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

AGENDA VIII
Washington, D.C.
June 17-19, 1993

TO: Honorable Robert E. Keeton, Chair, and Members of the Standing Committee on Rules of Practice and Procedure

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

DATE: May 28, 1993

The Advisory Committee on Appellate Rules submits the following items to the Standing Committee on Rules:

1. Proposed amendments to Federal Rules of Appellate Procedure 1, 3, 5, 5.1, 9, 13, 21, 25, 26.1, 27, 28, 30, 31, 32, 33, 35, 38, 40, 41 and 48 approved by the Advisory Committee on Appellate Rules at its April 20 & 21, 1993 meeting. All of these proposed amendments, except the amendments to Rule 1, were published in January 1993. A public hearing was scheduled for February 17, 1993, in Chicago, Illinois but was canceled for lack of interest.

   The Advisory Committee has reviewed the written comments and, in some instances, altered the proposed amendments in light of the comments. The Advisory Committee requests that the Standing Committee approve for transmittal to the Judicial Conference all of the published rules, as amended, except Rule 32. The Advisory Committee also requests that amended Rule 1 be included in this packet even though it has not been published. The change to Rule 1 is technical. Rule 1 is amended by adding a subdivision to it; the new subdivision includes the caption and text of existing Rule 48. The Advisory Committee suggests that change so that new rules can be added at the end of the existing set of appellate rules without "burying" the "title" provision currently found at Rule 48.

Because the post-publication alterations to Rule 32 are substantial, the Advisory Committee requests that the Standing Committee republish the proposed amendments to Rule 32 for a new period of comment. This report includes two drafts of Rule 32. The first draft, found at pages 23 through 28 of this memorandum, was approved by a majority of the Advisory Committee. The second draft, found at pages 29 through 34 of this memorandum, is favored by two members of the Committee. For a discussion of the Committee's concerns, *see* pp. 49-50 of this memorandum.

The Advisory Committee's report on the rules published in January is organized as follows:

- Part A of this report includes the amended rules.
- Part B identifies and discusses the changes made in the text or notes after publication and it discloses any disagreement among the Advisory Committee members concerning the changes.
- Part C is a summary of the written comments received.

2. Proposed amendments to Federal Rules of Appellate Procedure 4, 8, 10, 21, 25, 32, 35, 41, and 47, and proposed Rule 49. These proposals were approved at the Advisory Committee's April 20 & 21 meeting and the Advisory Committee requests the Standing Committee's approval of them for publication.

- Part D of this report contains the draft amendments.

cc: Chairs and Reporters other Advisory Committees
Members and Reporter, Advisory Committee on Appellate Rules

Rule 1. Scope of Rules and Title*

(a) *Scope of Rules.*-- These rules govern procedure in appeals to United States courts of appeals from the United States district courts and the United States Tax Court; in appeals from bankruptcy appellate panels; in proceedings in the courts of appeals for review or enforcement of orders of administrative agencies, boards, commissions and officers of the United States; and in applications for writs or other relief which a court of appeals or a judge thereof is competent to give. When these rules provide for the making of a motion or application in the district court, the procedure for making such motion or application shall be in accordance with the practice of the district court.

(b) *Rules Not to Affect Jurisdiction.*-- These rules shall not be construed to extend or limit the jurisdiction of the courts of appeals as established by law.

(c) *Title.*-- These rules may be known and cited as the Federal Rules of Appellate Procedure.

Committee Note

Subdivision (c). A new subdivision is added to the rule. The text of new subdivision (c) has been moved from Rule 48 to Rule 1 to allow the addition of new rules at the end of the existing set of appellate rules without burying the title provision among other rules. In a similar fashion the Bankruptcy Rules combine the provisions governing the scope of the rules and the title in the first rule.

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* Shaded material has been added or altered after publication.

Rule 3. Appeal as of Right - How Taken

(a) *Filing the Notice of Appeal*.-- An appeal permitted by law as of right from a district court to a court of appeals ~~shall~~ must be taken by filing a notice of appeal with the clerk of the district court within the time allowed by Rule 4. At the time of filing, the appellant must furnish the clerk with sufficient copies of the notice of appeal to enable the clerk to comply promptly with the requirements of subdivision (d) of this Rule 3. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal. Appeals by permission under 28 U.S.C. § 1292(b) and appeals in bankruptcy ~~shall~~ must be taken in the manner prescribed by Rule 5 and Rule 6 respectively.

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Committee Note

Subdivision (a). The amendment requires a party filing a notice of appeal to provide the court with sufficient copies of the notice for service on all other parties.

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

* * * * *

(c) *Form of Papers; Number of Copies.*-- All papers may be typewritten. ~~Three copies shall be filed with the original, but the court may require that additional copies be furnished.~~ 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.

* * * * *

Committee Note

Subdivision (c). The amendment makes it clear that a court may require a different number of copies either by rule or by order in an individual case. The number of copies of any document that a court of appeals needs varies depending upon the way in which the court conducts business. The internal operation of the courts of appeals necessarily varies from circuit to circuit because of differences in the number of judges, the geographic area included within the circuit, and other such factors. Uniformity could be achieved only by setting the number of copies artificially high so that parties in all circuits file enough copies to satisfy the needs of the court requiring the greatest number. Rather than do that, the Committee decided to make it clear that local rules may require a greater or lesser number of copies and that, if the circumstances of a particular case indicate the need for a different number of copies in that case, the court may so order.

Rule 5.1. Appeal by Permission Under 28 U.S.C. § 636(c)(5)

* * * * *

(c) *Form of Papers; Number of Copies.*-- All papers may be typewritten. ~~Three copies shall be filed with the original, but the court may require that additional copies be furnished.~~ 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.

* * * * *

Committee Note

Subdivision (c). The amendment makes it clear that a court may require a different number of copies either by rule or by order in an individual case. The number of copies of any document that a court of appeals needs varies depending upon the way in which the court conducts business. The internal operation of the courts of appeals necessarily varies from circuit to circuit because of differences in the number of judges, the geographic area included within the circuit, and other such factors. Uniformity could be achieved only by setting the number of copies artificially high so that parties in all circuits file enough copies to satisfy the needs of the court requiring the greatest number. Rather than do that, the Committee decided to make it clear that local rules may require a greater or lesser number of copies and that, if the circumstances of a particular case indicate the need for a different number of copies in that case, the court may so order.

~~Rule 9. Release in criminal cases~~

~~(a) *Appeals from orders respecting release entered prior to a judgment of conviction.* An appeal authorized by law from an order refusing or imposing conditions of release shall be determined promptly. Upon entry of an order refusing or imposing conditions of release, the district court shall state in writing the reasons for the action taken. The appeal shall be heard without the necessity of briefs after reasonable notice to the appellee upon such papers, affidavits, and portions of the record as the parties shall present. The court of appeals or a judge thereof may order the release of the appellant pending the appeal.~~

~~(b) *Release pending appeal from a judgment of conviction.* Application for release after a judgment of conviction shall be made in the first instance in the district court. If the district court refuses release pending appeal, or imposes conditions of release, the court shall state in writing the reasons for the action taken. Thereafter, if an appeal is pending, a motion for release, or for modification of the conditions of release, pending review may be made to the court of appeals or to a judge thereof. The motion shall be determined promptly upon such papers, affidavits, and portions of the record as the parties shall present and after reasonable notice to the appellee. The court of appeals or a judge thereof may order the~~

~~release of the appellant pending disposition of the motion.~~

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

Rule 9. Release in a Criminal Case

(a) *Appeal from an Order Regarding Release Before Judgment of Conviction*. -The district court must state in writing, or orally on the record, the reasons for an order regarding release or detention of a defendant in a criminal case. A party appealing from the order, as soon as practicable after filing a notice of appeal with the district court, must file with the court of appeals a copy of the district court's order and its statement of reasons. An appellant who questions the factual basis for the district court's order must file a transcript of any release proceedings in the district court or an explanation of why a transcript has not been obtained. The appeal must be determined promptly. It must be heard, after reasonable notice to the appellee, upon such papers, affidavits, and portions of the record as the parties present or the court may require.

Briefs need not be filed unless the court so orders. The court of appeals or a judge thereof may order the release of the defendant pending decision of the appeal.

(b) *Review of an Order Regarding Release After Judgment of Conviction*. -- A party entitled to do so may obtain review of a district court's order regarding release that is made after a judgment of conviction by filing a notice of appeal from that order with the district court, or by filing a motion with the court of appeals if the party has already filed a notice of appeal from the judgment of conviction. Both the order and the review are subject to Rule 9(a). In addition, the papers filed by the applicant for review must include a copy of the judgment of conviction.

(c) Criteria for Release. The decision regarding release must be made in accordance with applicable provisions of Title 18 U.S.C. §§ 3142, 3143 and 3145(c).

Committee Note

Rule 9 has been entirely rewritten. The basic structure of the rule has been retained. Subdivision (a) governs appeals from bail decisions made before the judgment of conviction is entered at the time of sentencing. Subdivision (b) governs review of bail decisions made after sentencing and pending appeal.

Subdivision (a). The subdivision applies to appeals from "an order regarding release or detention" of a criminal defendant before judgment of conviction, *i.e.*, before sentencing. See Fed. R. Crim. P. 32(b). The old rule applied only to a defendant's appeal from an order "refusing or imposing conditions of release." The new broader language is needed because the government is now permitted to appeal bail decisions in certain

circumstances. 18 U.S.C. §§ 3145 and 3731. For the same reason, the rule now requires a district court to state reasons for its decision in all instances, not only when it refuses release or imposes conditions on release.

The rule requires a party appealing from a district court's decision to supply the court of appeals with a copy of the district court's order and its statement of reasons. In addition, an appellant who questions the factual basis for the district court's decision must file a transcript of the release proceedings, if possible. The rule also permits a court to require additional papers. A court must act promptly to decide these appeals; lack of pertinent information can cause delays. The old rule left the determination of what should be filed entirely within the party's discretion; it stated that the court of appeals would hear the appeal "upon such papers, affidavits, and portions of the record as the parties shall present."

Subdivision (b). This subdivision applies to review of a district court's decision regarding release made after judgment of conviction. As in subdivision (a), the language has been changed to accommodate the government's ability to seek review.

The word "review" is used in this subdivision, rather than "appeal" because review may be obtained, in some instances, upon motion. Review may be obtained by motion if the party has already filed a notice of appeal from the judgment of conviction. If the party desiring review of the release decision has not filed such a notice of appeal, review may be obtained only by filing a notice of appeal from the order regarding release.

The requirements of subdivision (a) apply to both the order and the review. That is, the district court must state its reasons for the order. The party seeking review must supply the court of appeals with the same information required by subdivision (a). In addition, the party seeking review must also supply the court with information about the conviction and the sentence.

Subdivision (c). This subdivision has been amended to include references to the correct statutory provisions.

Rule 13. Review of a Decisions of the Tax Court

(a) *How Obtained; Time for Filing Notice of Appeal.*-- Review of a decision of the United States Tax Court ~~shall~~ must be obtained by filing a notice of appeal with the clerk of the Tax Court within 90 days after ~~the decision of the Tax Court is entered.~~ entry of the Tax Court's decision. At the time of filing the appellant must furnish the clerk with sufficient copies of the notice of appeal to enable the clerk to comply promptly with the requirements of Rule 3(d). If a timely notice of appeal is filed by one party, any other party may take an appeal by filing a notice of appeal within 120 days after ~~the decision of the Tax Court is entered.~~ entry of the Tax Court's decision.

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Committee Note

Subdivision (a). The amendment requires a party filing a notice of appeal to provide the court with sufficient copies of the notice for service on all other parties.

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

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(d) *Form of Papers; Number of Copies.*-- All papers may be typewritten. ~~Three copies shall be filed with the original, but the court may direct that additional copies be furnished.~~ 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.

Committee Note

Subdivision (d). The amendment makes it clear that a court may require a different number of copies either by rule or by order in an individual case. The number of copies of any document that a court of appeals needs varies depending upon the way in which the court conducts business. The internal operation of the courts of appeals necessarily varies from circuit to circuit because of differences in the number of judges, the geographic area included within the circuit, and other such factors. Uniformity could be achieved only by setting the number of copies artificially high so that parties in all circuits file enough copies to satisfy the needs of the court requiring the greatest number. Rather than do that, the Committee decided to make it clear that local rules may require a greater or lesser number of copies and that, if the circumstances of a particular case indicate the need for a different number of copies in that case, the court may so order.

Rule 25. Filing and Service

(a) *Filing*. - ~~Papers~~ A paper required or permitted to be filed in a court of appeals must be filed with the clerk. Filing may be accomplished by mail addressed to the clerk, but filing is not timely unless the clerk receives the papers within the time fixed for filing, except that briefs and appendices are treated as filed on the day of mailing if the most expeditious form of delivery by mail, except special delivery, is used. Papers filed by an inmate confined in an institution are timely filed if deposited in the institution's internal mail system on or before the last day for filing. Timely filing of papers by an inmate confined in an institution may be shown by a notarized statement or declaration (in compliance with 28 U.S.C. § 1746) setting forth the date of deposit and stating that first-class postage has been prepaid. If a motion requests relief that may be granted by a single judge, the judge may permit the motion to be filed with the judge, in which event the judge shall note thereon the ~~date of~~ filing date and thereafter give it to the clerk. A court of appeals may, by local rule, permit papers to be filed by facsimile or other electronic means, provided such means are authorized by and consistent with standards established by the Judicial Conference of the United States. The clerk shall not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by

these rules or by any local rules or practices.

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(d) *Proof of Service.*-- Papers presented for filing ~~shall~~ must contain an acknowledgment of service by the person served or proof of service in the form of a statement of the date and manner of service, ~~and~~ of the names of the persons served, and of the addresses to which the papers were mailed or at which they were delivered, certified by the person who made service. Proof of service may appear on or be affixed to the papers filed. The clerk may permit papers to be filed without acknowledgment or proof of service but ~~shall~~ must require such to be filed promptly thereafter.

(e) *Number of Copies.*-- Whenever these rules require the filing or furnishing of a number of copies, a court may require a different number by local rule or by order in a particular case.

Committee Note

Subdivision (a). Several circuits have local rules that authorize the office of the clerk to refuse to accept for filing papers that are not in the form required by these rules or by local rules. This is not a suitable role for the office of the clerk and the practice exposes litigants to the hazards of time bars; for these reasons, such rules are proscribed by this rule. This provision is similar to Fed. R. Civ. P. 5(e) and Fed. Bankr. R. 5005.

The Committee wishes to make it clear that the provision prohibiting a clerk from refusing a document does not mean that a clerk's office may no longer screen documents to determine whether they comply with the rules. A court may delegate to the clerk authority to inform a party about any noncompliance with

the rules and, if the party is willing to correct the document, to determine a date by which the corrected document must be resubmitted. If a party refuses to take the steps recommended by the clerk or if in the clerk's judgment the party fails to correct the noncompliance, the clerk must refer the matter to the court for a ruling.

Subdivision (d). The amendment requires that the certificate of service must state the addresses to which the papers were mailed or at which they were delivered. The Federal Circuit has a similar local rule, Fed. Cir. R. 25.

Subdivision (e). Subdivision (e) is a new subdivision. It makes it clear that whenever these rules require a party to file or furnish a number of copies a court may require a different number of copies either by rule or by order in an individual case. The number of copies of any document that a court of appeals needs varies depending upon the way in which the court conducts business. The internal operation of the courts of appeals necessarily varies from circuit to circuit because of differences in the number of judges, the geographic area included within the circuit, and other such factors. Uniformity could be achieved only by setting the number of copies artificially high so that parties in all circuits file enough copies to satisfy the needs of the court requiring the greatest number. Rather than do that, the Committee decided to make it clear that local rules may require a greater or lesser number of copies and that, if the circumstances of a particular case indicate the need for a different number of copies in that case, the court may so order.

A party must consult local rules to determine whether the court requires a different number than that specified in these national rules. The Committee believes it would be helpful if each circuit either: 1) included a chart at the beginning of its local rules showing the number of copies of each document required to be filed with the court along with citation to the controlling rule; or 2) made available such a chart to each party upon commencement of an appeal; or both. If a party fails to file the required number of copies, the failure does not create a jurisdictional defect. Rule 3(a) states: "Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate . . ."

Rule 26.1 Corporate Disclosure Statement

Any non-governmental corporate party to a civil or bankruptcy case or agency review proceeding and any non-governmental corporate defendant in a criminal case ~~shall~~ must file a statement identifying all parent companies, subsidiaries (except wholly owned subsidiaries), and affiliates that have issued shares to the public. The statement ~~shall~~ must be filed with a party's principal brief or upon filing a motion, response, petition or answer in the court of appeals, whichever first occurs, unless a local rule requires earlier filing. Whenever the statement is filed before a party's principal brief, an original and three copies of the statement must be filed unless the court requires the filing of a different number by local rule or by order in a particular case. The statement ~~shall~~ must be included in the front of the table of contents in a party's principal brief even if the statement was previously filed.

Committee Note

The amendment requires a party to file three copies of the disclosure statement whenever the statement is filed before the party's principal brief. Because the statement is included in each copy of the party's brief, there is no need to require the filing of additional copies at that time. A court of appeals may require the filing of a different number of copies by local rule or by order in a particular case.

Rule 27. Motions

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(d) *Form of Papers; Number of Copies.*-- All papers relating to a motions may be typewritten. ~~Three copies shall be filed with the original, but the court may require that additional copies be furnished.~~ 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.

Committee Note

Subdivision (d). The amendment makes it clear that a court may require a different number of copies either by rule or by order in an individual case. The number of copies of any document that a court of appeals needs varies depending upon the way in which the court conducts business. The internal operation of the courts of appeals necessarily varies from circuit to circuit because of differences in the number of judges, the geographic area included within the circuit, and other such factors. Uniformity could be achieved only by setting the number of copies artificially high so that parties in all circuits file enough copies to satisfy the needs of the court requiring the greatest number. Rather than do that, the Committee decided to make it clear that local rules may require a greater or lesser number of copies and that, if the circumstances of a particular case indicate the need for a different number of copies in that case, the court may so order.

Rule 28. Briefs

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

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(5) A summary of argument. The summary should contain a succinct, clear, and accurate statement of the arguments made in the body of the brief. It should not be a mere repetition of the argument headings.

~~(5)~~ (6) An argument. ~~The argument may be preceded by a summary.~~ The argument must contain the contentions of the appellant on the issues presented, and the reasons therefor, with citations to the authorities, statutes, and parts of the record relied on. The argument must also include for each issue a concise statement of the applicable standard of review; this statement may appear in the discussion of each issue or under a separate heading placed before the discussion of the issues.

~~(6)~~ (7) A short conclusion stating the precise relief sought.

(b) *Appellee's Brief*.--The brief of the appellee must conform to the requirements of paragraphs (a)(1)-~~(5)~~ (6) , except that none of the following need appear unless the appellee is dissatisfied with the statement of the appellant:

(1) the jurisdictional statement;

(2) the statement of the issues;

(3) the statement of the case;

(4) the statement of the standard of review.

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(g) *Length of briefs.*-- Except by permission of the court, or as specified by local rule of the court of appeals, principal briefs shall not exceed 50 pages, and reply briefs shall not exceed 25 pages, exclusive of pages containing the corporate disclosure statement, table of contents, tables of citations, proof of service, and any addendum containing statutes, rules, regulations, etc.

Committee Note

Subdivision (a). The amendment adds a requirement that an appellant's brief contain a summary of the argument. A number of circuits have local rules requiring a summary and the courts report that they find the summary useful. *See*, D.C. Cir. R. 11(a)(5); 5th Cir. R. 28.2.2; 8th Cir. R. 28A(i)(6); 11th Cir. R. 28-2(i); and Fed. Cir. R. 28.

Subdivision (b). The amendment adds a requirement that an appellee's brief contain a summary of the argument.

Subdivision (g). The amendment adds proof of service to the list of items in a brief that do not count for purposes of the page limitation. The concurrent amendment to Rule 25(d) requires a certificate of service to list the addresses to which a paper was mailed or at which it was delivered. When a number of parties must be served, the listing of addresses may run to several pages and those pages should not count for purposes of the page limitation.

Rule 30. Appendix to the Briefs

(a) *Duty of Appellant to Prepare and File; Content of Appendix; Time for Filing; Number of Copies.*-- The appellant ~~shall~~ must prepare and file an appendix to the briefs which ~~shall~~ must contain: (1) the relevant docket entries in the proceeding below; (2) any relevant portions of the pleadings, charge, findings, or opinion; (3) the judgment, order, or decision in question; and (4) any other parts of the record to which the parties wish to direct the particular attention of the court. Except where they have independent relevance, memoranda of law in the district court should not be included in the appendix. The fact that parts of the record are not included in the appendix shall not prevent the parties or the court from relying on such parts.

Unless filing is to be deferred pursuant to the provisions of subdivision (c) of this rule, the appellant ~~shall~~ must serve and file the appendix with the brief. Ten copies of the appendix ~~shall~~ must be filed with the clerk, and one copy ~~shall~~ must be served on counsel for each party separately represented, unless the court ~~shall~~ requires the filing or service of a different number by local rule or by order in a particular case ~~direct the filing or service of a lesser number~~.

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Committee Note

Subdivision (a). The only substantive change is to allow a court to require the filing of a greater number of copies of an appendix as well as a lesser number.

Rule 31. Filing and Service of a Briefs

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(b) *Number of Copies to Be Filed and Served*.-- Twenty-five copies of each brief ~~shall~~ must be filed with the clerk, ~~unless the court by order in a particular case shall direct a lesser number,~~ and two copies ~~shall~~ must be served on counsel for each party separately represented unless the court requires the filing or service of a different number by local rule or by order in a particular case. If a party is allowed to file typewritten ribbon and carbon copies of the brief, the original and three legible copies ~~shall~~ must be filed with the clerk, and one copy ~~shall~~ must be served on counsel for each party separately represented.

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Committee Note

Subdivision (b). The amendment allows a court of appeals to require the filing of a greater, as well as a lesser, number of copies of briefs. The amendment also allows the required number to be prescribed by local rule as well as by order in a particular case.

COMMITTEE APPROVED DRAFT**

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

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

(1) ~~Briefs and appendices~~ A brief or appendix may be produced by standard typographic printing or by any duplicating or copying process ~~which~~ that produces a clear black image on white paper. The text must be on opaque, unglazed paper. Carbon copies of ~~briefs and appendices~~ a brief or appendix may not be ~~submitted~~ used without the court's permission ~~of the court~~, except ~~in behalf of parties allowed to proceed~~ by pro se persons proceeding in forma pauperis. ~~All printed matter must appear in at least 11 point type on opaque, unglazed paper. Briefs and appendices produced by the standard typographic process shall be bound in volumes having pages 6-1/8 by 9-1/4 inches and type matter 4-1/6 by 7-1/6 inches. Those produced by any other process shall be bound in volumes having pages 8-1/2 by 11 inches and type matter not exceeding 6-1/2 by 9-1/2 inches. In patent cases the pages of briefs and appendices may be of such size as is necessary to utilize copies of patent documents.~~

(2) A brief or appendix produced by standard typographic printing must be in 11 point type or larger. Such a brief or

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** For discussion of the Advisory Committee's concerns about Rule 32, please see this memorandum at pp. 49-50.

appendix must be bound in volumes having pages 6-1/8 by 9-1/4 inches and type matter 4-1/6 by 7-1/6 inches.

(3) A brief or appendix produced by any other process must not exceed on average the same content per page (including footnotes and quotations) as a brief produced by standard typographic printing and must include a certification of compliance with this requirement. The Administrative Office of the United States Courts will, from time to time, publish a list of typefaces and other information needed to meet this standard. Lines of text must be separated by double spacing. Quotations more than two lines long may be indented and single spaced. Headings and footnotes may be single spaced. No attempt should be made to reduce or condense the typeface or to use footnotes in a manner that would increase the content of a document. Such a brief or appendix must be bound in volumes having pages 8-1/2 by 11 inches and type matter not exceeding 6-1/2 by 9-1/2 inches.

(4) Quotations and footnotes must appear in the same size type as the text.

(5) Copies of the reporter's transcript and other papers reproduced in a manner authorized by this rule may be inserted in the appendix; such pages may be informally renumbered if necessary.

(6) ~~If briefs are produced by commercial printing or duplicating firms, or, if produced otherwise and the covers to be~~

~~described are available,~~ Except for pro se parties, the cover of the appellant's brief ~~of the appellant should~~ must be blue; ~~that of the appellee~~ the appellee's, red; ~~that of~~ an intervenor's or amicus curiae's, green; ~~that of~~ and any reply brief, gray. The cover of ~~the appendix, if separately printed, should~~ a separately printed appendix must be white. The front ~~covers of the briefs and of appendices, if separately printed, shall~~ cover of a brief and of a separately printed appendix must contain:

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

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

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

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

~~(4)~~ (v) the title of the document identifying the party or parties for whom the document is filed ~~(e.g., Brief for (Appellant, Appendix)~~; and

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

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

(b) *Form of Other Papers.*--~~Petitions~~

(1) A petition for rehearing, a suggestion for rehearing in banc, and any response to such petition or suggestion must ~~shall~~ be produced in a manner prescribed by subdivision (a) with a cover the same color as the party's principal brief. ~~Motions and other papers~~

(2) A motion or other paper may be produced in like manner, or ~~they~~ it may be typewritten ~~upon~~ on opaque, unglazed paper 8-1/2 by 11 inches in size. Lines of typewritten text ~~shall~~ must be double spaced. Consecutive sheets ~~shall~~ must be attached at the left margin. Carbon copies may ~~be used for filing and service if they are legible~~ not be used without the court's permission except by pro se persons proceeding in forma pauperis. A motion or other paper addressed to the court ~~shall~~ need not have a cover but must contain a caption ~~setting forth~~ that includes the case number, the name of the court, the title of the case, ~~the file number,~~ and a brief descriptive title indicating the purpose of the paper and identifying the party or parties for whom it is filed.

Committee Note

Subdivision (a). A number of stylistic and substantive changes have been made in subdivision (a). New paragraphs have been added governing the printing of a brief or appendix. The old rule simply stated that a brief or appendix produced by the standard typographic process must be printed in at least 11 point type or, if produced in any other manner, the lines of text must be double spaced. Today few briefs are produced by commercial printers or by typewriters; most are produced on and printed by computers. The availability of computer fonts in a variety of

sizes and styles has given rise to local rules limiting type styles. D.C. Cir. R. 11(a); 5th Cir. R. 32.1; 7th Cir. R. 32; 10th Cir. R. 32.1; 11th Cir. R. 32-3; and Fed. Cir. R. 32(a). The Advisory Committee believes that some standards are needed both to ensure that all litigants have an equal opportunity to present their material and to ensure that the documents are easily legible. The standard adopted in this rule for documents produced by any method other than standard typographic printing is that the text, including quotations and footnotes, must not exceed on average the same content per page as a brief produced by standard typographic printing. The brief must include a certification of compliance with this requirement. To implement this standard, the Administrative Office of the United States Courts will issue a list of acceptable typefaces, including computer fonts. To add flexibility, the rule also authorizes the Administrative Office to augment the list with other information. For example, in order to meet the standard using certain fonts, the line length may need to be shorter than the usual 6-1/2 inches. The rule permits the Administrative Office to list a typeface as acceptable only if such additional restrictions are followed.

While the rule generally requires that a brief or appendix produced by a method other than standard typographic printing must be double spaced, the rule permits single spaced and indented quotations and single spaced footnotes. There is, however, an admonition that footnotes should not be used to attempt to increase the content of the document.

Because photocopying is inexpensive and widely available, the exception allowing a person to file carbon copies has been limited to pro se persons proceeding in forma pauperis.

The rule requires a brief or appendix to be bound or stapled in any manner that is secure, does not obscure the text, and that permits the document to lie flat when open. Many judges and most court employees do much of their work at computer keyboards and a brief that lies flat when open is significantly more convenient. The Federal Circuit already has such a requirement, Fed. Cir. R. 32(b) and the Fifth Circuit rule states a preference for it, 5th Cir. R. 32.3. While a spiral binding would comply with this requirement, it is not intended to be the exclusive method of binding.

The rule requires that the number of the case be centered at the top of the front cover of a brief or appendix. This will aid in identification of the document and again the idea was drawn from a local rule. 2d Cir. R. 32. The rule also requires that

the title of the document identify the party or parties on whose behalf the document is filed. When there are multiple appellants or appellees, this information is necessary to the court. If, however, the document is filed on behalf of all appellants or all appellees it may so indicate. Further, it may be possible to identify the class of parties on whose behalf the document is filed. Otherwise, it may be necessary to name each party. The rule also requires that attorneys' telephone numbers appear on the front cover of a brief or appendix.

Having amended the national rule to provide additional detail, the Committee foresees little need for local variation and suggests that the existing local rules be repealed. It is the Committee's further suggestion that before a circuit adopts a local rule governing the form or style of papers, the circuit will carefully weigh the value of the proposed local rule against the difficulties and inefficiencies local variations create for national practitioners.

Subdivision (b). The old rule required a petition for rehearing to be produced in the same manner as a brief or appendix. The new rule also requires that a suggestion for rehearing in banc and a response to either a petition for panel rehearing or a suggestion for rehearing in banc be prepared in the same manner with a cover the same color as the parties principal brief.

With regard to motions or other papers, the only substantive changes are to restrict the use of carbon copies to pro se parties who are proceeding in forma pauperis and to require that the title identify the party or parties for whom it is filed. These changes parallel the changes in subdivision (a).

DRAFT PREFERRED BY TWO MEMBERS OF THE ADVISORY COMMITTEE***

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

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

~~(1) Briefs and appendices~~ A brief or appendix may be produced by standard typographic printing or by any duplicating or copying process ~~which~~ that produces a clear black image on white paper. The text must be on opaque, unglazed paper. Carbon copies of ~~briefs and appendices~~ a brief or appendix may not be ~~submitted~~ used without the court's permission ~~of the court~~, except ~~in behalf of parties allowed to proceed~~ by pro se persons proceeding in forma pauperis. ~~All printed matter must appear in at least 11 point type on opaque, unglazed paper. Briefs and appendices produced by the standard typographic process shall be bound in volumes having pages 6-1/8 by 9-1/4 inches and type matter 4-1/6 by 7-1/6 inches. Those produced by any other process shall be bound in volumes having pages 8-1/2 by 11 inches and type matter not exceeding 6-1/2 by 9-1/2 inches. In patent cases the pages of briefs and appendices may be of such size as is necessary to utilize copies of patent documents.~~

(2) A brief or appendix produced by standard typographic printing must be bound in volumes having pages 6-1/8 by 9-1/4 inches and type matter 4-1/6 by 7-1/6 inches. Such a brief or appendix

*** This draft differs from the committee draft at subparagraphs (a)(2) & (3).

must be in 11 point type or larger.

(3) A brief or appendix produced by any other process must be bound in volumes having pages 8-1/2 by 11 inches and type matter not exceeding 6-1/2 by 9-1/2 inches. Lines of text must be separated by double spacing. Quotations more than two lines long may be indented and single spaced. Headings and footnotes may be single spaced. Any such brief must i) be typed or printed with no more than 11 characters per inch or ii) be in 11 point type or larger and contain on average no more than 300 words per page, including footnotes and quotations, and include a certificate of compliance with this requirement. The Administrative Office of the United States Courts will, from time to time, publish a list of typefaces and other information needed to meet this standard. No attempt should be made to reduce or to meet this standard. No attempt should be made to reduce or condense the typeface or to use footnotes in a manner that would increase the content of a document.

(4) Quotations and footnotes must appear in the same size type as the text.

(5) Copies of the reporter's transcript and other papers reproduced in a manner authorized by this rule may be inserted in the appendix; such pages may be informally renumbered if necessary.

(6) ~~If briefs are produced by commercial printing or duplicating firms, or, if produced otherwise and the covers to be~~

~~described are available,~~ Except for pro se parties, the cover of the appellant's brief ~~of the appellant should~~ must be blue; ~~that of the appellee~~ the appellee's, red; ~~that of~~ an intervenor's or amicus curiae's, green; ~~that of~~ and any reply brief, gray. The cover of ~~the appendix, if separately printed, should~~ a separately printed appendix must be white. The front ~~covers of the briefs and of appendices, if separately printed, shall~~ cover of a brief and of a separately printed appendix must contain:

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

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

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

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

~~(4)~~ (v) the title of the document identifying the party or parties for whom the document is filed ~~(e.g., Brief for (Appellant, Appendix)~~; and

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

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

(b) *Form of Other Papers.*--~~Petitions~~

(1) A petition for rehearing, a suggestion for rehearing in banc, and any response to such petition or suggestion must ~~shall~~ be produced in a manner prescribed by subdivision (a) with a cover the same color as the party's principal brief. ~~Motions and other papers~~

(2) A motion or other paper may be produced in like manner, or ~~they~~ it may be typewritten ~~upon~~ on opaque, unglazed paper 8-1/2 by 11 inches in size. Lines of typewritten text ~~shall~~ must be double spaced. Consecutive sheets ~~shall~~ must be attached at the left margin. Carbon copies may ~~be used for filing and service if they are legible~~ not be used without the court's permission except by pro se persons proceeding in forma pauperis. A motion or other paper addressed to the court ~~shall~~ need not have a cover but must contain a caption ~~setting forth~~ that includes the case number, the name of the court, the title of the case, ~~the file number,~~ and a brief descriptive title indicating the purpose of the paper and identifying the party or parties for whom it is filed.

Committee Note

Subdivision (a). A number of stylistic and substantive changes have been made in subdivision (a). New paragraphs have been added governing the printing of a brief or appendix. The old rule simply stated that a brief or appendix produced by the standard typographic process must be printed in at least 11 point type or, if produced in any other manner, the lines of text must be double spaced. Today few briefs are produced by commercial printers or by typewriters; most are produced on and printed by computers. The availability of computer fonts in a variety of

sizes and styles has given rise to local rules limiting type styles. D.C. Cir. R. 11(a); 5th Cir. R. 32.1; 7th Cir. R. 32; 10th Cir. R. 32.1; 11th Cir. R. 32-3; and Fed. Cir. R. 32(a). The Advisory Committee believes that some standards are needed both to ensure that all litigants have an equal opportunity to present their material and to ensure that the documents are easily legible. For documents produced by any method other than standard typographic printing, the rule provides two options. The text can be prepared using a standard typwriter or word processor which uses no more than 11 characters per inch. Alternatively, the rule allows use of other typefaces providing that the typeface is 11 point type or larger and the brief does not contain, on the average, more than 300 words per page. The brief must include a certification of compliance with this second requirement. To implement this standard, the Administrative Office of the United States Courts will issue a list of acceptable typefaces, including computer fonts. To add flexibility, the rule also authorizes the Administrative Office to augment the list with other information. For example, in order to meet the standard using certain fonts, the line length may need to be shorter than the usual 6-1/2 inches. The rule permits the Administrative Office to list a typeface as acceptable only if such additional restrictions are followed.

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Having amended the national rule to provide additional detail, the Committee foresees little need for local variation and suggests that the existing local rules be repealed. It is the Committee's further suggestion that before a circuit adopts a local rule governing the form or style of papers, the circuit will carefully weigh the value of the proposed local rule against the difficulties and inefficiencies local variations create for national practitioners.

Subdivision (b). The old rule required a petition for rehearing to be produced in the same manner as a brief or appendix. The new rule also requires that a suggestion for rehearing in banc and a response to either a petition for panel rehearing or a suggestion for rehearing in banc be prepared in the same manner with a cover the same color as the parties principal brief.

With regard to motions or other papers, the only substantive changes are to restrict the use of carbon copies to pro se parties who are proceeding in forma pauperis and to require that the title identify the party or parties for whom it is filed. These changes parallel the changes in subdivision (a).

~~**Rule 33. Prehearing conference**~~

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

Rule 33. Appeal Conferences

The court may direct the attorneys, and in appropriate cases the parties, to participate in one or more conferences to address any matter that may aid in the disposition of the proceedings, including the simplification of the issues and the possibility of settlement. A conference may be conducted in person or by telephone and be presided over by a judge or other person designated by the court for that purpose. Before a settlement conference, attorneys shall consult with their clients and obtain as much authority as feasible to settle the case. As a result of a conference, the court may enter an order controlling the course

of the proceedings or implementing any settlement agreement.

Committee Note

Rule 33 has been entirely rewritten. The new rule makes several changes.

The caption of the rule has been changed from "Prehearing Conference" to "Appeal Conferences" to reflect the fact that occasionally a conference is held after oral argument.

The rule permits the court to require the parties to attend the conference in appropriate cases. The Committee does not contemplate that attendance of the parties will become routine, but in certain instances the parties' presence can be useful. The language of the rule is broad enough to allow a court to determine that an executive or employee (other than the general counsel) of a corporation or government agency with authority regarding the matter at issue, constitutes "the party."

The rule includes the possibility of settlement among the possible conference topics.

The rule recognizes that conferences are often held by telephone.

The rule allows a judge or other person designated by the court to preside over a conference. A number of local rules permit persons other than judges to preside over conferences. 1st Cir. R. 47.5; 6th Cir. R. 18; 8th Cir. R. 33A; 9th Cir. R. 33-1; and 10th Cir. R. 33.

The rule requires an attorney to consult with his or her client before a settlement conference and obtain as much authority as feasible to settle the case. An attorney can never settle a case without his or her client's consent. Certain entities, especially government entities, have particular difficulty obtaining authority to settle a case. The rule requires counsel to obtain only as much authority "as feasible."

Rule 35. Determination of Causes by the Court in Banc

* * *

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

Committee Note

Subdivision (d). Subdivision (d) is added; it authorizes the courts of appeals to prescribe the number of copies of suggestions for hearing or rehearing in banc that must be filed. Because the number of copies needed depends directly upon the number of judges in the circuit, local rules are the best vehicle for setting the required number of copies.

Rule 38. Damages and Costs for ~~delay~~ Frivolous Appeals

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

Committee Note

The amendment requires a court of appeals to give notice and opportunity to respond before imposing sanctions. The amendment reflects the basic principle enunciated in the Supreme Court's opinion in Roadway Express, Inc. v. Piper, 447 U.S. 752, 767 (1980), that notice and opportunity to respond must precede the imposition of sanctions. The form of the notice and opportunity purposely are left to the court's discretion. However, the amendment requires that the court notify a party that it is contemplating sanctions. Requests, either in briefs or motions, for sanctions have become so commonplace that it is unrealistic to expect careful responses to such requests without any indication that the court is actually contemplating such measures.

Rule 40. Petition for Rehearing

(a) *Time for Filing; Content; Answer; Action by Court if Granted.*-- A petition for rehearing may be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order or by local rule. However, in all civil cases in which the United States or an agency or officer thereof is a party, the time within which any party may seek rehearing shall be 45 days after entry of judgment unless the time is shortened or enlarged by order. The petition ~~shall~~ must state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended and ~~shall~~ must contain such argument in support of the petition as the petitioner desires to present. Oral argument in support of the petition will not be permitted. No answer to a petition for rehearing will be received unless requested by the court, but a petition for rehearing will ordinarily not be granted in the absence of such a request. If a petition for rehearing is granted, the court may make a final disposition of the cause without reargument or may restore it to the calendar for reargument or resubmission or may make such other orders as are deemed appropriate under the circumstances of the particular case.

Committee Note

Subdivision (a). The amendment lengthens the time for filing a petition for rehearing from 14 to 45 days in civil cases

involving the United States or its agencies or officers. It has no effect upon the time for filing in criminal cases or for nongovernmental parties in civil cases. The amendment makes nation-wide the current practice in the District of Columbia and the Tenth Circuits, *see* D.C. Cir. R. 15(a), 10th Cir. R. 40.3. This amendment, analogous to the provision in Rule 4(a) extending the time for filing a notice of appeal in cases involving the United States, recognizes that the Solicitor General needs time to conduct a thorough review of the merits of a case before requesting a rehearing. In a case in which a court of appeals believes it necessary to restrict the time for filing a rehearing petition, the amendment provides that the court may do so by order. Although the first sentence of Rule 40 permits a court of appeals to shorten or lengthen the usual 14 day filing period by order or by local rule, the sentence governing appeals in civil cases involving the United States purposely limits a court's power to alter the 45 day period to orders in specific cases. If a court of appeals could adopt a local rule shortening the time for filing a petition for rehearing in all cases involving the United States, the purpose of the amendment would be defeated.

Rule 41. Issuance of Mandate; Stay of Mandate

(a) *Date of Issuance*. -- The mandate of the court ~~shall~~ must issue ~~21~~ 7 days after the ~~entry of judgment~~ expiration of the time for filing a petition for rehearing unless such a petition is filed or the time is shortened or enlarged by order. A certified copy of the judgment and a copy of the opinion of the court, if any, and any direction as to costs shall constitute the mandate, unless the court directs that a formal mandate issue. The timely filing of a petition for rehearing will stay the mandate until disposition of the petition unless otherwise ordered by the court. If the petition is denied, the mandate ~~shall~~ must issue 7 days after entry of the order denying the petition unless the time is shortened or enlarged by order.

(b) *Stay of Mandate Pending ~~Application~~ Petition for Certiorari*.~~--A stay of mandate pending application to the Supreme Court for a writ of certiorari may be granted upon motion, reasonable notice of which shall be given to all parties.~~ A party who files a motion requesting a stay of mandate pending petition to the Supreme Court for a writ of certiorari must file, at the same time, proof of service on all other parties. The motion must show that a petition for certiorari would present a substantial question and that there is good cause for a stay. The stay ~~shall~~ cannot exceed 30 days unless the period is extended for cause shown ~~. If~~ or unless during the period of the

stay ~~there is filed with the clerk of the court of appeals~~, a notice from the clerk of the Supreme Court is filed showing that the party who has obtained the stay has filed a petition for the writ ~~in that court~~, in which case the stay ~~shall~~ will continue until final disposition by the Supreme Court. ~~Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari the mandate shall issue immediately.~~ The court of appeals 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 ~~may be required~~ as a condition to the grant or continuance of a stay of the mandate.

Committee Note

Subdivision (a). The amendment conforms Rule 41(a) to amendment made to Rule 40(a). The amendment keys the time for issuance of the mandate to the expiration of the time for filing a petition for rehearing, unless such a petition is filed in which case the mandate issues 7 days after the entry of the order denying the petition. Because the amendment to Rule 40(a) lengthens the time for filing a petition for rehearing in civil cases involving the United States from 14 to 45 days, the rule requiring the mandate to issue 21 days after the entry of judgment would cause the mandate to issue while the government is still considering requesting a rehearing. Therefore, the amendment generally requires the mandate to issue 7 days after the expiration of the time for filing a petition for rehearing.

Subdivision (b). The amendment requires a party who files a motion requesting a stay of mandate to file, at the same time, proof of service on all other parties. The old rule required the party to give notice to the other parties; the amendment merely requires the party to provide the court with evidence of having done so.

The amendment also states that the motion must show that a

petition for certiorari would present a substantial question and that there is good cause for a stay. The amendment is intended to alert the parties to the fact that a stay of mandate is not granted automatically and to the type of showing that needs to be made. The Supreme Court has established conditions that must be met before it will stay a mandate. See Robert L. Stern et al., Supreme Court Practice § 17.19 (6th ed. 1986).

~~Rule 48. Title~~

~~These rules may be known and cited as the Federal Rules of Appellate Procedure.~~

Rule 48. Masters

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

Committee Note

The text of the existing Rule 48 concerning the title was moved to Rule 1.

This new Rule 48 authorizes a court of appeals to appoint a special master to make recommendations concerning ancillary matters. The courts of appeals have long used masters in contempt proceedings where the issue is compliance with an enforcement order. *See Polish National Alliance v. NLRB*, 159 F.2d 38 (7th Cir. 1946); *NLRB v. Arcade-Sunshine Co.*, 132 F.2d 8

(D.C. Cir. 1942); *NLRB v. Remington Rand, Inc.*, 130 F.2d 919 (2d Cir. 1942). There are other instances when the question before a court of appeals requires a factual determination. An application for fees or eligibility for Criminal Justice Act status on appeal are examples.

Ordinarily when a factual issue is unresolved, a court of appeals remands the case to the district court or agency that originally heard the case. It is not the Committee's intent to alter that practice. However, when factual issues arise in the first instance in the court of appeals, such as fees for representation on appeal, it would be useful to have authority to refer such determinations to a master for a recommendation.

ISSUES AND CHANGES
Proposed Amendments to the Federal Rules of Appellate Procedures
Published January 1993

Number of Copies

The amendments to Rules 3, 5, 5.1, 13, 21, 25(e), 26.1, 27, 30, 31, and 35 deal with the number of copies of documents that must be filed with a court of appeals. The Local Rules Project noted that a number of circuits have local rules requiring a party to file a different number of copies of a document than the national rules require. The Local Rules Project also pointed out that the Appellate Rules are inconsistent regarding the authority of a court of appeals to alter the number by local rule or by order in an individual case. The Project suggested that the rules be amended either to require a uniform number in all circuits, or to consistently authorize local rulemaking. The Advisory Committee decided to authorize local variations and to make the language in the national rules consistent.

No comments were received concerning these amendments. No changes were made in either the text of the rules or the committee notes except to change "shall" to "must" in the text of Rules 26.1 and 30.

Rule 1

The proposed amendment to Rule 1 was not published but it is a companion amendment to the proposed new rule on special masters that was published. A new subdivision is added to Rule 1. The text of new subdivision (c) has been moved from Rule 48 to Rule 1 to allow the addition of new rules at the end of the existing set of appellate rules without burying the "title" provision among other rules. The title provision is combined with the scope provision in the Bankruptcy Rules.

The Advisory Committee believes that the change is technical in nature and does not require publication.

Part B
Rules published January 1993
Issues and changes

Rule 9

The amended rule published in January was a complete rewriting of Rule 9. The amended rule recognizes the government's ability to appeal release decisions. The amendments also require a party seeking review to supply the court with certain basic documents: a copy of the district court's order regarding release and its statement of reasons; and, if the appellant questions the factual basis for the district court's order, a transcript of the release proceedings in the district court. In addition, subdivision (b) clarifies those instances in which review may be sought by motion rather than by notice of appeal.

Only two comments were submitted. One commentator notes that subdivision 9(c) should also refer to 18 U.S.C. § 3145(c). The other commentator suggests that all statutory references be omitted from subdivision (c). Because subdivision (c) and the statutory references were added to the rule by Congress, the Committee decided that it should not delete them but should add the reference to § 3145(c).

The second commentator, the National Association of Criminal Defense Lawyers (NACDL), also made other suggestions. It suggests that the captions of subdivision (a) and (b) should be coordinated to clarify whether (a) or (b) applies after a finding of guilt but before sentencing. In response to that comment the Committee approved several changes:

1. it amended the caption of subdivision (a) to read: "Appeal from an Order Regarding Release Before Judgment of Conviction";
2. on line 57 the Committee inserted a period after the word "conviction" and deleted the words "or the terms of the sentence";
3. it amended the first paragraph of the Committee Note, in line three after the word "before" the Committee inserted "the judgment of conviction is entered at the time of";
4. following the first sentence of the Committee Note explaining subdivision (a), the Committee added a citation to Fed. R. Crim. P. 32(b); and
5. in the second paragraph of the Committee Note accompanying subdivision (b), the Committee inserted a period at line 4 after the word conviction and deleted the words "or from the terms of the sentence".

NACDL also suggests that the rule should be amended to make it clear whether a motion for release must be filed in the district court after a notice of appeal has been filed. In response to that suggestion, the Committee decided to omit the second sentence of the Committee Note accompanying subdivision (b). That sentence stated: "Implicit in the first sentence, but less clear than in subdivision (a), is the requirement that the initial decision regarding release after sentencing must be made by the district court." The deletion was

intended to remove any inference that a motion for release must in all instances be made first in the district court. The rule deals only with review of a release decision made by a district court and not with release decisions that may be sought initially in a court of appeals. Therefore, the Committee decided that it would be inappropriate to include any language stating categorically either that a motion must be made, or need not be made, first in a district court.

NACDL also suggests that the rule be amended to allow a party to supplement the district court's bail record with evidentiary material. The Committee decided that it would ordinarily be inappropriate to allow a party to supplement the bail record in the court of appeals so no change was made in the rule.

Rule 25(a)

The published amendment provides that a clerk may not refuse to file any paper solely because the paper is not presented in the proper form. The amendment parallels similar language in Civil Rule 5(e) and Bankruptcy Rule 5005. No formal comments were submitted but the clerks, through their representative who attends the Advisory Committee meetings, expressed opposition to the change.

The Advisory Committee made no post-publication changes in the proposed amendments.

Rule 25(e)

The published amendment to Rule 25(e) provides that whenever service is accomplished by mailing, the proof of service must include the addresses to which the papers were mailed. No comments were submitted; the Committee decided, however, to expand the change to require that a proof of service must also include the addresses at which papers were hand delivered. When a document is hand delivered, the document is usually delivered to office personnel rather than to the party or the party's counsel personally. Therefore, questions about service can arise even when a document has been hand delivered. The Committee consensus was that the change is not substantial and that republication would not be necessary.

In cases involving many parties inclusion of all the addresses could result in a lengthy certificate of service. The Committee agreed that the certificate of service should not count against the page limit for a brief. Therefore, the Committee approved a conforming amendment to Rule 28(g) which provides that the "proof of service" should be included in

that subdivision that among the other items that do not count for purposes of the page limit. The Committee agreed that the change could be treated as technical and would not require publication.

Rule 28

The published amendment to Rule 28 requires that a brief include a summary of argument.

Three comments were submitted. Two commentators suggest that there should not be a national rule requiring a summary of argument. The third commentator suggests that a summary should be required only when the argument exceeds 25 pages.

The Committee believes that a summary of argument would be useful in a variety of ways and decided not to make any changes in the proposed amendments. The Committee discussion further noted that a number of circuits have local rules requiring a summary of argument, that those circuits report satisfaction with the requirement, and that including the requirement in the national rule would eliminate the need for those local rules.

For a discussion of the change to subdivision (g), see the discussion of Rule 25(e) above.

Rule 32

Rule 32 governs the form of documents. Four commentators remarked on the proposed amendments and substantial changes were made after the close of the comment period.

The major changes in the rule involve an effort to standardize type styles. The published rule provided that any brief not produced by standard typographic printing must be prepared using not more than 11 characters per inch. Although only one commentator formally objected to that approach, the Committee decided that it would be undesirable to use that standard because it does not permit the use of proportional typefaces.

Having decided that the rule should permit proportional typeface, the Committee had difficulty formulating a standard that would accomplish its objectives without unduly complicating the rule. The Committee has two basic objectives: that all litigants have equal opportunity to present their arguments, and that briefs be easily legible.

The first objective requires parity between commercially printed briefs and those produced by some other method. It also requires parity among non-printed briefs produced by a variety of office machines and software programs.

Legibility, the Committee's second objective, hinges upon the interplay of several factors. The type size, the style of type, and the page format (meaning line length, spacing between lines, and number of lines per page) all affect legibility.

The task of formulating such a rule is made more difficult by the need for a rule that is sufficiently general that it will not require constant amendment to keep pace with rapid changes in the computer industry.

The majority of the Committe approves of the approach used in draft one, found at pages 23 through 28. That draft provides that a brief produced by a method other than standard typographic printing cannot exceed on average the same content per page as a printed brief. The Committee realizes that practitioners will need additional information to assist them in implementing that standard. Therefore, the rule provides that the Administrative Office will from time to time publish a list of acceptable typefaces and any other information necessary to assist a person to comply with the standard established in the rule. The list prepared by the Administrative Office should include only typefaces and formats that are legible.

Because the rule itself establishes the standard, the Advisory Committee does not believe that the task delegated to the Administrative Office creates any problems under the Rules Enabling Act.

Two members of the Committee believe that a more concrete standard is needed. They suggest draft two, found at pages 29 through 34. Because draft two is a very recent suggestion, it is uncertain whether 300 words per page is the appropriate number although cursory review suggests that it is.

If the Standing Committee approves either draft for publication, the Advisory Committee requests that special efforts be made to elicit comments from the printing and software industries. Their comments may be key to the final development of a stable and precise rule.

In addition to changing the provisions governing typefaces, the Committee considered a number of other suggestions made by the commentators and made several minor changes in the proposed amendments.

Part B
Rules published January 1993
Issues and changes

Three commentators object to double spacing footnotes. The Committee agrees that the rule should permit single spaced footnotes but added a caution, modeled on language drawn from Sup. Ct. R. 33.1(b), that no attempt should be made to use footnotes in a manner that would increase the content of a brief.

Two commentators object to the requirement that a brief be bound so that it will lie flat when open. A third commentator favors the change but suggests that the rule specifically require spiral binding. The Committee decided to make no change in the proposal.

Two commentators object to the requirement that the case number be centered at the top of the cover. One of them suggests that if the requirement is retained that the rule be reorganized so that the requirements are arranged in the rule in order corresponding to the items' location on the cover page, *i.e.*, from top to bottom. In response to that suggestion, the Committee approved rearranging the list of items that must appear on a cover so that the items are listed in the order of their location. One commentator objects to the requirement that the attorney's telephone number be included on the cover. The requirement was retained. One commentators also notes that the proposed amendment requires a petition for rehearing, a suggestion for rehearing in banc, and any response to such petition or suggestion be produced in the same manner as a brief, but that the rule does not prescribe the cover color. The Committee approved an amendment requiring such documents to have "a cover the same color as the party's principal brief."

One commentator suggests that the rule should be amended so that a petition for rehearing may be in the form either of a brief or a motion, or that it should be in the form of a brief unless local rules provide otherwise. The Committee decided to make no change in the proposed rule.

Rule 33

The published amendments to Rule 33 made several changes in the existing rule. The published amendments provide: 1) the court may require parties to attend an appellate conference in appropriate cases; 2) settlement of the case is a possible conference topic; 3) persons other than judges may preside over a conference; and 4) an attorney must consult with his or her client before a settlement conference and obtain as much authority as feasible to settle the case.

Only one comment was submitted. The commentator does not remark generally about the amendments but suggests specifically that the language be changed to make it clear that the choice of an in-person or telephone conference is the court's choice, not the parties'. The Committee decided to make no changes in the proposed amendments. The Committee thought that any statement to the effect that the "court" decides the nature of the conference might suggest that judges are involved in the process. Because circuits that currently use settlement conferences have adopted practices aimed at keeping the judges distanced from the process, the Committee did not adopt the suggestion.

The Solicitor General's office had requested that changes be made to the Committee Note and the Committee approved those changes. The Solicitor's office thought that as published the Committee Note could give rise to an inference that suits against government official should be treated differently than suits against agencies. The redrafting is intended to make it clear that a government official may be represented at an appeal conference by an employee. The specific changes are:
1) the Committee deleted the third sentence of the third paragraph of the Committee Note (that sentence stated: "The Committee realizes that when the party is a corporatin or government agency, the party can attend only through agents.");
2) the fourth sentence of the third paragraph of the Note was amended by inserting "of a corporation or government agency" after the parenthetical; and
3) in that same sentence the word "regarding" was substituted for the word "over."

Rule 38

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

Two comments were received. NACDL strongly supports the proposal and the NLRB suggests deleting the requirement that the notice come "from the court." The Committee decided to make no substantive changes in the proposed amendments. The only

post-publication change is a language change, changing "shall determine" to "determines."

Rule 40

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

Two comments were submitted. One commentator states that the additional time for requesting a rehearing should be extended only to the United States and not to other parties to a civil appeal that involves the United States. The Committee decided to make no change in the published rule. A rule giving an extension only to the government would leave the clerk's office in the position of trying to determine whether the government might want to petition for rehearing or whether the mandate should issue. The Committee decided that an evenhanded approach would be preferable.

The NLRB opposes the amendment because it may delay the effectiveness of enforcement orders. The NLRB believes that an enforcement order becomes effective only upon issuance of the mandate. Because the extension of the time for petitioning for rehearing will delay the issuance of the mandate, the effective date of an enforcement order will also be delayed. The Committee decided to make no change in the proposed amendment because when necessary the court can direct that the mandate issue forthwith.

Rule 41

The published amendments to subdivision (a) provide that the mandate will not issue until 7 days after expiration of the time for filing a petition for rehearing. This is a conforming amendment to the change being made in Rule 40(a). Because the amendment to Rule 40(a) lengthens the time for filing a petition for rehearing in civil cases involving the United States from 14 to 45 days, the rule requiring the mandate to issue 21 days after the entry of judgment would cause the mandate to issue while the government is still considering whether to request a rehearing. Therefore, the amendment generally requires the mandate to issue 7 days after the expiration of the time for filing a petition for rehearing.

One comment was received. The commentator suggests that the rule should state that the mandate must issue within 7 days after the time for seeking rehearing expires. The Committee decided to make no change in the proposed amendment. The Committee discussed the possibility that 7 days may even be too short a time period to seek a stay of mandate if the party intends to petition for a writ of certiorari. The Committee also

preferred to have a day certain on which the mandate will issue. The NLRB's comment on Rule 40 is also pertinent here. See the discussion of Rule 40 above.

The published amendments to subdivision (b) provide that a motion for a stay of mandate pending petition for certiorari must show that a petition for certiorari would present a substantial question and that there is good cause for a stay.

One comment was submitted and it does not bear directly upon the proposed amendment. NACDL suggests that the 30 day period for a stay is anachronistic because the period for filing a petition for certiorari is now 90 days in both civil and criminal suits. The Committee decided to make no change in the proposed amendment but placed the suggestion on its docket for later discussion.

When the Advisory Committee voted to approve the amendments as published there was one dissenting vote. That members wanted the record to reflect his belief that the rule should require a motion to show that a petition for ceritorari would present a substantial question or that there is good cause for a stay. In short, that the two should be disjunctive not conjunctive. The Committee's position is that the rule does not create a substantive standard that the circuits are bound to follow but instead that the rule provides notice of the issues that should be addressed in such a motion. To remove the inference that the rule establishes a substantive standard for granting a stay, the Committee decided to delete from the Committee Note the citation to Justice Scalia's chambers opinion in the Barnes case and to substitute therefor a citation to the § 17.19 of Stern & Gressman's treatise on Supreme Court Practice.

Rule 48

Rule 48 is a proposed new rule authorizing the use of special masters in the courts of appeals. Only one comment was received, the NLRB voiced strong support for the proposed rule. The only change made after publication was to change the number of the proposed rule from 49 to 48 (and the consequent moving of the provisions in existing Rule 48 to Rule 1(c)).

SUMMARY OF COMMENTS ON THE PROPOSED AMENDMENTS TO THE FED. R. APP. P. PUBLISHED JANUARY, 1993

1. There are no comments concerning the proposed amendments to Rules 3, 5, and 5.1.

2. With regard to the proposed amendments to Rule 9, there are two comments. One commentator notes that proposed Rule 9(c) should also refer to 18 U.S.C. § 3145(c). The other commentator makes several suggestions: a) clarify which subdivision applies after finding of guilt but before sentencing; b) clarify whether a motion for release must always be filed first in a district court; c) omit the statutory references in subdivision (c); and d) allow a party to supplement the district court's bail record.

3. There are no comments concerning the proposed amendments to Rule 13.

4. There is one comment concerning the proposed amendments to Rule 21. The comment is occasioned by the cover memorandum accompanying the published rules and need not concern the committee.

5. There are no comments on the proposed amendments to Rules 25, 26.1, and 27.

6. There are three comments concerning the proposed amendments to Rule 28. Two commentators suggest that there should not be a national rule requiring a summary of argument. The third commentator suggests that a summary should be required only when the argument exceeds 25 pages.

7. There are no comments on the proposed amendments to Rules 30 and 31.

8. Four commentators submitted remarks on the proposed amendments to Fed. R. App. P. 32.

   One commentator supports the effort to standardize type styles but suggests several changes:

   a. Normal text should be in roman font.
   b. For non-typographic processes, the "11 characters per inch" standard is not clear enough. If the effort is to prohibit proportional fonts, the rule should say so and give an example such as "courier."
   c. Requiring all briefs produced by non-typographic processes to be double-spaced may have unintended consequences. Word processors can produce text

that is visually indistinguishable from standard typographic process. A brief prepared by such a technique should be subject to the same rules that govern the standard typographic process.

As to all three of the preceding points, the commentator suggests review of the new Second Circuit local rule.

Three commentators object to double spacing footnotes.

Two commentators object to the requirement that a brief or appendix be bound so that it will lie flat when open. One of them bases his objection on the fact that coil bindings take extra space and become entangled with other documents. A third commentator favors the change but suggests that the language be more specific and require spiral binding.

Two commentators object to the requirement that the case number be positioned at the top of the cover. One of them suggests that if the requirement is retained that the rule be reorganized so that the requirements are arranged in the rule in order corresponding to the items' location on the cover page, i.e., from top to bottom.

One commentator suggests that the committee consider a uniform rule as to whether briefs produced in any manner other than standard typographic process use only one side of each sheet or both.

One commentator objects to the requirement that the attorney's telephone number be included on the cover.

One commentator suggests that the rule be amended so that a petition for rehearing may be in the form of either a brief or a motion, or that it should be in the form of a brief unless local rule provides otherwise.

9. One comment was received concerning the proposed amendments to Rule 33. The commentator does not remark generally about the amendments but suggests specifically that the language be changed to make it clear that the choice of an in-person or telephone conference is the court's choice, not the parties'.

10. There are no comments on the proposed amendments to Rule 35.

11. There are two comments on the proposed amendments to Rule 38. One commentator strongly endorses the notice provision. The other commentator believes that requiring the court to give notice unduly burdens the court and that notice from the other party

that the party has requested sanctions should be sufficient.

12. There are two comments on the proposed amendments to Rule 40. One commentator states that it is unwise to build a one-month delay into all civil appeals in which the government is a party in order to accommodate the small number of cases in which the government seeks rehearing. The additional time should be extended only to the United States or an agency of officer thereof. The other commentator opposes the extension of time because it will delay the issuance of the mandate and thus delay the effective date of an enforcement order.

13. There are three comments on the proposed amendments to Rule 41. Two of the comments relate to the delay of issuance of the mandate in civil cases involving the United States. One commentator states that there is no need to delay the issuance of the mandate for seven days after the time for seeking rehearing expires. The courts should be free to issue the mandate immediately. The other commentator opposes the delay in issuance of the mandate because it will delay the effective date of an enforcement order. The third comment is not directly relevant to any of the proposed amendments but suggests that the 30 day presumptive period for a stay pending certiorari should be changed to 90 days.

14. There is one comment on proposed Rule 49. The commentator strongly supports the proposed rule.

Part C
Rules Published January 1993
Summary of Comments

COMMENTS ON PROPOSED AMENDMENT OF FED. R. APP. P. 9

1. Honorable Peter C. Dorsey
United States District Judge
141 Church Street
New Haven, Connecticut 06510

Judge Dorsey makes no general comment about the proposed amendments to Rule 9 but suggests that subdivision (c) should refer to 18 U.S.C. § 3145 (c). He states that the difficulty of resolving the interrelation between §§ 3142 and 3143 with § 3145(c) suggests that the rule should also refer to § 3145(c).

2. National Association of Criminal Defense Lawyers (NACDL)
1110 Vermont Avenue, N.W.
Suite 1150
Washington, D.C. 20005

NACDL makes four suggestions. First, it suggests that the captions of subdivisions (a) and (b) should be coordinated to clarify whether (a) or (b) applies after a finding of guilt but before sentencing. Second, it suggests that the rule should be amended to make it clear whether a motion for release must be filed first in the district court even after a notice of appeal has been filed. Third, it suggests omitting the statutory references in subdivision (c) and, if necessary, moving them to the Committee Note. Fourth, it suggests amending the rule to allow a party to supplement the district court's bail record with evidentiary material.

Part C
Rules Published January 1993
Summary of Comments

COMMENTS ON PROPOSED AMENDMENT OF FED. R. APP. P. 21

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

Judge Newman notes that the transmittal letter accompanying the published rules reports an amendment concerning use of the judge's name and *pro forma* representation and that the published text omits those changes. The transmittal letter included in the published materials is the letter from the Advisory Committee to the Standing Committee requesting publication of a packet of rules. The Standing Committee did not approve the changes noted by Judge Newman, therefore, they were not published for comment. A different letter should have accompanied the published rules.

Part C
Rules Published January 1993
Summary of Comments

COMMENTS ON PROPOSED AMENDMENT OF FED. R. APP. P. 28

1. Jerry M. Hunter, Esquire
General Counsel
National Labor Relations Board
Washington, D.C. 20570

Suggests that a summary of argument should be required only when the argument exceeds 25 pages.

2. National Association of Criminal Defense Lawyers (NACDL)
1110 Vermont Avenue, N.W.
Suite 1150
Washington, D.C. 20005

Recommends that the decision whether to include a summary of argument be left to the judgment of the lawyer.

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

Judge Newman states that requiring a brief to contain a summary of the argument is ill-advised. He does not believe that it is useful; a judge must still read the main argument. He doubts that an argument is clearer because a summary is provided. He suggests that the choice should be left to each court and to the parties in courts that do not require a summary.

Part C
Rules Published January 1993
Summary of Comments

COMMENTS ON PROPOSED AMENDMENT OF FED. R. APP. P. 32

1. Charles D. Cole, Jr., Esquire
Meyer, Suozzi, English & Klein, P.C.
1505 Kellum Place
Mineola, New York 11501-4824

Mr. Cole agrees with the amendment requiring a brief or appendix to be stapled or bound so that it will lie flat when open. He suggests, however, that the rule be made more specific and require spiral binding. He also suggests that the committee create uniformity on the question of whether a brief or appendix, produced by the any process other than standard typographic process, should use only one side of a sheet of paper or both.

2. Gordon P. MacDougall, Esquire
1026 Connecticut Avenue, N.W.
Washington, D.C. 20036

Mr. MacDougall voices several objections to the proposed amendments. First, he objects to double spacing of footnotes. Second, he objects to the requirement that briefs be bound so that they will lie flat when open. Third, he objects to the requirement that the case number be positioned at the top of a cover and that the attorney's telephone number be included on the cover.

3. National Association of Criminal Defense Lawyers (NACDL)
1110 Vermont Avenue, N.W.
Suite 1150
Washington, D.C. 20005

NACDL objects to double spacing of footnotes. NACDL also questions the need for a national rule to specify the location of the case number on a brief cover but suggests that if the rule does specify the location, the rule be reorganized so that requirements are arranged in the rule in order corresponding to the items' location on the cover page, i.e., from top to bottom. NACDL suggests that the rule be amended so that a petition for rehearing may be in the form of either a brief or a motion, or that it should be in the form of a brief unless local rule provides otherwise.

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

Judge Newman supports the effort to standardize type styles but suggests several changes:

a. Normal text should be in roman font.

b. For non-typographic processes, the "11 characters per inch" standard is not clear enough. If the effort is to prohibit proportional font, the rule should say so and give an example such as "courier."

c. Textual footnotes should not be double spaced; requiring that they be in the same size type is adequate.

d. Requiring all briefs produced by non-typographic processes to be double-spaced may have unintended consequences. Word processors can produce text that is visually indistinguishable from standard typographic process. A brief prepared by such a technique should be subject to the same rules that govern the standard typographic process.

As to all four of the proceeding points, Judge Newman suggests that the Committee review of the new Second Circuit local rule.

e. The rule should not require all briefs and appendices to be bound as to permit them to lie flat because coil bindings take extra space and become entangled with other documents.

COMMENTS ON THE PROPOSED AMENDMENT OF FED. R. APP. P. 33

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

Judge Newman does not comment generally on the proposed amendments but suggests specifically that the language be amended to make it clear that the choice of an in-person or telephone conference is the court's not the parties. He suggests adding ", as the court directs," after the word telephone on line 24 of the published rule.

Part C
Rules Published January 1993
Summary of Comments

COMMENTS ON THE PROPOSED AMENDMENT OF FED. R. APP. P. 38

1. Jerry M. Hunter, Esquire
General Counsel
National Labor Relations Board
Washington, D.C. 20570

Mr. Hunter believes that the proposed amendment requiring a court to give notice would place unwarranted burdens on the court. He suggests deleting the words that require notice to come "from the court." He suggests that the rule should state: "after notice and reasonable opportunity to respond."

2. National Association of Criminal Defense Lawyers (NACDL)
1110 Vermont Avenue, N.W.
Suite 1150
Washington, D.C. 20005

NACDL strongly endorses the notice provision.

COMMENTS ON THE PROPOSED AMENDMENT OF FED. R. APP. P. 40

1. Jerry M. Hunter, Esquire
General Counsel
National Labor Relations Board
Washington, D.C. 20570

Mr. Hunter opposes the amendment because it lengthens the time for filing a petition for rehearing in a civil case involving the United States. That change may delay the effectiveness of an order enforcing an administrative order. An enforcement order becomes effective upon issuance of the mandate which will issue later under the proposed amendments.

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

Judge Newman states that it is unwise to build a one-month delay into all civil appeals in which the government is a party. He suggests that the added time should be extended only to the United States or an agency or officer thereof.

Part C
Rules Published January 1993
Summary of Comments

COMMENTS ON THE PROPOSED AMENDMENT OF FED. R. APP. P. 41

1. Jerry M. Hunter, Esquire
General Counsel
National Labor Relations Board
Washington, D.C. 20570

Mr. Hunter opposes the amendment because it lengthens the time for filing a petition for rehearing in a civil case involving the United States. That change may delay the effectiveness of an order enforcing an administrative order. An enforcement order becomes effective upon issuance of the mandate which will issue later under the proposed amendments.

2. National Association of Criminal Defense Lawyers (NACDL)
1110 Vermont Avenue, N.W.
Suite 1150
Washington, D.C. 20005

NACDL suggests that the 30 day presumptive period for a stay pending certiorari should be changed to 90 days. NACDL notes that the 30 day period was written into the rule when the period for filing a petition for a writ of certiorari in a federal criminal case was 30 days. Because a party now has 90 days to file a petition for a writ of certiorari even in a criminal case, NACDL suggests that the presumptive period should be 90 days.

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

Judge Newman states that there is no need to delay the issuance of the mandate until 7 days after the time for seeking rehearing has expired. He believes that a court should be able to issue a mandate immediately.

Part C
Rules Published January 1993
Summary of Comments

COMMENTS ON THE PROPOSED NEW RULE 49

1. Jerry M. Hunter, Esquire
General Counsel
National Labor Relations Board
Washington, D.C. 20570

Mr. Hunter expressed complete agreement with the advent and overall thrust of proposed Rule 49. He states that the Board has regularly called upon the courts of appeals to appoint special masters in contempt cases and the proposed rule would appear to codify existing practice.

NEW PROPOSALS

At the Advisory Committee's April 20 and 21, 1993, meeting, the Committee approved proposed amendments to several additional rules.

1. A technical amendment to Rule 4(a)(4) is proposed. Amendments to Rule 4(a)(4) are currently before Congress. This technical amendment provides that a party who wants to obtain review of an alteration or amendment of a judgment must either file a notice of appeal or amend a previously filed notice.

2. A technical amendment to Rule 8(c) is proposed. The amendment conforms subdivision (c) to previous amendments to Fed. R. Crim. P. 38. Subdivision 8(c) currently provides that a stay in a criminal case shall be had in accordance with the provisions of Rule 38(a). When Rule 8(c) was adopted Criminal Rule 38(a) provided procedures for obtaining a stay of execution when the sentence in question was death, imprisonment, a fine, or probation. Criminal Rule 38 was later amended and it now treats each of those topics in a separate subdivision. Subdivision 38(a) now addresses only stays of death sentences. The proper cross reference is to all of Criminal Rule 38, so the reference to paragraph (a) is deleted.

3. An amendment to Rule 10(b)(1) is proposed to conform that subparagraph to the amendments to Rule 4(a)(4). The purpose of this amendment is to suspend the 10-day period for ordering a transcript if a timely postjudgment motion is made and a notice of appeal is suspended under Rule 4(a)(4).

4. Amendments to Rule 21 governing petitions for mandamus are proposed. The rule is amended so that the trial judge is not named in the petition and is not treated as a respondent. The amendments also provides that the judge shall be represented *pro forma* by counsel for the party opposing the relief. The judge is, however, permitted to appear to oppose issuance of the writ if the judge chooses or if the court of appeals orders the judge to do so. Although the proposed amendments were unanimously approved by the Advisory Committee, two members wanted the record to relfect that they preferred another approach. They would permit a trial court judge to participate only if ordered to do so by the court of appeals and would authorize a court of appeals to invite an amicus curiae to defend the order in question.

5. A proposed amendment to Rule 25 provides that in order to file a brief using the mailbox rule, the brief must be mailed by first-class mail.

6. Proposed amendments to Rules 32, 35 and 41 treat a request for a rehearing in banc like a petition for a panel rehearing so that a request for a rehearing in banc will also suspend the finality of a court of appeals' judgment and extend the period for filing a petition for writ of certiorari. The term "petition" for rehearing in banc is substituted for the term "suggestion" for rehearing in banc to reflect the Committee's intent to treat the two requests similarly.

7. Amendments to Rule 47 are proposed. These amendments, and the proposed Rule 49, are the result of collaborative efforts by the chairs and reporters of the various advisory committees. The amendments to Rule 47 require that local rules be consistent not only with the national rules but also with Acts of Congress and that local rules be numbered according to a uniform numbering system. The amendments also allow a court to regulate practice in a variety of ways but prohibit a court from imposing sanctions or any other disadvantage for failure to follow the court's directives unless the violator has actual notice of the requirements. The Advisory Committee voted to delete the last sentence of the proposed Committee Note because it could be read to permit imposition of sanctions when a party only has constructive notice of a court directive.

8. Proposed Rule 49 allows the Judicial Conference to make technical amendments to the rules without the need for Supreme Court or Congressional review of the amendments.

Rule 4. Appeal as of Right - When Taken

(a) *Appeal in a Civil Case.*

* * * * *

(4) If any party makes a timely motion of a type specified immediately below, the time for appeal for all parties runs from the entry of the order disposing of the last such motion outstanding. This provision applies to a timely motion under the Federal Rules of Civil Procedure:

(A) for judgment under Rule 50(b);

(B) to amend or make additional findings of fact under Rule 52(b), whether or not granting the motion would alter the judgment;

(C) to alter or amend the judgment under Rule 59:

(D) for attorney's fees under Rule 54 if a district court under Rule 58 extends the time for appeal;

(E) for a new trial under Rule 59; or

(F) for relief under Rule 60 if the motion is served within 10 days after the entry of judgment.

A notice of appeal filed after announcement or entry of the judgment but before disposition of any of the above motions is ineffective to appeal from the judgment or order, or part thereof, specified in the notice of appeal, until the date of the entry of the order disposing of the last such motion outstanding. Appellate review of an order disposing of any of the above

motions requires the party, in compliance with Appellate Rule 3(c), to amend a previously filed notice of appeal. A party intending to challenge an alteration or amendment of the judgment ~~shall~~ must file ~~an~~ a notice, or amended notice, of appeal within the time prescribed by this Rule 4 measured from the entry of the order disposing of the last such motion outstanding. No additional fees will be required for filing an amended notice.

* * * * *

Committee Note

The amendment is technical in nature and is intended simply to clarify the fact that a party who wants to obtain review of an alteration or amendment of a judgment must file a notice of appeal or amend a previously filed notice to indicate intent to appeal from the altered judgment.

Rule 8. Stay or Injunction Pending Appeal

* * * * *

(c) Stays in a Criminal Cases. ~~Stays~~ A stay in a criminal cases shall be had in accordance with the provisions of Rule 38~~(a)~~ of the Federal Rules of Criminal Procedure.

Committee Note

Subdivision (c). The amendment conforms subdivision (c) to previous amendments to Fed. R. Crim P. 38. This amendment strikes the reference to subdivision (a) of Fed. R. Crim. P. 38 so that Fed. R. App. P. 8(c) refers instead to all of Criminal Rule 38. When Rule 8(c) was adopted Fed. R. Crim. P. 38(a) included the procedures for obtaining a stay of execution when the sentence in question was death, imprisonment, a fine, or probation. Criminal Rule 38 was later amended and now addresses those topics in separate subdivisions. Subdivision 38(a) now addresses only stays of death sentences. The proper cross reference is to all of Criminal Rule 38

Rule 10. The Record on Appeal

(a) *Composition of the Record on Appeal.* The record on appeal consists of the ~~The~~ original papers and exhibits filed in the district court, the transcript of proceedings, if any, and a certified copy of the docket entries prepared by the clerk of the district court. ~~shall constitute the record on appeal in all cases.~~

(b) *The Transcript of Proceedings; Duty of Appellant to Order; Notice to Appellee if Partial Transcript is Ordered.*

(1) Within 10 days after filing the notice of appeal or entry of an order disposing of the last timely motion outstanding of a type specified in Rule 4(a)(4), whichever is later, the appellant ~~shall~~ must order from the reporter a transcript of such parts of the proceedings not already on file as the appellant deems necessary, subject to local rules of the courts of appeals. The order ~~shall~~ must be in writing and within the same period a copy ~~shall~~ must be filed with the clerk of the district court. If funding is to come from the United States under the Criminal Justice Act, the order ~~shall~~ must so state. If no such parts of the proceedings are to be ordered, within the same period the appellant ~~shall~~ must file a certificate to that effect.

* * * * *

Committee Note

Paragraph (b)(1). The amendment conforms this rule to amendments being made in Rule 4(a)(4). The amendments to Rule 4(a)(4) provide that certain postjudgment motions have the effect of suspending a filed notice of appeal until the disposition of the last of such motions. The purpose of this amendment is to suspend the 10-day period for ordering a transcript if a timely postjudgment motion is made and a notice of appeal is suspended under Rule 4(a)(4). The 10-day period set forth in the first sentence of this rule begins to run when the order disposing of the last of such postjudgment motions outstanding is entered.

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

(a) *Mandamus or Prohibition ~~to a Judge or Judges~~; Petition for Writ; Service and Filing.* - ~~Application~~ A party applying for a writ of mandamus or of prohibition ~~directed to a judge or judges shall be made by filing~~ must file a petition ~~therefor~~ with the clerk of the court of appeals with proof of service on ~~the respondent judge or judges and on~~ all parties to the action in the trial court. The party must also transmit a copy to the clerk of the trial court for the information of the trial judge and certify to the court of appeals that such transmission has been made. The petition must be titled simply, In re [name of petitioner] , Petitioner. All parties to the action in the trial court other than the petitioner are respondents for all purposes. The petition ~~shall contain a statement of the facts necessary to an understanding of the issues presented by the application; a statement of~~ must state the issues presented and ~~of~~ the relief sought; state the facts necessary to understand the issues presented by the application; ~~a~~ state~~ment of~~ the reasons why the writ should issue; and include copies of any order or opinion or parts of the record ~~which~~ that may be essential to ~~an~~ understand~~ing of~~ the matters set forth in the petition. ~~Upon receipt of~~ When the clerk receives the prescribed docket fee, the clerk ~~shall~~ must docket the petition and submit it to the

court.

(b) *Denial, Order Directing Answer.* - ~~If the court is of the opinion that the writ should not be granted, it shall deny the petition.~~ The court may deny the petition without an answer. Otherwise, it ~~shall~~ must order that the respondent ~~an~~ answer ~~to the petition be filed by the respondents~~ within the time fixed by the order. ~~The order shall be served by the clerk on the judge or judges named respondents and on all other parties to the action in the trial court.~~ The clerk must serve the order on all respondents and send a copy to the clerk of the trial court. Two or more respondents may answer jointly. ~~All parties below other than the petitioner shall also be deemed respondents for all purposes. Two or more respondents may answer jointly. If the judge or judges named respondents do not desire to appear in the proceeding, they may so advise the clerk and all parties by letter, but the petition shall not thereby be taken as admitted.~~ The trial court judge need not respond unless the court of appeals orders the trial court judge to do so; however, the trial court judge may respond if the judge chooses to do so. If briefs or oral argument are required, ~~T~~ the clerk shall advise the parties. ~~of the dates on which briefs are to be filed, if briefs are required, and of the date of oral argument.~~ The proceeding ~~shall~~ must be given preference over ordinary civil cases.

Committee Note

In most instances, a writ of mandamus or of prohibition is not actually directed to a judge in any more personal way than is an order reversing a court's judgment. Most often a writ of mandamus seeks review of the intrinsic merits of a judge's action and is in reality an adversary proceeding between the parties. See, *e.g., Walker v. Columbia Broadcasting System, Inc.*, 443 F.2d 33 (1971). In order to change the tone of the rule and of mandamus proceedings generally, the Rule is amended so that the judge is not treated as a respondent. The caption and subdivision (a) are amended by deleting the reference to a writ of mandamus or prohibition as being "directed to a judge or judges."

Subdivision (a) is also amended so that a petition for a writ of mandamus or prohibition does not bear the name of the judge. Another amendment requires the clerk of the court of appeals to send a copy of the petition to the clerk of the trial court. Although most petitions for mandamus are actually adversarial proceedings, there are instances in which a petition for mandamus complains about a judge's conduct which is extrinsic to the merits of a decision or in which both parties support the mandamus. In such instances, the judge may wish to appear to oppose issuance of the writ. In order to make the judge aware of the filing of the petition, a trial court may instruct its clerk to provide a judge involved in a mandamus with a copy of the petition.

Subdivision (b). The amendment provides that even if relief is requested of a particular judge, the judge shall be represented *pro forma* by counsel for the party opposing the relief who appears in the name of the party and not of the judge. That is, arguments made on behalf of the party opposing the relief are treated as if also made on behalf of the judge. However, this provision does not create an attorney client relationship between the attorney and the judge, nor does it give rise to any right to compensation from the judge. A judge who wishes to appear may do so, and if the court desires to hear from the judge, the court may order the judge to respond. Once again, so that the judge is aware of the time for responding, the amendment requires the clerk of the court of appeals to send the trial court a copy of the order requesting an answer.

Rule 25. Filing and Service

(a) *Filing*.-- A paper required or permitted to be filed in a court of appeals must be filed with the clerk. Filing may be accomplished by mail addressed to the clerk, but filing is not timely unless the clerk receives the paper within the time fixed for filing, except that a briefs ~~and~~ or appendixes ~~are treated as filed on the day of mailing if the most expeditious form of delivery by mail, excepting special delivery, is used~~ is timely filed if it is mailed to the clerk by first-class mail, postage prepaid, and bears a postmark showing that the document was mailed on or before the last day for filing. ~~Papers~~ A paper filed by an inmate confined in an institution ~~are~~ is timely filed if deposited in the institution's internal mail system on or before the last day for filing. Timely filing of ~~papers~~ a paper by an inmate confined in an institution may be shown by a notarized statement or declaration (in compliance with 28 U.S.C. § 1746) setting forth the date of deposit and stating that first-class postage has been prepaid. If a motion requests relief that may be granted by a single judge, the judge may permit the motion to be filed with the judge, in which event the judge ~~shall~~ must note thereon the filing date and thereafter give it to the clerk. A court of appeals may, by local rule, permit papers to be filed by facsimile or other electronic means, provided such means are authorized by and consistent with standards established by the

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

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Committee Note

Subdivision (a). The amendment deletes the language requiring a party to use "the most expeditious form of delivery by mail, excepting special delivery" in order to file a brief using the mailbox rule. The amendment substitutes therefor a requirement that a brief be mailed by first-class mail and bear a postmark showing that the brief was mailed on or before the last day for filing.

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

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(b) Form of Other Papers.--

(1) A petition for rehearing, a ~~suggestion~~ petition for rehearing in banc, and any response to such petition ~~or suggestion~~ must be produced in a manner prescribed by subdivision (a) with a cover the same color as the party's principal brief.

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Committee Note

This amendment is made to conform this rule to concurrent changes in Rule 35. Amendments to Rule 35 substitute the term "petition for rehearing in banc" for "suggestion for rehearing in banc."

Rule 35. Determination of Causes by the Court in Banc

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(b) ~~*Suggestion*~~ *Petition of a Party for Hearing or Rehearing in Banc*.-- A party may ~~suggest the appropriateness of~~ petition for a hearing or rehearing in banc. No response ~~shall~~ should be filed unless the court ~~shall so~~ orders a response. The clerk ~~shall~~ must transmit any such ~~suggestion~~ petition 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~~ will 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~~ Petition of a Party for Hearing or Rehearing in Banc ~~; Suggestion Does Not Stay Mandate~~*.-- If a party desires to ~~suggest that~~ petition for an appeal to be heard initially in banc, the ~~suggestion~~ petition must be made by the date on which the appellee's brief is filed. A ~~suggestion~~ petition for a rehearing in 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.~~

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Committee Note

The purpose of the amendments is to treat a request for a rehearing in banc like a petition for panel rehearing so that a request for a rehearing in banc will suspend the finality of the court of appeals' judgment and extend the period for filing a petition for writ of certiorari.

Subdivision (b). The term "petition for rehearing in banc" is substituted for the term "suggestion for rehearing in banc." The change from suggestion to petition is not necessary to accomplish the Committee's objective, but it reflects the Committee's intent to treat the two requests similarly.

Because of the discretionary nature of the in banc procedure, the filing of a suggestion for rehearing in banc has not required a vote; a vote is taken only when requested by a judge. 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 in 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.

Subdivision (c). Two changes are made in this subdivision. First, the sentence stating that a request for a rehearing in banc does not affect the finality of the judgment or stay the issuance of the mandate is deleted. The deletion of that sentence does not affirmatively accomplish the goal of extending the period for filing a petition for writ of certiorari; it simply sets the stage for such an amendment. In order to affirmatively accomplish that objective, Sup. Ct. R. 13.4 must be amended.

Second, the language permitting a party to include a request for rehearing in 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.

Rule 41. Issuance of Mandate; Stay of Mandate

(a) *Date of Issuance.* The mandate of the court must issue 7 days after the expiration of the time for filing a petition for rehearing unless such a petition, or a petition for rehearing in banc, is filed or the time is shortened or enlarged by order. A certified copy of the judgment and a copy of the opinion of the court, if any, and any direction as to costs ~~shall~~ constitute the mandate, unless the court directs that a formal mandate issue. The timely filing of a petition for rehearing, or of a petition for rehearing in banc, will stay the mandate until disposition of the petitions unless ~~otherwise ordered by~~ the court orders otherwise. If the petition ~~is~~ or petitions are denied, the mandate must issue 7 days after entry of the order denying the last such petition unless the time is shortened or enlarged by order.

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Committee Note

Subdivision (a). The amendment is a companion to the amendment to Rule 35. This amendment provides that the filing of a petition for rehearing in banc stays the issuance of the mandate until disposition of the petition unless otherwise ordered by the court. Once again, this amendment advances the Committee's objective of tolling the time for filing a petition for writ of certiorari only indirectly. Amendment of Sup. Ct. R. 13.4 is also necessary. Because the filing of a petition for rehearing in 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.

Rule 47. Rules ~~by~~ of a Courts of Appeals

(a) *Local Rules.* -- Each court of appeals ~~by action of~~ acting by a majority of ~~the circuit~~ its judges in regular active service may, after giving appropriate public notice and opportunity to comment, ~~from time to time~~ make and amend rules governing its practice. A local rule must be ~~not in~~consistent with, but not duplicative of, Acts of Congress and ~~these~~ rules adopted under 28 U.S.C. § 2072. Local rules must conform to any uniform numbering system prescribed by the Judicial Conference of the United States. The clerk of each court of appeals must send the Administrative Office of the United States Courts a copy of each local rule and internal operating procedure when it is promulgated or amended. ~~In all cases not provided for by rule, the courts of appeals may regulate their practice in any manner not inconsistent with these rules. Copies of all rules made by a court of appeals shall upon their promulgation be furnished to the Administrative Office of the United States Courts.~~

(b) *Procedure When There Is No Controlling Law.* -- A court of appeals may regulate practice in any manner consistent with federal laws, rules, and local rules of the circuit. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal statutes, rules, or the local circuit rules unless the alleged violator has actual notice of the requirements.

Committee Note

Subdivision (a). The amendment requires that local rules be consistent not only with the national rules but also with Acts of Congress. The amendment also states that local rules should not repeat national rules. Repetition of a national rule in the text of a local rule makes the additional local requirement or variation less apparent.

The amendment also requires that the numbering of local rules conform with any uniform numbering system that may be prescribed by the Judicial Conference. Lack of uniform numbering might create unnecessary traps for counsel and litigants. A uniform numbering system would make it easier for an increasingly national bar and for litigants to locate a local rule that applies to a particular procedural issue.

Subdivision (b). The rule provides flexibility to the court in regulating practice when there is no controlling law. Specifically, it permits the court to regulate practice in any manner consistent with Acts of Congress, with rules adopted under 28 U.S.C. § 2072, and with the circuit's local rules.

This rule recognizes that courts rely on multiple directives to control practice. Some courts regulate practice through the published Federal Rules and the local rules of the court. In the past, some courts have also used internal operating procedures, standing orders, and other internal directives. Failure to include directives in local rules can result in lack of notice. Counsel or litigants may be unaware of various directives. In addition, the sheer volume of directives may impose an unreasonable barrier. For example, it may be difficult to obtain copies of the directives. Finally counsel or litigants may be unfairly sanctioned for failing to comply with a directive. For these reasons, this Rule disapproves imposing any sanction or other disadvantage on a person for noncompliance with such an internal directive, unless the alleged violator has actual notice of the requirement.

There should be no adverse consequence to a party or attorney for violating special requirements relating to practice before a particular court unless the party or attorney has actual notice of those requirements.

Rule 49. Technical and Conforming Amendments

The Judicial Conference of the United States may amend these rules to correct errors in spelling, cross-references, or typography, or to make technical changes needed to conform these rules to statutory amendments.

Committee Note

This rule is added to enable the Judicial Conference to make minor technical amendments to these rules without having to burden the Supreme Court and Congress with reviewing such changes. This delegation of authority will relate only to uncontroversial, nonsubstantive matters.