions and "in banc" in 46 opinions. Indeed, the Supreme Court uses "en banc" in its own rules. See Sup. Ct. R. 13.3. The Committee decided to follow the spelling most commonly used.

Comments on Proposed Amendments to Rule 36

I. General Summary of Public Comments on Rule 36

There was only one comment on Rule 36. The commentator suggests substantive amendments to the rule. Specifically he suggests addressing the disposition of appeals without any explanatory opinion, and the practice of issuing opinions that are not for publication. Because both of these changes would be new substantive amendments, it is inappropriate to make them at this stage and the Advisory Committee should consider whether the suggestions should be placed on the agenda for future consideration.

II. Summary of Individual Comments on Rule 36

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

Mr. Lacovara suggests that Rule 36 is the appropriate place to address two issues not currently addressed by the rules:

1. the practice of disposing of appeals heard on the merits without issuing any explanatory opinion, no matter how brief, and
2. the practice of issuing opinions that are not for publication.

Mr. Lacovara believes that the rules should require an opinion, or at least a brief explanatory memorandum) in every case unless the panel concludes that the appeal was frivolous. A one-line affirmance not only denigrates the efforts of the parties, it also effectively insulates the appellate court's judgment from a rehearing petition and from a petition for certiorari. Mr. Lacovara also believes that there should be uniform, nationwide treatment of when decisions are precedential and when they are essentially private communications with the parties.

Gap Report

No post-publication changes are recommended.

Comment on Proposed Amendments to Rule 37

I. General Summary of Public Comments on Rule 37

There was only one comment on Rule 37. The commentator suggests one stylistic revision and one other change intended to make it clear that interest runs only from the most recent district-court judgment.

II. Summary of Individual Comments

1. David S. Ettinger, Esquire
Chair, Appellate Courts Committee
Los Angeles County Bar Association
P.O. Box 55020
Los Angeles, California 90055-2020

The last line of (a) is ambiguous if there have been multiple appeals and district-court judgments. The committee suggests inserting "affirmed" between "district court's" and "judgment was". That would make it clear that interest automatically runs only to the most recent district-court judgment.

To be consistent with the terminology used in Rule 39, in subdivision (b), "affirms in part, reverses in part" should be inserted between "modifies" and "or reverses a judgment."

Gap Report

No post-publication changes recommended. I am unsure whether either of the stylistic suggestions actually provide clarification.

Comments on Proposed Amendments to Fed. R. App. P. 38

I. General Summary of Public Comments on Rule 38

There was only one comment on Rule 38. The commentator asserts that the constitutional right to petition the government is not limited to non-frivolous petitions; therefore, the commentator asserts that Rule 38 is unconstitutional.

II. Summary of Individual Comments on Rule 38

1. Douglas B. McFadden, Esquire
McFadden, Evans & Still, P.C.
1627 Eye Street, N.W., Suite 810
Washington, D.C. 20005

Mr. McFadden states that Rule 38 violates the First Amendment because the First Amendment confers a right to petition the government for redress of grievances and is not limited to non-frivolous petitions.

Gap Report

No post-publication changes recommended.

Comments on Proposed Amendments to Rule 39

I. General Summary of Public Comments on Rule 39

Two comments on Rule 39 were received.

One commentator specifically supports omitting the reference to "printing" and using "copies" for fixing costs.

The other commentator suggests adding a word to be consistent with Rule 37. The same commentator suggests substantive amendments. The commentator suggests amending the rule to state whether the court of appeals or the district court determines attorney's fees awarded as costs on appeal and the procedure for determining such fees. Because that change would be a new substantive amendment, it is inappropriate to make at this stage and the Advisory Committee should consider whether the suggestions should be placed on the agenda for future consideration.

II. Summary of Individual Comments on Rule 39

1. Andrew Chang, Esquire
Chair, The Committee on Appellate Courts
The State Bar of California
555 Franklin Street
San Francisco, California 94102-4498

The committee supports the omission of the reference to "printing" and using instead the term "copies" for the purpose of fixing costs.

2. David S. Ettinger, Esquire
Chair, Appellate Courts Committee
Los Angeles County Bar Association
P.O. Box 55020
Los Angeles, California 90055-2020

In (a)(4), "modified" should be inserted on the second line between "reversed in part," and "or vacated" to be consistent with the terminology used in Rule 37.

The committee also asks whether the rule should state whether the court of appeals or the district court determines any attorney's fees awarded as costs on

appeal and the procedure for determining such fees. It notes that the Ninth Circuit requires a separate request for attorney's fees and requires that a party intending to request attorney's fees state that intent in its first brief.

Gap Report

I recommend adding the word "modified" to (a)(4). Cannot an "affirmed" judgment can be "modified" without "reversing" any portion of it?

I also recommend adding a sentence to the Committee Note. The sentence is intended to make it clear that attorney's fees are not assesssed as costs under Rule 39.

Comments on Proposed Amendments to Rule 40

I. General Summary of Comments on Rule 40

There were two comments on Rule 40.

One commentator suggests amending the rule to treat a pleading that requests rehearing en banc as if it also included a petition for panel rehearing.

One commentator recommends that the Advisory Committee amend Rules 35 and 40 to include specific reference to the tolling effect of a petition for rehearing en banc, or that the Committee urge the Supreme Court to amend its rules so that it is clear that the filing of a petition for rehearing en banc tolls the time for filing a petition for certiorari.

II. Summary of Individual Comments on Rule 40

1. Jack N. Goodman, Esquire
National Association of Broadcasters
Vice President/Policy Counsel
Legal Department
1771 N Street, N.W.
Washington, D.C. 20036-2891

Mr. Goodman suggests amending the rule to provide that a pleading requesting rehearing en banc should be deemed to include both a petition for rehearing by the panel that decided the case and a suggestion for rehearing en banc. The suggestion is intended to eliminate the trap for the unwary that exists under current procedures because a petition for panel rehearing does not extend the time for filing a petition for *certiorari*.

2. Paul Alan Levy, Esquire
Public Citizen Litigation Group
1600 20th Street, N.W.
Washington, D.C. 20009-1001

Public Citizen recommends that the Advisory Committee amend Rules 35 and 40 to include specific reference to the tolling effect of a petition for rehearing en banc, or that the Advisory Committee urge the Supreme Court to amend its rules so that it is clear that the filing of a petition for rehearing en banc tolls the time for filing a petition for certiorari.

III. Internal Comments

1. Joe Spaniol says that Rule 40 deals exclusively with rehearing by the panel that originally heard the appeal; yet the word "panel" does not appear in the rule or its heading. On the other hand, the words "panel rehearing" are used in line 2 of restyled Rule 35(b)(3). He suggests that, at a minimum, the heading of Rule 40 be amended to say "Rule 40 Petition for Panel Rehearing." And perhaps the word "panel" might appropriately be added to the text of the rule.

Gap Report

1. I recommend adoption of Joe Spaniol's suggestion; it distinguishes petitions for panel rehearing from petitions for rehearing en banc.

2. Mr. Goodman suggests treating every pleading that requests rehearing en banc as if it includes a petition for panel rehearing. Several circuits have adopted that approach in order to eliminate the trap that concerns both Mr. Goodman and Mr. Levy. The Advisory Committee rejected this approach in favor of a more straight forward approach, that of having a request for rehearing en banc also suspend finality of judgment and delay the running of time for filing a petition for a writ of certiorari.

3. Mr. Levy's concern is addressed in the Gap Report to Rule 35.

Comments on Proposed Amendments to Rule 41

None

Gap Report

1. The changes noted are the result of comments submitted following the September 1995 publication of this rule. The amendments suggested in the September 1995 publication, and the Advisory Committee's post-publication recommendations, have been not been formally approved by the Standing Committee (although a straw vote taken in July 1996 disclosed no opposition to them) and the changes were not forwarded to the Judicial Conference. The Advisory Committee chose to delay forwarding the changes until the close of the comment period on the style packet.

   Because there were no comments on Rule 41 as it appeared in the style packet, no further amendments of the text are recommended.

   A copy of the Gap Report (following the summer 1995 publication) submitted to the Standing Committee in July 1996 follows this page. Because the Standing Committee has not formally approved the changes published in September 1995, or the post-publication changes recommended by the Advisory Committee, the Gap Report probably needs to be carried forward as part of this report.

2. Because there were no comments on Rule 41 as it appears in the style packet, I do not recommend any post-publication changes except to substitute for the Committee Note appearing in the style packet, the Committee Note developed in connection with the process described above.

   The Committee Note is inserted into the rules packet following Rule 41. I have made slight changes in the Committee Note so that it is consistent with the rest of the notes in the style packet. The changes are shaded for your convenience.

Excerpts from June 1996 Report to the Standing Committee

Gap Report on Rule 41

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 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 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 must be served on all parties and

must 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~~ must not exceed ~~30~~ 90 days, unless the period is extended for good cause ~~shown~~, or unless the party who obtained the stay files a petition for the writ and so notifies the circuit clerk during the period of the stay. ~~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~~ 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 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. If a petition for rehearing or a petition for rehearing en banc is granted, the court enters

a new judgment after the rehearing and the mandate issues within the normal time after entry of that judgment.

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. 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 stays the issuance of the mandate until the court disposes of the petition or motion. The provision that a petition for rehearing en banc 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. 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 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. 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.

Public Comments on 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, contained comments from two of the sections' committees. There were therefore nine commentators. Six of the commentators approved the amendments without reservation. Two other commentators suggested revisions. One commentator made no substantive comments. None of them expressed general disapproval of the proposed changes.

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.

Gap Report on Rule 41

All but one of the changes are stylistic. The stylistic changes are the same as those in the restyled rule published in April.

The one new change is in subparagraph (d)(2)(B). The language was changed to make it clear that the party, not the Supreme Court Clerk, has the burden of notifying the court of appeals when the party has filed a petition for a writ or

certiorari.

Comments on Proposed Amendments to Rule 42

None

Gap Report

No post-publication changes recommended.

Comments on Proposed Amendments to Rule 43

There were no public comments.

III. Internal Comments

1. With regard to the heading for 43(c)(2), Joe Spaniol says that Webster's International Dictionary shows "officeholder" as one word; there should be no hyphen.

Gap Report

I recommend changing "Office-Holder" to "Officeholder" in (c)(2).

Comments on Proposed Amendments to Rule 44

I. General Summary of Public Comments on Rule 44

Two comments on Rule 44 were received.

One commentator suggests that the Advisory Committee consider making the rule applicable to constitutional challenges to federal regulations. Because that change would be a new substantive amendment, it is inappropriate to make at this stage and the Advisory Committee should consider whether the suggestions should be placed on the agenda for future consideration.

The other commentator suggests stylistic revisions.

II. Summary of Individual Comments on Rule 44

1. Honorable Cornelia G. Kennedy
United States Circuit Judge
Theodore Levin U.S. Courthouse
231 West Lafayette Boulevard
Detroit, Michigan 48226

Judge Kennedy asks whether consideration has been given to making the rule applicable to constitutional challenges to federal regulations.

2. Walter H. Fleischer, Esquire
1850 M Street, N.W., Suite 800
Washington, D.C. 20036

Mr. Fleischer suggests rewriting the first sentence as follows:

> A party which questions the constitutionality of any Act of Congress in a proceeding in which the United States or its agency, officer, or employee is not a party in an official capacity must give written notice to the circuit clerk immediately upon the filing of the record or as soon as the question is raised in the court of appeals.

Gap Report

No post-publication changes recommended.

Comments on Proposed Amendments to Rule 45

I. General Summary of Public Comments on Rule 45

Only one comments on Rule 45 was received. It asks whether dropping the word "proper" increases the clerks' potential obligations.

II. Summary of Individual Comments on Rule 45

1. Cathy Catterson, Clerk of Court
United States Court of Appeals
121 Spear Street
P.O. Box 193939
San Francisco, California 94119-3939
(forwarding the comments of individual members of the Ninth Circuit Advisory Committee)

   Existing Rule 45(a) requires the clerk's office to remain open for the filing of any "proper" paper, the new version drops the use of the word proper. The commentator asks whether the change adds a potential obligation as to which the clerk currently has discretion.

III. Internal Comments

1. Joe Spaniol suggests that the last sentence of (a)(2) ["A court may provide . . . that the clerk's office be open for specified hours on Saturdays or on legal holidays other than . . ."] be deleted as obsolete. He says there is no comparable provision in the Civil or Criminal Rules and he does not think that any court of appeals now requires its clerk to maintain office hours on Saturdays or legal holidays. He thinks this change could be made without publication.

Gap Report

1. Dropping the word "proper" from 45(a)(2) probably has no substantive import because the recent amendment of Rule 25(a)(4) prohibits a clerk to refuse to accept a paper for filing because "it is not presented in proper form." It is possible that a paper is not "proper" because it may not be filed in a court of

appeals, for example when it should be filed in the district court.

2. I do not recommend dropping the last sentence of (a)(2) at this point in time. My recommendation may be the result of excessive caution. The style package has been well received. I would not want to give opportunity for criticism. Making arguably substantive changes without republication, could do so.

Comments on the Proposed Amendments to Rule 46

I. General Summary of Public Comments on Rule 46

Four comments on Rule 46 were submitted.

None of the commentators expressed either general approval or disapproval of the proposed amendments; instead, they offered comments on specific provisions.

One commentator asks whether (a)(1) should continue to refer to the Canal Zone.

One commentator would omit as unnecessary the reference to the clerk in (a)(2). Another commentator specifically supports the language change in the (a)(2) oath -- from "demean" to "conduct."

One commentator suggests a substantive change. He suggests amending the rule so that once a person becomes a member of the bar of a court of appeals for any circuit, that person may appear as counsel in any other circuit without the need for admission to the bar of that court. Because that change would be a new substantive amendment, it is inappropriate to make at this stage and the Advisory Committee should consider whether the suggestions should be placed on the agenda for future consideration.

II. Summary of Individual Comments on Rule 46

1. Francis H. Fox, Esquire
Bingham, Dana and Gould LLP
150 Federal Street
Boston, Massachusetts 02110-1726

Mr. Fox asks whether the rule should continue to refer to the Canal Zone.

2. Walter H. Fleischer, Esquire
1850 M Street, N.W., Suite 800
Washington, D.C. 20036

Mr. Fleischer suggests amending the first sentence to read:

> Applications for admission must be filed on a form approved by the court, and must contain the applicant's personal statement showing

eligibility for membership.

He believes that the reference to the clerk is unnecessary; any applicant who needs the form but lacks the sense to contact the clerk's office should not be admitted.

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

Mr. Lacovara suggests that Rule 46 be revised to specify that:

> "a member of the bar of the court of appeals for any circuit may appear as counsel in any other circuit without the need for admission to the bar of that court."

The current admission requirements reflect an anachronistic and unnecessary balkanization of federal appellate practice. The court would still be able to take disciplinary action against an attorney who practices before the court. While there are legitimate reasons for preserving the bars for each circuit - they are the natural core of Circuit Judicial Conferences and of other court committees - there is no longer a good reason to require formal admission as a precondition to handling a case before a particular court.

4. Gary S. Chilton, Esquire
Andrews Davis Legg Bixler Milsten & Price
500 West Main
Oklahoma City, Oklahoma 73102-2275

Mr. Chilton's letter (to Mr. Fisher, Clerk of the Tenth Circuit) agrees with the proposed word change from "demean" to "conduct" in the attorney oath.

III. Internal Comments

Judge Parker suggests amending the caption and the first sentence of (c) to state:

> "**Discipline.** A court of appeals may discipline an attorney who practices before it for conduct unbecoming a member of the bar or for failure to comply with any court rule."

Gap Report

1. I recommend adoption of Judge Parker's style suggestions.

2. The reference in (a)(2) to the clerk is unnecessary, I recommend deleting it.

3. I think there is no further need to refer to the Canal Zone.

4. An amendment that dispenses with the need to be admitted in each circuit once an attorney is admitted in one circuit would be a major substantive change that is not appropriate at this stage.

Comments on Proposed Amendments to Rule 47

I. General Summary of Public Comments on Rule 47

Three comments on Rule 47 were received.

None of the commentators expressed either general approval or disapproval of the proposed amendments; instead, they offered comments on specific provisions.

One commentator suggests retention of the language that requires a court of appeals' order in a particular case to be "consistent with federal law, these rules, and local rules of the circuit." Another commentator asks whether the federal rules and local circuit rules are encompassed within "federal law" or if there is a substantive change.

One commentator suggests some minor language modifications to clarify the meaning of the rule.

II. Summary of Individual Comments on Rule 47

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

Mr. Lacovara suggests that 47(a) should refer to general directives to "parties or lawyers" rather than to "a party or a lawyer." If a directive is address to a specific party or specific lawyer, it may well be in the form of an order. It is only when the requirements are intended to affect the class of "parties" or "lawyers" that Rule 27 appropriately insists that the requirements be embodied in formal local rules.

In 47(b), Mr. Lacovara suggests substituting "had" for "has." The objective of the rule is to preclude sanctions unless the alleged violator "had received" actual notice of the requirement before the alleged violation. The use of "has" leaves open the possibility of interpreting the rule to permit sanctions so long as the court transmits "actual notice" of the requirement in a show cause order - in such an instance the violator "has received" notice.

2. Saul A. Green
United States Attorney
211 W. Fort Street, Suite 2300
Detroit, Michigan 48226

Currently, 47(b) allows the courts of appeals to "regulate practice in a particular case in any manner consistent with federal law, these rules, and local rules of the circuit." The current rule has been useful to practitioners faced with directives from clerk's office personnel that appear inconsistent with directives contained in the federal or local rules. In contrast, the proposed rule would permit the courts -- acting through their clerks' offices -- to "regulate practice in a particular case in any manner consistent with federal law." He fears that the clerks' offices will not interpret "federal law" as encompassing the federal and local rules. He urges retention of the requirement that orders in particular cases must conform to the federal rules and local circuit rules.

3. Cathy Catterson, Clerk of Court
United States Court of Appeals
121 Spear Street
P.O. Box 193939
San Francisco, California 94119-3939
(forwarding the comments of individual members of the Ninth Circuit Advisory Committee)

The existing rule allows the court to regulate practice in any manner consistent with federal law "these rules and local rules of the circuit." The new rule deletes the quoted language. Is it assumed that the federal and local rules are encompassed within "federal law" or is there a substantive change?

Gap Report

1. I recommend adoption of both of Mr. Lacovara's style suggestions; they both add clarity.

2. I do not recall any Committee discussion about deleting reference at the end of the first sentence of (b) to "these rules, and local rules of the circuit." An argument that the term "federal law" encompasses the federal and local rules is undercut by second sentence that prohibits imposing a sanction for noncompliance with a requirement that is not in "federal law, federal rules, or the local circuit rules" unless the violator had actual notice of the requirement. I recommend reinserting the language found in the existing rule. This is consistent with Civil Rule 83.

Comments on Proposed Amendments to Rule 48

None

Gap Report

No post-publication changes recommended.

Agenda Item III

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

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

FROM: Carol Ann Mooney, Reporter

DATE: March 12, 1997

SUBJECT: Proposed amendments to Rules 5 and 5.1, and to Form 4

In August 1996 the Advisory Committee, with the approval of the Standing Committee, published proposed amendments to Federal Rules of Appellate Procedure 5 and 5.1 and to Form 4. The period for public comment closed on February 15, 1997. At the Advisory Committee's meeting on April 3 and 4, the committee must consider all the comments and decide whether to make any changes in the published rules. If the committee decides to make changes, it has the further task of deciding whether the amendments are substantial. If substantial amendments are made, it may be necessary to republish the rule(s). If only minor changes are made, republication is not necessary.

Existing Rule 5 and 5.1 are combined in a new Rule 5. Rule 5.1 is largely repetitive of Rule 5 and it has become obsolete since the enactment of the *Federal Courts Improvement Act of 1996* . New Rule 5 is intended to govern all discretionary appeals from district court orders, judgments, or decrees. Most of the changes are intended only to broaden the language so that the Rule applies to all discretionary appeals. The time for filing provision, for example, states only that the petition must be filed within the time provided by the statute or rule authorizing the appeal or, if no such time is specified, within the time provided by Rule 4(a) for filing a notice of appeal. A uniform time - 7 days - is established for filing an answer in opposition or a cross-petition.

Form 4 is substantially revised to obtain more detailed information needed to assess a party's eligibility to proceed in forma pauperis. The revision was initially

undertaken in response to a September 1995 request from the Clerk of the United States Supreme Court. (The Supreme Court requires a party who desired to proceed IFP to file an affidavit or declaration in the form prescribed by Form 4.)

In addition, the federal statutory provisions governing IFP status were substantially amended in spring 1996 by the *Prison Litigation Reform Act*.

~~**Rule 5. Appeal by Permission Under 28 U.S.C. § 1292 (b)**~~

~~(a) ***Petition for permission to appeal.*** An appeal from an interlocutory order containing the statement prescribed by 28 U.S.C. § 1292(b) may be sought by filing a petition for permission to appeal with the clerk of the court of appeals within 10 days after the entry of such order in the district court with proof of service on all other parties to the action in the district court. An order may be amended to include the prescribed statement at any time, and permission to appeal may be sought within 10 days after entry of the order as amended.~~

~~(b) ***Content of petition; answer.*** The petition shall contain a statement of the facts necessary to an understanding of the controlling question of law determined by the order of the district court; a statement of the question itself; and a statement of the reasons why a substantial basis exists for a difference of opinion on the question and why an immediate appeal may materially advance the termination of the litigation. The petition shall include or have annexed thereto a copy of the order~~

~~from which appeal is sought and of any findings of fact, conclusions of law and opinion relating thereto. Within 7 days after service of the petition an adverse party may file an answer in opposition. The application and answer shall be submitted without oral argument unless otherwise ordered.~~

~~(c) ***Form of Papers; Number of Copies.*** — All papers may be typewritten. An original and three copies must be filed unless the court requires the filing of a different number by local rule or by order in a particular case.~~

~~(d) ***Grant of permission; cost bond; filing of record.*** — Within 10 days after the entry of an order granting permission to appeal the appellant shall (1) pay to the clerk of the district court the fees established by statute and the docket fee prescribed by the Judicial Conference of the United States and (2) file a bond for costs if required pursuant to Rule 7. The clerk of the district court shall notify the clerk of the court of appeals of the payment of the fees. Upon receipt of such notice the clerk of the court of appeals shall enter the appeal upon the docket. The record shall be transmitted and filed in accordance with Rules 11 and 12(b). A notice of~~

~~appeal need not be filed.~~

~~Rule 5.1. Appeal by Permission Under 28 U.S.C. § 636(c)(5)~~

~~**(a) *Petition for Leave to Appeal; Answer or Cross Petition.***— An appeal from a district court judgment, entered after an appeal under 28 U.S.C. § 636(c)(4) to a district judge from a judgment entered upon direction of a magistrate judge in a civil case, may be sought by filing a petition for leave to appeal. An appeal on petition for leave to appeal is not a matter of right, but its allowance is a matter of sound judicial discretion. The petition shall be filed with the clerk of the court of appeals within the time provided by Rule 4(a) for filing a notice of appeal, with proof of service on all parties to the action in the district court. A notice of appeal need not be filed. Within 14 days after service of the petition, a party may file an answer in opposition or a cross petition.~~

~~**(b) *Content of Petition; Answer.***— The petition for leave to appeal shall contain a statement of the facts necessary to an understanding of the questions to be presented by the appeal; a statement of those questions and of the relief sought; a statement of the reasons why in~~

~~the opinion of the petitioner the appeal should be allowed; and a copy of the order, decree or judgment complained of and any opinion or memorandum relating thereto. The petition and answer shall be submitted to a panel of judges of the court of appeals without oral argument unless otherwise ordered.~~

~~(c) *Form of Papers; Number of Copies.* All papers may be typewritten. An original and three copies must be filed unless the court requires the filing of a different number by local rule or by order in a particular case.~~

~~(d) *Allowance of the Appeal; Fees; Cost Bond; Filing of Record.* Within 10 days after the entry of an order granting the appeal, the appellant shall (1) pay to the clerk of the district court the fees established by statute and the docket fee prescribed by the Judicial Conference of the United States and (2) file a bond for costs if required pursuant to Rule 7. The clerk of the district court shall notify the clerk of the court of appeals of the payment of the fees. Upon receipt of such notice, the clerk of the court of appeals shall enter the appeal upon the docket. The record shall be transmitted and filed in accordance with Rules 11 and 12(b).~~

Rule 5 Appeal by Permission

(a) Petition for Permission to Appeal.

(1) To request permission to appeal when an appeal is within the court of appeals' discretion, a party must file a petition for permission to appeal. The petition must be filed with the circuit clerk with proof of service on all other parties to the district-court action.

(2) The petition must be filed within the time specified by the statute or rule authorizing the appeal or, if no such time is specified, within the time provided by Rule 4(a) for filing a notice of appeal.

(3) If a party cannot petition for appeal unless a district court first enters an order granting permission to do so or stating that the necessary conditions are met, the district court may amend its order, either sua sponte or in response to a party's motion, to include the required permission or statement. In that event, the time to

petition runs from entry of the amended order.

(b) Contents of the Petition; Answer or Cross-Petition.

(1) The petition must include the following:

(A) the facts necessary to understand the question presented;

(B) the question itself;

(C) the relief sought;

(D) the reasons why~~, in the opinion of the petitioner,~~ the appeal should be allowed — including reasons that the appeal is within the grounds, if any, established by the statute or rule claimed to authorize the appeal; and

(E) an attached copy of:

(i) the order, decree, or judgment complained of and any related opinion or memorandum, and

(ii) any order stating the district

court's permission to appeal or finding that any necessary conditions to appeal are met.

(2) A party may file an answer in opposition or a cross-petition within 7 days after the petition is served.

(3) The petition and answer will be submitted without oral argument unless the court of appeals orders otherwise.

(c) **Form of Papers; Number of Copies.** All papers must conform to Rule 32(a)(1). Three copies must be filed with the original, unless the court requires a different number by local rule or by order in a particular case.

(d) **Grant of Permission; Fees; Cost Bond; Filing the Record.**

(1) Within 10 days after the entry of the order granting permission to appeal, the appellant must:

(A) pay the district clerk all required fees; and

(B) file a cost bond if required under

Rule 7.

(2) A notice of appeal need not be filed but the date when the order granting permission to appeal is entered serves as the date of the notice of appeal for calculating time under these rules.

(3) The district clerk must notify the circuit clerk once the petitioner has paid the fees. Upon receiving this notice, the circuit clerk must enter the appeal on the docket. The record must be forwarded and filed in accordance with Rules 11 and 12(c).

Committee Note

In 1992 Congress added paragraph (e) to 28 U.S.C. § 1292. Paragraph (e) says that the Supreme Court has power to prescribe rules that "provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for" in section 1292. The amendment of Rule 5 was prompted by the possibility of new rules authorizing additional interlocutory appeals. Rather than add a separate rule governing each such appeal, the Committee believes it is preferable to amend Rule 5 so that it will govern all such appeals.

In addition the *Federal Courts Improvement Act of 1996*, Pub. L. 104-317, abolished appeals by permission under 28 U.S.C. § 636(c)(5), making Rule 5.1 obsolete. ~~Rule 5.1 has been largely repetitive of Rule 5 and the Committee believes that its provisions could also be subsumed into Rule 5. Although Rule 5.1 did not deal with an interlocutory appeal, the similarity to Rule 5 was based upon the fact that both rules governed~~

~~discretionary appeals.~~

This new Rule 5 is intended to govern all discretionary appeals from district court orders, judgments, or decrees. At this time that includes interlocutory appeals under 28 U.S.C. § 1292(b), (c)(1), and (d)(1) &(2) ~~and the discretionary appeal under 28 U.S.C. § 636(c) from a district court judgment entered after an appeal from a judgment entered on direction of a magistrate judge in a civil case.~~ If additional interlocutory appeals are authorized under § 1292(e), the new Rule is intended to govern them if the appeals are discretionary.

Subdivision (a). Paragraph (a)(1) says that when granting an appeal is within a court of appeals' discretion, a party may file a petition for permission to appeal. The time for filing provision states only that the petition must be filed within the time provided in the statute or rule authorizing the appeal or, if no such time is specified, within the time provided by Rule 4(a) for filing a notice of appeal.

Section 1292(b), (c), and (d) provide that the petition must be filed within 10 days after entry of the order containing the statement prescribed in the statute. Existing Rule 5(a) provides that if a district court amends an order to contain the prescribed statement, the petition must be filed within 10 days after entry of the amended order. The new rule similarly says that if a party cannot petition without the district court's permission or statement that necessary circumstances are present, the district court may amend its order to include such a statement and the time to petition runs from entry of the amended order.

The provision that the Rule 4(a) time for filing a notice of appeal should apply if the statute or rule is silent about the filing time was drawn from existing Rule 5.1.

Subdivision (b). The changes made in the provisions in paragraph (b)(1) are intended only to broaden them sufficiently to make them appropriate for all discretionary appeals.

In paragraph (b)(2) a uniform time — 7 days — is established for filing an answer in opposition or a cross-petition. Seven days is the time for responding under existing Rule 5 and is an appropriate length of time when dealing with an interlocutory appeal. Although existing Rule 5.1 provides 14

days for responding, the Committee does not believe that the longer response time is necessary ~~because an appeal under § 636(c)(5) is a second appeal and the party involved will have had sufficient time to develop a response or cross-petition~~.

Subdivision (c). Subdivision (c) is substantively unchanged.

Subdivision (d). Paragraph (d)(2) is amended to state that "the date when the order granting permission to appeal is entered serves as the date of the notice of appeal" for purposes of calculating time under the rules. That language simply clarifies existing practice.

Comments on Proposed Amendments to Rules 5 and 5.1

I. General Summary of Comments on Proposed Rule 5

Eight comments on proposed Rule 5 were received.

Four commentators express general support for the proposed rule; two of them also offer suggestions for further improvement. None of the commentators express general opposition to the proposed rule.

Two commentators are concerned that 7 days is a short time to prepare and submit opposition to a petition or a cross-petition. One of those commentators suggests extending the "mailbox rule" so that a response or cross-petition is timely if mailed or delivered to a commercial carrier within the 7-day period. The other commentator recommends a 14-day period for responding.

One commentator suggests amending (a)(3) so that it explicitly says that a district court "may amend" an order that a party wishes to appeal and the amendment may be undertaken either in response to a party's request or *sua sponte*.

One commentator suggests deleting the word "in the opinion of the petitioner" from (b)(1)(D).

One commentator says that the term "cost bond" in (d)(1)(B) is too vague.

One commentator suggests that because most appeals by permission are interlocutory the rule should require expedited treatment of them. The commentator suggests adding another subparagraph to 5(d), or creating paragraph 5(e) that would require expedited treatment for appeals under § 1292(b), (c)(1), or (d) as well as when

permission to appeal is granted under § 1292(e). The same commentator suggests that at some later time the Advisory Committee consider according such expedited treatment to other kinds of interlocutory appeals.

II. Summary of Individual Comments on Proposed Rule 5

1. Professor Thomas D. Rowe, Jr.
Duke University School of Law
Box 90360
Durham, North Carolina 27708-0360

Professor Rowe notes that in 5(b)(1)(D) the continued use of the words "in the opinion of the petitioner" reads jarringly and may be in tension with the standard rules about the irrelevance of an advocate's opinion. He notes that new Rule 5(b)(1)(C) refers to giving "the reasons why," without reference to anyone's opinion. If it is necessary to avoid complete elimination of the old Rule 5(b), he suggests replacing "in the opinion of the petitioner" with"the petitioner contends" or a similar formulation.

2. Christopher S. Underhill, Esquire
Hartman Underhill & Brubaker
Lancaster, Pennsylvania 17602-2782

Mr. Underhill supports the proposed changes; he says they simplify and clarify two rules that were wordy and confusing.

3. Jack E. Horsley, Esquire
Craig and Craig
1807 Broadway Avenue
P.O. Box 689
Mattoon, Illinois 61938-0689

Mr. Horsley criticizes the use of the term "cost bond" in (d)(1)(B) as vague. He suggests instead that the rule state:

> (B) file a cost bond <u>including all printing costs, filing fees, reimbursement for sanctions which have been reversed and any other costs or expenses,</u> if required under Rule 7.

4. Ronald F. Waterman, Esquire
Gough, Shanahan, Johnson & Waterman
33 South Last Chance Gulch
Helena, Montana 59601

He generally supports the proposed amendments because they substantially clarify the language of the rule. In 5(b)(1)(B) he would strike the word "itself" and replace it with the word "presented" making it internally consistent and consistent with 5(b)(1)(A).

5. Andrew Chang, Esquire
Chair, The State Bar of California, Committee on Appellate Courts
555 Franklin Street
San Francisco, California 94102

The Committee generally supports the amendments. However, the Committee suggests that the period for filing an answer or cross-petition should be 10, rather than 7, days. The Committee states that there generally is a 10-day period for filing a petition for permission to appeal, and that a 10-day period for filing and answer or cross-petition would be more appropriate.

6. Paul Alan Levy, Esquire
Public Citizen Litigation Group
1600 20th Street, N.W.
Washington, D.C. 20009-1001

Public Citizen suggests amending (a)(3) to make explicit that the district court "may amend" the original order that a party wishes to appeal either in response to a request from one or both parties, or *sua sponte*. The first sentence of (a)(3) would then read:

> If a party cannot petition for appeal unless the district court first enters an order granting permission to do so or stating that the necessary conditions are met, the district court may amend its order, <u>either sua sponte or in response to a motion by a party,</u> to include the required permission or statement.

Because 7 days is a short period within which to prepare and submit opposition to a petition or a cross-petition, Public Citizen would make the mailbox rule applicable so that the response or cross-petition is timely if mailed or delivered to a commercial carrier within the 7-day period established in (b)(2). Public Citizen also suggests that the rule should state whether reply memoranda will be accepted in the absence of leave of court.

Public Citizen notes that most appeals by permission are interlocutory and concern issues that need to be resolved before the litigation still pending in the district court can be completed. Public Citizen suggests that if permission to appeal is granted, it warrants expedited treatment. Public Citizen suggests the following addition either in 5(d)(4) or 5(e).

> **Expedition of Interlocutory Appeals by Permission.** When permission for appeal has been granted under 28 U.S.C. § 1292(b), 1292(c)(1), or 1292(d), the case shall be set for oral argument as soon as possible after briefing has been completed. In circuits where the briefing schedule is set based on the oral argument date, that date shall be set as soon as practicable. The same provisions of expedition shall apply to interlocutory appeals by permission granted under 28 U.S.C. § 1292(e), unless the rule authorizing such appeals provides otherwise.

Public Citizen urges the Advisory Committee whether to accord similar expedition to other kinds of interlocutory appeals which, although not subject to a grant of permission, nevertheless delay the litigation of matters that remain in the district court, for example appeals of qualified immunity under the collateral order doctrine.

7. George E. Tragos, Esquire
Chair, Florida Bar Association, Federal Court Practice Committee's Subcommittee on Criminal Rules
600 Cleveland Street
Clearwater, Florida 34615

The Board of Governors of the Florida Bar Association adopted the subcommittee's position and authorized its communication. The Florida Bar says that 5(b)(2) is an attempt to change a time limitation from 14 to 7 days. Seven days is too short to file an answer in opposition to a petition or to file a cross petition. The Florida Bar recommends that the 14-day period for responding be maintained.

8. Dana E. McDonald
President, Federal Bar Association
1815 H. Street, N.W.
Washington, D.C. 20006-3697

The Federal Bar Association endorses the proposed amendments.

Gap Report

1. The 7-day response time is identical to the response time currently provided by Rule 5. There was not unanimity when the Advisory Committee discussed the response time. One member suggested that it should be 14 days. That was rejected because a petitioner under § 1292(b) has only 10 days to file the petition; it would be anomalous to give an opposing party a longer response

time. Another member suggested that the response time should be 10 days. Because most petitions are denied, the consensus was that expanding the response time beyond 7 days would cause unnecessary delay.

If the Committee wishes to reexamine the question, I recommend that the longest time that should be considered is 10 days.

2. I recommend adoption of the proposed amendment of (a)(3).

3. I also recommend adoption of the proposed amendment of (b)(1)(D).

4. I do not recommend changing the term "cost bond."

5. It is certainly desirable to expedite interlocutory appeals. I am uncertain whether a rule amendment is necessary to achieve that goal, or if it is the best way to do so.

Form 4

Affidavit Accompanying Motion for Permission to Appeal In Forma Pauperis

United States District Court for the _____ District of _____

A.B., Plaintiff

v. Case No. _____

C.D., Defendant

Affidavit in Support of Motion	**Instructions**
I swear or affirm under penalty of perjury that, because of my poverty, I cannot prepay the docket fees of my appeal or post a bond for them. I believe I am entitled to redress. I swear or affirm under penalty of perjury under United States laws that my answers on this form are true and correct. (28 U.S.C. § 1746; 18 U.S.C § 1621.)	Complete all questions in this application and then sign it. Do not leave any blanks: if the answer to a question is "0." "none," or "not applicable (N/A)," write in that response. If you need more space to answer a question or to explain your answer, attach a separate sheet of paper identified with your name, your case's docket number, and the question number.
Signed: _____	Date: _____

If you do not currently live with your husband/wife, you may write "N/A" in response to any question about your spouse.

My issues on appeal are:

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	**Average monthly amount during the past 12 months**		**Amount expected next month**	
	You	**Spouse**	**You**	**Spouse**
Employment	$_____	$_____	$_____	$_____
Self-employment	$_____	$_____	$_____	$_____
Income from real property (such as rental income)	$_____	$_____	$_____	$_____
Interest and dividends	$_____	$_____	$_____	$_____
Gifts	$_____	$_____	$_____	$_____
Alimony	$_____	$_____	$_____	$_____
Child support	$_____	$_____	$_____	$_____
Retirement (such as social security, pensions, annuities, insurance)	$_____	$_____	$_____	$_____
Disability (such as social security, insurance payments)	$_____	$_____	$_____	$_____
Unemployment payments	$_____	$_____	$_____	$_____
Public-assistance (such as welfare)	$_____	$_____	$_____	$_____
Other (specify):_____	$_____	$_____	$_____	$_____
Total monthly income:	$_____	$_____	$_____	$_____

for the past 2 years

2. *List your employment history, most recent employer first. (Gross monthly pay is before taxes or other deductions.)*

Employer	Address	Dates of employment	Gross monthly pay

for the past 2 years

3. *List your spouse's employment history, most recent employer first. (Gross monthly pay is before taxes or other deductions.)*

Employer	Address	Dates of employment	Gross monthly pay

4. *How much cash do you and your spouse have?* $_____
Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial institution	Type of account	Amount you have	Amount your spouse has
		$_____	$_____
		$_____	$_____
		$_____	$_____

If you are a prisoner, you must attach a statement certified by the appropriate institutional officer showing all receipts, expenditures, and balances during the last six months in your institutional accounts. If you have multiple accounts, perhaps because you have been in multiple institutions, attach one certified statement of each account.

5. *List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.*

Home (Value)	**Other real estate** (Value)	**Motor vehicle #1** (Value)
		Make & year:
		Model:
		Registration #:

Motor vehicle #2 (Value)	**Other assets** (Value)	**Other assets** (Value)
Make & year:		
Model:		
Registration #:		

6. *State every person, business, or organization owing you or your spouse money, and the amount owed.*

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse

Seeking to appeal a judgment in a civil action or proceeding

7. *State the persons who rely on you or your spouse for support.*

Name	Relationship	Age
_____	_____	_____
_____	_____	_____
_____	_____	_____

8. *Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate.*

	You	Your Spouse
Rent or home-mortgage payment (include lot rented for mobile home) Are real-estate taxes included? ☐Yes ☐No Is property insurance included? ☐Yes ☐No	$_____	$_____
Utilities (electricity, heating fuel, water, sewer, and telephone)	$_____	$_____
Home maintenance (repairs and upkeep)	$_____	$_____
Food	$_____	$_____
Clothing	$_____	$_____
Laundry and dry-cleaning	$_____	$_____
Medical and dental expenses	$_____	$_____
Transportation (not including motor vehicle payments)	$_____	$_____
Recreation, entertainment, newspapers, magazines, etc.	$_____	$_____
Insurance (not deducted from wages or included in mortgage payments)	$_____	$_____
Homeowner's or renter's	$_____	$_____
Life	$_____	$_____
Health	$_____	$_____
Motor Vehicle	$_____	$_____
Other: _____	$_____	$_____
Taxes (not deducted from wages or included in mortgage payments) (specify): _____	$_____	$_____
Installment payments	$_____	$_____
Motor Vehicle	$_____	$_____
Credit card (name): _____	$_____	$_____
Department store (name): _____	$_____	$_____
Other: _____	$_____	$_____
Alimony, maintenance, and support paid to others	$_____	$_____
Regular expenses for operation of business, profession, or farm (attach detailed statement)	$_____	$_____
Other (specify): _____	$_____	$_____
Total monthly expenses:	$_____	$_____

9. *Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?*
☐Yes ☐No If yes, describe on an attached sheet.

10. *Have you paid — or will you be paying — an attorney any money for services in connection with this case, including the completion of this form?* ☐Yes ☐No

If yes, how much? $_____

If yes, state the attorney's name, address, and telephone number:

_____

_____

_____

11. *Have you paid — or will you be paying — anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?*
☐Yes ☐No

If yes, how much? $_____

If yes, state the person's name, address, and telephone number:

_____

_____

_____

12. *Provide any other information that will help explain why you cannot pay the docket fees for your appeal.*

13. *State the address of your legal residence.*

_____

_____

Your daytime phone number: (____) _____

Your age: _____ Your years of schooling: _____

Your social-security number: _____

Comments on Proposed Amendments to Form 4

I. General Summary of Public Comments on Form 4

Five comments on Form 4 were submitted.

Two commentators endorse the proposed changes. Two commentators oppose the proposed changes because of the expanded and detailed nature of the information requested. One of them says that the "penalty of perjury" clause obviates the need for collection of any detailed information.

Two commentators question the provisions requiring a prisoner to attach a certified statement of his or her institutional account for the last six months. The commentators note that a prisoner will not have control over obtaining a timely response to a request for such a statement. A third commentator focuses on the difficulty a prisoner would have in obtaining timely statements from previous institutions if the prisoner has lived in more than one institution during the relevant six-month period. That commentator suggests amending the form to require a certified statement from the institution in which the prisoner currently resides and the name of any other institutions in which the prisoner has had accounts during the same six-month period. Alternatively, the commentator suggests authorizing a court, with the prisoner's consent, to extrapolate from the statement obtained from the prisoner's current institution. If the prisoner refuses consent, the prisoner would be required to obtain statements from all relevant institutions.

Two commentators object to requiring an applicant to state the issues that the applicant wishes to pursue on appeal.

One commentator asks whether it is fair to treat the assets of the applicant's spouse as available to the petitioner because they may not be available to the applicant.

One commentator suggests that the form should make it clear that although a prisoner is required to pay the full filing fee even if IFP status is granted, the fee may be paid in installments from his/her institutional account if the prisoner does not presently have sufficient funds.

The same commentator also suggests that the form should reflect the fact that IFP status may apply not only to filing fees or the cost of bond for fees, but also to other costs such as preparation of the transcript.

One commentator suggests that there should be a specific time limit on employment history.

II. Summary of Individual Comments on Form 4

1. Bennet Boskey, Esquire
1800 Massachusetts Avenue, N.W.
Washington, D.C. 20036

Mr. Boskey says that the proposed revision "is an overreaction against the present lack of specificity."

He asks whether it is fair to treat the petitioner and the petitioner's spouse always as one. Even if it normally would be fair, shouldn't the form take into account that they may be separated, either by living apart or in their financial arrangements, and that the petitioner may not have any real access to the spouse's assets.

He questions the provision requiring prisoners to attach a certified statement of their receipts, expenditures and balances during the last six months in their institutional accounts. He asks whether timely response to such requests can be obtained.

2 Mr. Clayton R. Jackson 06751-097
Mr. Richard Arrota
Mr. Roscoe Foreman
C.S. 4500
North Las Vegas, Nevada 89036-4500

They suggest striking the last sentence of question four ("If you have multiple accounts, perhaps because you have been in multiple institutions, attach one certified statement of each account."). They suggest replacing it with the following:

> "If you have multiple accounts, attach one certified statement of each account. If you have had an account at more than one institution during the past six months, attach a certified statement of your account at your current institution (indicating the number of months this account has been active), and the name of any other institutions in which you have had accounts during the balance of the same six-month period."

They note that an incarcerated person is able to obtain a statement from his/her current institution. But if one has been at multiple institutions during the relevant six-month period, serious difficulties will arise in attempting to comply with the published language.

They propose another alternative -- permitting the court, with the permission of

the prisoner, to extrapolate for the six-month period based upon the certified balance of the reported period. If the prisoner refuses to consent, the prisoner would be required to obtain certified statements from every institution in which he/she resided during the six-month period.

3. David C. Long, Esquire
The State Bar of California
555 Franklin Street
San Francisco, California 94101-4498

The Board of Governors of the State Bar of California voted to oppose the proposed changes to Form 4. The decision was based upon recommendation of four State Bar Committees (Administration of Justice, Appellate Courts, and Legal Services Section, and the Litigation Section)

The bar committees and sections object to the requirement that prisoners provide certified statements from prison officials regarding their institutional accounts because prison officials are then in control of a prisoner's ability to obtain IFP status. That control may permit prison officials to effectively block a prisoner's appeal. They also note that obtaining the forms in time to meet the deadline for filing a notice of appeal will be especially difficult.

The committees also objected to the expanded and detailed nature of the information requested, noting that the burden of providing such information may serve as a deterrent to obtaining access to the appellate process.

The committees note that the form asks the applicant to list the issues on appeal. The subject matter of the appeal has no relevance to a motion for IFP status.

One committee says that the inclusion of the "penalty of perjury" clause obviates the need for Form 4 in its entirety.

4. Carol A. Brook, Esquire
William J. Genego, Esquire
Peter Goldberger, Esquire
Co-Chairs, National Association of Criminal Defense Lawyers
Committee on Rules of Procedure
1627 K Street, N.W.
Washington, D.C. 20006

The Committee notes that modification of Form 4 is necessary in light of the amendments to 28 U.S.C. § 1915. The Committee says that the proposed form is an improvement in many respects, but suggests a number of additional changes.

1. The form should make it clear that although § 1915(b)(1) requires a prisoner who files an appeal IFP to pay the full filing fee, the fee may be paid in installments from his/her institutional account if the prisoner does not presently have the funds to do so. The form also should inform prisoners that this requirement does not apply to habeas corpus of § 225 proceedings.
2. The form should reflect the fact that it applies to items other than payment of docket fees or a bond for fees. A litigant who is able to pay the filing fee, may not be able to pay other costs that are covered by § 1915, such as transcript preparation and, in certain circumstances, having the record on appeal printed.
3. The committee suggests deleting the portion of the form asking the applicant to state the issues on appeal.
   The form does not explain why an applicant should be required to state his or her issues on appeal. If the purpose is to aid in determining whether the appeal is "frivolous" under § 1915(d), it is not an effective, or fair, method to obtain that information. The applicant is not given notice that the response will be used to determine whether the appeal is frivolous, and thus whether IFP status will be granted.
   In addition, the form does not encourage full and complete statement of the issues -- the form suggests that a perfunctory statement, without supporting facts or other relevant information, is sufficient.
4. It would be helpful to include a specific time limit for employment history.

5. Dana E. McDonald
   President, Federal Bar Association
   1815 H. Street, N.W.
   Washington, D.C. 20006-3697

   The Federal Bar Association endorses the proposed amendments; indeed says, "Proposed Form 4 should be adopted without change."

Gap Report

1. The requirement that a prisoner attach a certified statement of his institutional account for the preceding six months is statutorily mandated. 28 U.S.C. § 1915(a)(2). Indeed, it is not even clear that the alternatives suggested by one commentator are workable. The statute requires a prisoner to:

   > ". . . submit a certified copy of the trust fund account statement (or institutional equivalent) for the prisoner for the 6-month period immediately preceding the filing of the complaint of notice of appeal, obtained from the appropriate official <u>of each prison at which the</u>

prisoner is or was confined."

The difficulty of obtaining statements from multiple institutions is, I think, obvious. The remedy is not so clear.

It is not clear how the supersession provision, 28 U.S.C. § 2072(b), would work if the Advisory Committee were to recommend some method short of obtaining certified statements from each institution. Section 2072(a) establishes the Supreme Court's power to "prescribe general rules of practice and procedure" and § 2072(b) says that "[a]ll laws in conflict with such rules shall be of no further force or effect after such rules have taken effect." Is Form 4 a rule? If not, does § 2072(b) apply? Even if Form 4 can be considered a "rule," is the requirement of supplying a certified statement a rule of "procedure"? Would amendment of Rule 24 be the better route?

Without regard to the questions raised in the preceding paragraph, the remedies suggested by the commentator both pose difficulties. One alternative suggested is for the form/rule to require a statement only from the prisoner's current institution and the names of all other institutions in which the prisoner resided during the past six months. Who would collect statements from the other institutions? The prisoner's consent probably would be necessary to obtain the statements. A consent could be included as part of Form 4. Would the court clerk's office then undertake the task of obtaining the statements? That could be a big undertaking. The other alternative, extrapolating from the statement obtained from the current institution, could be misleading. If the prisoner has been in a new institution a very short time, the chance that the extrapolation would be inaccurate probably rises sharply.

I don't see an easy solution.

I do recommend one amendment of the language dealing with the certified statements. The statute does not require the statements in criminal appeals. 28 U.S.C. § 1915(b)(1) requires them when a prisoner seeks to "bring a civil action or appeal a judgment in a civil action or proceeding." I have amended the language to conform to the statute.

2. The requirement that an applicant state the issues he/she wishes to pursue on appeal is not new. FRAP 24 does, and has, required such a statement. In addition, § 1915(a) also requires the affidavit to "state the nature of the action, defense or appeal and the affiant's belief that the person is entitled to redress."

3. I recommend limiting inquiry into the income and assets of a spouse if the two do not live together; in such instances, it is unlikely that the spouse's assets are available to the applicant and the applicant may have no means of obtaining the

information requested.

4. I also recommend placing a two-year time limit on the employment history asked for in questions 2 and 3.

Agenda Item IV

Proposed Substantive Amendments

Several of the commentators offered suggestions for improving the rules which I believed would work substantive changes. With the exception of the changes to Rules 27, 28, and 32, all of which were in process at the time of publishing the restyled rules, the current project is to rewrite the rules as clearly and logically as possible and to avoid making substantive changes except to the extent necessary to remove ambiguities.

With the exception of certain substantive changes made necessary by recent statutory amendments, making additional substantive changes at this point could delay, or possibly even derail, the project. Therefore, I have not recommended taking action on any of the newly proposed substantive amendments.

The Committee should determine, however, which of the suggestions it wants to place on its agenda for future consideration. Therefore, I have made a list of the suggestions.

Rule 4

1. The rule should clarify whether a cross-appeal is necessary to preserve an issue not addressed by the appellant.
2. The time computation problem discussed in the Committee Note be eliminated by amending Fed. R. App. P. 26(a) so that it is consistent with Fed. R. Civ. P. 6(a).
3. 4(a)(5) should not permit extensions of time for filing a notice of appeal upon a motion filed *ex parte*.

Rule 6

1. The rule should require the appellant to serve the statement of issues on other parties, not just on the appellee.
2. The rule should state who decides which exhibits are too bulky or heavy for routine transmission to the court of appeals, and at what time arrangements must be made for sending such exhibits to the court of appeals.

Rule 8

1. The rule should require a party appealing from a Bankruptcy Appeal Panel (B.A.P.) to first seek a stay from the B.A.P.
2. A reference to the B.A.P should be added to (a)(2).

Rule 15

Many appeals from agencies arise out of rulemaking proceedings. In such instances, it is not clear who is a party to the agency proceeding for the purpose of the 15(c)(1) requirement to serve the petition on all parties "admitted to participate in the agency proceedings." One commentator suggests amending Rule 15 to incorporate the solution adopted by D.C. Cir. R.

15(a) which provides that "in cases involving informal rulemaking . . . a petitioner or appellant need serve copies only on the respondent agency, and on the United States if required by statute."

Rule 24
Rule 24(a)(2) says that if the district court grants a motion to proceed IFP, "the party may proceed on appeal without prepaying of giving security for fees and costs." Does this need to be amended in light of the Prisoner Litigation Reform Act? Prisoners must pay the filing fee, but need not prepay the full amount if they do not have it; partial payments will be collected by the court over time.

Rule 25
Extend the "mailbox rule" to petitions for rehearing.

Rule 26
Create consistency between the Civil and Appellate Rules concerning the computation of time.

Rule 27
Amend (b) to permit appellate commissioners to rule on procedural motions.

Rule 28
Amend (j) so that the letter referencing new authorities can include a brief explanation of the new authority and a statement of its significance.

Rule 29
Amend the rule to permit a state agency or state officer to file an amicus brief without consent of the parties or leave of court.

Rule 31
1. A court of appeals should be permitted to "modify" rather than simply "shorten" the time for briefs to be filed. The change would permit a court to shift the briefing schedule.
2. It is no longer necessary to require service of two copies of a brief on counsel for each party to an appeal.

Rule 32
Establish the color for the cover of a petition for rehearing, or rehearing en banc, for a response to either, and for a supplemental brief.

Rule 34
Dispense with the third exception (a court may dispense with oral argument if "the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument") because the first two provide sufficient, but not excessive, flexibility to dispense with oral argument.

Rule 36

1. The rule should address the disposition of appeals without any explanatory opinion.
2. The rule should address the practice of issuing opinions that are not for publication.

Rule 39

Amend the rule to state whether the court of appeals or the district court determines the attorney's fees awarded as costs on appeal and the procedure for determining such fees.

Rule 44

Make the rule applicable to constitutional challenges to federal regulations.

Rule 46

Amend the rule so that once a person becomes a member of the bar of a court of appeals for any circuit, that person may appear as counsel in any other circuit without the need for admission to the bar of that court.