MINUTES OF THE MEETING

OF THE ADVISORY COMMITTEE ON APPELLATE RULES

APRIL 17 & 18, 1995

Judge James K. Logan called the meeting to order at 8:30 a.m. in the Ritz-Carlton Hotel in Pasadena, California. In addition to Judge Logan, the Committee Chair, the following Committee members were present: Chief Justice Pascal Calogero, Judge Will L. Garwood, Judge Alex Kozinski, Mr. Michael Meehan, Mr. Luther Munford, Mr. John Charles Thomas, and Judge Stephen Williams. Mr. Robert Kopp attended the meeting on behalf of Solicitor General Days. Judge Alicemarie Stotler, the Chair of the Standing Rules Committee attended. Mr. Robert Hoecker, the Circuit Executive for the Tenth Circuit and that circuit's former clerk, and Ms. Cathy A. Catterson, the Clerk of the Ninth Circuit, attended on behalf of the clerks. Professor Carol Mooney, the Reporter for the Advisory Committee was present. Mr. Peter McCabe, the Secretary, and Mr. John Rabiej, the Chief of the Rules Committee Support Office were present along with Ms. Judith McKenna of the Federal Judicial Center, and Mr. Joseph Spaniol, consultant.

Judge Logan began by introducing the new member, Chief Justice Pascal Calogero of the Louisiana Supreme Court. Judge Logan welcomed Chief Justice Calogero to the Committee and introduced the other members of the Committee.

The minutes of the October 1994 meeting were approved as submitted.

Mr. Munford pointed out that the minutes state that the subcommittee on sanctions should prepare a report for the fall 1995 meeting. Because Mr. Munford is the sole remaining member on that subcommittee, he requested that Judge Logan appoint additional members, especially a judicial member, to the subcommittee. Judge Logan asked Professor Mooney to work with Mr. Munford but promised to appoint at least one additional member.

Mr. Rabiej reported that the Supreme Court was still considering the rule amendments approved by the Judicial Conference last September. Mr. Rabiej stated that the Supreme Court decided to change "must" back to "shall" in all the rules under consideration so that the language of the rules would be uniform. Whether a consistent use of "must" would be acceptable to the Court remains uncertain. Having changed "must" back to "shall," the Supreme Court planned to send the rule amendments to Congress by May 1.

I. RULES PUBLISHED SEPTEMBER 1, 1994

Judge Logan asked the Committee to turn its attention to the rules that had been published for comment on September 1, 1994. The comment period closed on February 28, 1995. Judge Logan stated that the Advisory Committee's task was to consider all the comments and decide whether to amend the published

rules.

Rule 21 - Mandamus

The published amendments provide that the trial judge is not named in a petition for mandamus and is not treated as a respondent. The judge is permitted to appear to oppose issuance of the writ only if the court of appeals orders the judge to do so. The proposed amendments also permit a court of appeals to invite an amicus curiae to respond to a petition. The only issue that had been controversial among the Committee members was whether a trial judge should have the right to respond to a petition for mandamus. Some members of the Advisory Committee, as well as some members of the Standing Committee, believe that a judge should have the right to respond.

The reporter summarized the post-publication changes that she suggested in her redraft. First, the draft was amended to state directly that a trial judge may not respond unless requested to do so by the court of appeals. In the published rule the judge's inability to participate without court of appeals authorization was implicit but not stated directly except in the Committee Note. Second, the redraft authorizes a court of appeals to "invite" the judge's participation as well as order it. The only other changes suggested were stylistic.

A motion to adopt the redraft was made and seconded. The motion passed by a vote of 7 to 2.

In a recent circuit court proceeding one of the parties asked the trial judge to write to the court of appeals concerning the proceeding. An opposing party pointed out that the judge's letter was not a pleading to which the party could respond. The redraft permits a court of appeals to "invite" the trial judge to respond to a petition for mandamus. When extending such an invitation, a court of appeals may also authorize the opposing party to respond.

One member expressed agreement with the decision to delete the trial judge as a party, but wanted the judge to have notice of the proceeding. Another member responded that the philosophy of the published rule is that the trial judge is no longer the respondent. The focus is shifted to the real parties in interest.

Judge Logan agreed that the rule should ensure that notice of a mandamus petition is given to the trial judge. He suggested that language might be added at line 84 of the redraft. Lines 71-72 permit a court to deny a petition without an answer, but lines 72-74 state that in all other instances the respondent must be ordered to answer. Lines 82-84 require the clerk to serve a notice to respond on all persons directed to answer. Judge Logan suggested that a trial court does not need notice of a petition if the court of appeals denies it without ordering any response. Therefore, he suggested that line 84 could require service on the trial judge only when there is an order to respond. Since the majority of mandamus petitions are disposed of without requiring a response, some members of the Committee supported this suggestion on the assumption that the trial judge need not be concerned about such petitions.

Other members of the Committee disagreed. They said that if a judge is to be given notice, it would be simpler and more efficient if the notice is given at the inception of the proceeding and in all cases.

Therefore, it was agreed to amend line 15 so that notification is given to the judge when the petition is filed. In order to be consistent with the fact that the judge is not treated as a respondent, the Committee decided to require that a copy of the petition be sent to the clerk of the trial court rather than directly to the judge.

A motion was made and seconded to amend line 15 to include a new sentence as follows: "The party shall also file a copy with the clerk of the trial court." The motion passed with 8 members voting in favor of it, none in opposition, and 1 abstention.

Judge Stotler asked whether the language at lines 78-81 of the redraft would permit a trial judge who had received notice of the proceeding to request permission to participate. A trial judge may have information that should be brought to the court's attention and the judge may want to seek permission to do so. The Committee consensus was that the language would permit a trial judge to request authorization to respond to a petition.

The newly approved amendment requires a petitioner to file a copy of a petition for mandamus with the trial court. Filing a copy of the petition with the trial court clerk will result in the docketing of the petition. The Committee considered whether it should require the court of appeals to send a copy of its order disposing of the petition to the trial court. Some members of the Committee believe that it is unnecessary to do anything other than notify the trial judge of the commencement of the proceeding. If the court of appeals orders the trial court to do something, the trial court will receive notice of that order. In other instances, notice is unnecessary. The majority of the Committee, however, believe it better to ensure that the trial court has notice of both the beginning and ending of a mandamus proceeding. A motion was made and seconded to add a new paragraph (7) after line 97. The new paragraph would say: "The circuit clerk shall send a copy of the final disposition to the clerk of the trial court." The motion passed by a vote of 7 to 2.

The numbered paragraphs of subdivision (b) were also rearranged. A motion was made and seconded to move paragraph (2) of the draft below paragraphs (3) and (4). The motion passed with 6 voting in favor of it, no one opposing it, and 3 abstentions.

Rules 25 and 26 - Filing and Service

The published amendments to Rule 25 provide that in order to file a brief or appendix using the mailbox rule, the brief or appendix must be mailed by First-Class Mail or delivered to a "reliable commercial carrier." The amendments also require a certificate stating that the document was mailed or delivered to the carrier on or before the last day for filing. Subdivision (c) is amended to permit service on other parties by a "reliable commercial carrier." Amended subdivision (c) further provides that whenever feasible, service on other parties shall be by a manner at least as expeditious as the manner of filing.

The published amendment to Rule 26 gives a party who must respond within a specified time after service of a document 3 additional days to respond when service is by "reliable commercial carrier," just as a party has a 3-day extension when service is by "mail."

Some of the commentators suggested that the rules need not permit the use of commercial carriers. As a preliminary matter Judge Logan asked whether there was any sentiment on the Committee to prescind from the possible use of commercial carriers. Only one member spoke in favor of omitting use of commercial carriers.

A member of the Committee noted that one of the commentators suggested that there should be a specific preemption of local rules. Because that suggestion is not specific to Rule 25, the member asked that it be discussed at a later time.

One of the commentators on Rule 26 stated that the proposed amendment highlights the fact that there is no clear dividing line between personal service and other kinds of service. If a messenger service can be used to make personal service on a party residing in the same city as the person making service, it is not clear that using a private courier service to make service on a party residing in another city is not personal, especially if the carrier leaves the document with a "clerk or other responsible person." Yet the proposed Rule 26(c) gives a 3-day extension when service is by reliable commercial carrier, but not when it is personal. To the extent that it is unclear whether service is personal or by commercial carrier, it is unclear whether the 3-day extension is applicable or not.

One possible solution would be to require use of next-day service and to provide only a one-day extension when commercial carriers are used. Then in the ordinary course of events there would be no confusion. Personal service is complete upon delivery, but service by commercial carrier is complete upon delivery to the carrier. If the carrier makes delivery the next day, it would be pragmatically irrelevant to the recipient whether service was personal or by commercial carrier; the time for response would (as a practical matter) be counted from the day of receipt. One problem with that approach is that the United States Postal Service also provides next-day service and service in that manner should be treated like next-day service provided by a commercial carrier. Another problem is that there are places in the ninth circuit where next-day service is not available.

A motion was made and seconded to adopt yet another approach -- to eliminate subdivision (c) and any extension of time. Eliminating the extension following service by mail might provide an incentive to use more expeditious forms of service. If a paper is served by mail and takes several days to arrive and the response time is computed from the date of service, it is likely that a motion to extend the response time will be made and granted. To avoid such a delay, the serving party has an incentive to personally serve the paper or to use expedited commercial or postal delivery. The motion failed by a vote of 3 in favor and 6 in opposition.

Another possible solution was considered -- to provide the 3-day extension whenever a document is not delivered to the party being served on the same day that it is "served." The 3-day extension was created because service by mail is complete on the date of mailing. Since the party being served by mail does not receive the paper on that date, an extension is provided. Making the extension available whenever the party does not receive the document on the date it is served achieves the original objective and avoids the confusion arising from the need to know the type of service.

A motion was made and seconded to adopt that approach. The motion was to amend Rule 26(c) to state that when a party must act within a "prescribed period after service of a paper upon that party, unless the paper is delivered on or before the date of service stated in the proof or acknowledgement of service" three days are added to the prescribed period. Since the party being served will receive a copy of the proof of service which states the date and manner of service and the party will know when he or she receives the document, the party should have no difficulty knowing whether he or she has the benefit of the 3-day extension.

The discussion made it clear that the rule should not tie the extension to whether or not the paper is delivered on or before the day it is "filed." A paper may be "served" before it is filed, as when a paper is mailed to the court for filing and hand-delivered to opposing counsel on the day of mailing. The party being served would not know the filing date and would need to contact the court to ascertain that date.

The motion passed by a vote of 8 to 1.

Lines 8 through 10 of the redraft addressed another problem raised by the comments. The problem is whether the 3-day extension provided by subdivision (c) is itself a period of less than 7 days for purposes of subdivision (a). In other words, if the time for responding after service is 30 days and service is by mail, does the party served by mail have 33 days in which to respond, or 30 days plus 3 days; and as to the latter 3 days, do weekends and holidays count? Assume that an appellant serves its principal brief by mail on a Wednesday. If the appellee's brief is due 33 days later, it is due on Monday. If, however, the appellee's brief is due 30 days later, plus a separate 3-day period because of the mailing and if the separate 3 day period is governed by 26(a), the appellee's brief is due Wednesday (30 days ends on Friday, then the additional 3-day period is computed excluding weekend days). On the basis of a recent D.C. Circuit case construing the parallel civil rule, Fed. R. Civ. P. 6, the Committee decided that the 3-day extension should mean 3 calendar days so that weekends and holidays are counted. A motion was made and seconded to adopt the substance of the suggestion but to do so by omitting the sentence at lines 8-10 of the redraft and inserting the word "calendar" before the word "days" on line 5. The motion passed by a vote of 6 to 3. The consensus was that the Committee Note should be amended to explain that the insertion of "calendar days" is intended to clarify the relationship of the 3-day extension with subdivision (a).

Having completed its discussion of Rule 26, the Committee returned to Rule 25.

The published rule made the mailbox rule applicable when a brief or appendix is mailed on or before the last day for filing by First-Class Mail. In order to permit the use of Express Mail or Priority Mail, language was added that makes the mailbox rule applicable not only to First-Class Mail but also to any other "class of mail that is at least as expeditious." The Committee did not want to require use of Express or Priority Mail but did not want to preclude their use.

Several commentators opposed the provision requiring that when feasible service should be accomplished in as expeditious a manner as the manner used to file the paper with the court. An equal number of commentators expressed support for the change. The purpose of the change was to preclude a party from using an overnight courier to file with the court but serving opposing parties by some significantly slower method, sometimes in an obvious effort to shorten the response time available to the party being served. This is a special problem when the time to respond runs from the date of filing rather

than the date of service. The redraft eliminated the "when feasible" language and stated that "when reasonable considering such factors as distance and cost, service on a party must be by a manner at least as expeditious as the manner used to file the paper with the court."

One member stated that the standard, even in the redraft, is too vague. He favored the approach suggested by one of the commentators that the requirement of comparable service should apply only when a document is hand-delivered to a court for filing. Another member asked how the provision would be enforced and suggested deleting the language from the rule and moving it to the Committee Note. Another member indicated that he envisioned the provision being invoked only when a party who had been the victim of "slow service" sought an extension or there was an argument about the timeliness of a responsive document.

Another member favored the new language but suggested adding to it. He suggested that one of the factors that should bear upon the reasonableness of using comparable service is the immediacy of the relief requested. The method of service is not nearly so critical with a brief, where the response time is relatively long, as it is with a motion.

A motion was made and seconded to amend line 96 as follows: "considering such factors as immediacy of the relief sought, distance, and cost . . ." The motion passed by a vote of 8 to 1.

Four commentators said that using the term "reliable commercial carrier" was undesirable because disputes about "reliability" are likely to arise. In response to those commentators, and to coordinate with the amendments to Rule 26 regarding the 3-day extension of time, a motion was made to amend the language at lines 35 and 36 on page 46. The motion would make the mailbox rule applicable if a brief or appendix is dispatched to the clerk on or before the last day for filing "for delivery within 3 calendar days by a third-party commercial carrier." The motion was seconded and unanimously approved. The reporter was instructed to make any coordinating changes necessary, e.g. at lines 96 and 97.

On page 50, the second sentence of the shaded material in the Committee Note accompanying subdivision (c) was deleted upon motion and unanimous approval.

The Committee adjourned for lunch at 12:15 and reconvened at 1:30 p.m. Upon reconvening, the Committee was joined by Bryan Garner, Esq., the consultant to the Style Subcommittee of the Standing Committee, and by a visitor, Miriam Krinsky of the United States Attorney's Office in Los Angeles.

Judge Logan asked Mr. Garner to review the changes to Rules 21, 25, and 26, that were approved by the Committee during the morning session, and began the afternoon session with discussion of Rule 27.

Rule 27 - Motions

Judge Logan asked the Reporter to explain the changes made in the redraft. She noted that at page 95

lines 67 through 79 are new. These lines, like the Department of Justice's original draft, expressly authorize inclusion of a request for affirmative relief in a response to a motion. The provision states that the time for response to the new request and for a reply to that response are governed by the general rule.

The reporter further noted that at page 96 lines 107-109 are new. The rule permits a court to act upon a motion for a procedural order without awaiting a response from the opposing party. The published rule stated that if timely opposition to a motion is filed after the motion is granted, the opposition does not constitute a request to reconsider, vacate, or modify the disposition. The new language states that a motion requesting such relief must be filed. Although that was implicit in the published draft, the redraft makes it explicit.

Two changes were made in the Committee Note in response to comments. Paragraph (a) of Subdivision (a) permits a reply to a response and states that a reply generally must not "reargue propositions presented in the motion or present matters that do not reply to the response." The first addition to the Committee Note recognizes that matters relevant to a motion sometime arise after the motion is filed. The Note states that treatment of such matters in the reply is appropriate even though strictly speaking it is not in reply to the response.

As previously noted, subdivision (b) permits a court to dispose of a procedural motion without awaiting a response from the opposing party. If the party opposing the motion files the response shortly before the court issues its order, the party may be uncertain whether the court considered the response before issuing the order. It would be helpful to the party deciding whether to request reconsideration to know whether the court considered its response. The second addition to the Committee Note states that if a court has received and considered the response before issuing its order, it is desirable for the court to indicate that it has done so.

In keeping with the procedure followed in the morning, the changes in the redraft were treated as having the status of a motion made and seconded. The changes were approved by a vote of 7 in favor and none in opposition.

Two commentators said that the time periods for responding to a motion (7 days) and for replying to a response (3 days) are too short. One of those commentators suggested providing longer response periods for "dispositive" motions and retaining the shorter time periods for "non-dispositive" motions. A member of the Committee agreed that the time periods are too short for substantive motions but because of the difficulty of distinguishing between substantive/non-substantive or dispositive/non-dispositive motions, he rejected the idea of different time periods depending upon the nature of the motion. He suggested lengthening the time for the initial response to 10 days (page 94, line 53) and for the reply to 5 days (page 95, line 83).

Although some members of the Committee favored different time periods for substantive motions, the Committee decided that it would be better to have a single set of time limitations; having different time limits depending upon the nature of the motion would create difficulties for the clerk's office. It was further noted that as to procedural orders, subdivision (b) permits the court to act prior to receipt of a response. A motion was made and seconded to change the time for an initial response from 7 to 10 days. The motion passed by a vote of 5 to 3.

A motion was then made and seconded to change the time for filing a reply from 3 to 5 days. That motion was approved by a vote of 8 to 1.

The following style changes were also approved:

1. On page 95, lines 68 and 71, the word "request" was changed to "motion."

2. On page 96, line 90, the words "determination" was changed to "disposition."

3. On page 97, lines 112-114, the words "request for relief that under these rules may properly be sought by motion" were deleted and replaced by the word "motion", and at lines 114-115, the words "a single judge must" were deleted and replaced by the word "may".

4. On page 97, lines 118 through 122 were amended to change from the passive to the active voice. At line 118, the words "only the court may act on" were inserted after the word "that", and at line 119, the words "must be acted upon by the court" were deleted. At line 120, the words "court may review the" were inserted after the word "The" and before the word "action". At lines 121-122, the words "may be reviewed by the court" were stricken.

The Committee did not believe that republication would be necessary because the post-publication changes, including the changes in time periods, were not significant. The consensus was that all the suggested changes are logical outgrowths of the published rule.

Style Changes to Rules 21 and 26

Mr. Garner, having had the opportunity to review the changes approved during the morning session, suggested the following stylistic changes, all of which were approved.

1. Rule 21

a. At page 20, line 11, and page 24, line 88, the word "must" was changed to "shall" in light of the Supreme Court's recent decision regarding the rules before it. In contrast at page 24, line 95, and page 25, line 111, the "must" was retained because "shall" should be used only when the subject of the sentence is the actor who has a duty.

b. At page 21, lines 27 through 29 were combined as subparagraph (A) and the words "The petition must" were inserted at line 30 before the word "state." At page 22, line 21, the words "The petition must" were inserted before the word "include."

c. At page 24, line 87, the word "briefs" was changed to "briefing" and the word "are" was changed to "is".

2. Rule 26

a. At page 65 line 2, the word "Whenever" was changed to "When"; at line 3, the words "do an" were omitted.

b. At page 65 the words "3 calendar days are added to the prescribed period" were deleted from lines 5 and 6 and inserted in line 4 after the word "party."

Rule 28 - Briefs

Rule 28 as published was amended to delete the page limitations for a brief and to make the correct cross-reference in subdivision (h) to paragraphs in subdivision (a). The length limitations are being moved to Rule 32. The only change made in the redraft as a result of the comments on the published amendments was to note that subdivision (g) is reserved and to leave the current labels on the remaining Rule 28 subdivisions. Those changes were approved by the Committee unanimously.

Mr. Garner, however, suggested a number of style revisions in subdivision (h) all of which were approved. As amended, subdivision (h) reads as follows:

(h) *Briefs in a Cases ~~Involving a Cross-Appeals~~*. If a cross-appeal is filed, the party who ~~first~~ files a notice of appeal first, or if ~~in the event that~~ the notices are filed on the same day, the plaintiff in the proceeding below is ~~shall be~~ deemed the appellant for the purposes of this rule and Rules 30, ~~and~~ 31, and 34, unless the parties agree otherwise ~~agree~~ or the court ~~otherwise~~ orders otherwise. The appellee's brief must ~~of the appellee shall~~ conform to the requirements of Rule 28 ~~subdivisions~~ (a)(1)-(7) ~~(6) of this rule~~ with respect to the appellee's cross-appeal as well as respond to the appellant's brief, ~~of the appellant~~ except that a statement of the case need not be made unless the appellee is dissatisfied with the appellant's statement ~~of the appellant~~.

Rule 32 - Form of Briefs and Other Papers

Judge Logan began the discussion of Rule 32 with the topics that drew the most comment. He asked the Committee to initially make substantive decisions on the issues rather than deal with specific language.

1. Double-sided printing

Thirty-one commentators opposed double-sided printing of a brief or appendix. Judge Logan suggested that any reference to printing on both sides be eliminated. A motion was made and seconded to eliminate the reference. The motion passed unanimously. A motion was then made to go one step further and prohibit printing on both sides, at least for 8-1/2 by 11" briefs. That motion passed by a vote of 7 to 1.

2. Proportional type

Nine commentators expressed opposition to the use of proportional type; another 15 commentators would delete the preference for proportional type. A motion was made and seconded to eliminate the preference for proportional type. The motion passed unanimously. A motion was then made and seconded to include a preference for monospaced type. The motion failed by a vote of 1 in favor and 8 in opposition.

Twenty-seven commentators said that if proportional type is permitted it should be required to be larger than 12 point. Most of the commentators said that it should be at least 14 or 15 point. A motion was made and seconded that the minimum size should be 14 point. Some members of the Committee believed that the published rule may have been too subtle in using word limitations to both eliminate the incentive to squeeze as much material as possible on a page and to free practitioners to use the most attractive and most legible type. Yet other members of the Committee believed the word limitation approach is sufficient and should be retained. They believed that the change to a pure word limit would eliminate the incentive for game playing and the sole remaining incentive would be to make a brief legible. Reference was made to the font samples included in Judge Easterbrook's letter to the Committee. Some members of the Committee believed that a 14 point minimum would be too large in some fonts. The motion to require a minimum of 14 points passed by a vote of 6 to 2.

3. Monospaced type

Nineteen commentators said that the monospaced type permitted under the rule should have no more than 10 characters per inch, the equivalent of pica type on a standard typewriter. The reason that the published rule states that the monospaced type used cannot have more than 11 characters per inch (cpi) is that some of the monospaced typefaces produced by computers that are labeled 10 cpi actually produce slightly more than 10 cpi. A motion was made and seconded to change to 10 cpi. The motion failed by a vote of 3 to 6. A motion was then made and seconded to specify no more than 10-1/2 cpi. The motion was approved.

4. Length

Regarding the length limitation, twelve commentators opposed use of word limitations (both total words per brief and average number of words per page); one other opposed applying word limits to *pro se* litigants proceeding *in forma pauperis*. Another five commentators implicitly rejected the word limitations by saying that the rule should use page limits. A motion was made to use word counts. The motion passed unanimously.

One commentator suggested that the word counts should be replaced by a character count because a character count eliminates the variations resulting from the different word counting methods used by software programs. Although various word processing programs count words differently, a difference of 200 or 300 words per brief is insignificant compared to the variation possible under the current rule. No motion was made to use a character count.

Having decided to retain word limits, Judge Logan asked whether the limits should be increased. Seven

commentators objected to the 12,500 word limit in the published rule on the ground that it reduces the length below the traditional 50 page limit. The commentators suggested increasing the total number of words to 14,000 or 14,500. A motion was made and seconded to raise the limit to 14,000 words.

Some members of the Committee believed that even if 12,500 words is shorter than the traditional 50 page brief in pica type, that 12,500 words is sufficient. A local rule in the D.C. Circuit limits a principal brief to 12,500 words and that length seems sufficient. Other members of the Committee were concerned that some cases warrant a longer brief and that it is more of a problem to cut short helpful discussion than to have some briefs longer than need be. A longer, more complete brief can be of significant assistance to the court.

The Committee examined some of the sample brief pages prepared by Microsoft using proportional typefaces and complying with the 280 word per page limit in the published rule. The pages were attractive and easily legible. If each page has no more than 280 words, a 50 page brief would have 14,000 words. Although some members continued to support 12,500 as sufficient, it was argued that it would be better to provide more leeway because of the variation in word counting methods.

The motion to increase the word limit to 14,000 passed by a vote of 7 to 1.

The next issue considered was retention of the 280 words per page limit. Retention was unanimously approved.

5. Certification of compliance & safe harbors

Three commentators objected to the requirement that a brief must include a certification that it does not exceed either the total word count or the limit on the average number of words per page. The commentators stated that the requirement is demeaning. The Committee approved retention of the requirement. The person preparing a brief has easy access to the information through use of the computer equipment used to prepare the brief; the clerk's office does not.

A certification of compliance is not required if the brief falls in the safe harbor. The next issue considered was whether to retain the safe-harbor provisions. If the safe-harbor provisions are generous enough, a person preparing a brief using a typewriter will use the safe harbor and will not be forced to manually count words in order to make certification.

Ms. Catterson, the Clerk of the Ninth Circuit, stated that her office had flow-charted the operation of the published rule to indicate all the various requirements and the things that would need to be checked by a deputy clerk. On the basis of that exercise, she recommended that all briefs contain a certification of compliance with the rule and indicate the method of compliance being used.

The Committee first decided, by a vote of 7 to 1 with 1 abstention, to delete the safe-harbor provisions for proportional type and retain a safe harbor only for monospaced type.

The discussion then turned to the length of a monospaced brief permitted under the safe-harbor provision. The published rule set the maximum length under the safe harbor for a principal brief at 40 pages. A member of the Committee argued that it should be 50 pages. He argued that the primary method of "cheating" under the current length limitation is the use of proportional type; if the safe harbor applies only to monospaced briefs (with a typeface producing no more than 10-1/2 cpi), he asked why the length should be any less than 50 pages. Another member responded that in addition to the use of small proportional type, single-spaced footnotes and quotations are also used to pack more material into a brief. Most members of the Committee agreed that the safe harbor should be shorter than 50 pages. A motion was made to retain a 40 page limit for the safe harbor. The motion passed by a vote of 6 to 3.

6. Inclusion in an appendix of electronically retrieved opinions

Seven commentators objected to that portion of the Committee Note stating that decisions retrieved electronically from Lexis or Westlaw may not be included in an appendix. If an opinion is unpublished or not yet published but citation to it is permitted, inclusion of the opinion as retrieved from Lexis or Westlaw may be the only pragmatic way to provide the court with a copy of the opinion. Paragraph (a)(7) of the published rule said that an appendix may include a legible photocopy of any document found in the record or of a printed court or agency decision. The language limiting inclusion to "printed" decisions was the source of the objections.

One member asked why a Rule 30 appendix would ever include copies of decisions in other cases. It was pointed out that although the classical appendix contains only documents pertaining to the case being appealed, in some circuits it is common practice for a lawyer who believes that he or she has found some new authority relevant to the case to prepare an appendix to the brief containing that authority. A motion was made to delete the words "or of a printed court or agency decision" from paragraph (a)(7). The motion passed by a vote of 8 to 1. A further problem was, however, noted. Even as to the decision being appealed, it is far more convenient to have the published decision, if any, rather than the typewritten decision. A motion was made to amend the Committee Note to state that if any opinion that is included in the appendix has been published, a copy of the published decision should be provided.

7. Margins

Five commentators opposed having different margins depending upon whether a brief is prepared with monospaced or proportional type. The draft rule prescribed different margins because proportional type is easier to read if the line length does not exceed 6 inches. Given the change to requiring a minimum of 14 point proportional type, a motion was made to have side margins of not less than 1 inch regardless of the type style used. The motion passed by a vote of 6 to 3.

8. Requiring a brief to lie flat when open

Four commentators opposed requiring a brief to lie flat when open. A motion was made to eliminate that requirement. The motion failed by a vote of 2 in favor, 6 opposed and 1 abstention. A motion was made

to require a brief to lie "reasonably" flat when open. The motion passed.

9. Pamphlet briefs

Given the infrequent use in the courts of appeals of pamphlet briefs, a motion was made to simplify the rule by eliminating pamphlet briefs. The ninth circuit eliminated pamphlet briefs because the circuit's rules committee believed that a party submitting a pamphlet brief has an advantage. Some members of the Advisory Committee concluded, on the same basis, that pamphlet briefs should be encouraged; while other members of the Committee concluded that pamphlet briefs should be prohibited because they can be used only by parties with sufficient economic resources to pay for the printing. A motion to eliminate pamphlet briefs passed by a vote of 7 to 2.

10. 300 dots per inch

Six commentators recommended deleting the requirement that briefs be printed with a resolution of 300 dots per inch or more. The commentators stated that the requirement is too technical and that requiring "legibility" is sufficient.

A motion to eliminate the 300 dots per inch requirement passed unanimously. But the Committee favored inserting a statement in the Committee Note that would encourage the use of print with a resolution of 300 dots per inch or more.

11. Serifs, bold type, underlining, and italics

Several commentators objected to requiring type with serifs. A motion was made to eliminate that requirement. The motion passed by a vote of 5 in favor, 2 in opposition, and one abstention.

Other commentators objected to the prohibitions on use of bold type, underlining, and italics. The objection was that the rule should not be concerned with such technical matters and should leave such matters to the discretion of the person preparing the brief. Mr. Garner pointed out that the misuse of bold type, etc. is very distracting and should be controlled. A motion was made to eliminate (a)(4) and (5). The motion passed by a vote of 6 to 3.

12. Preemption of local rules

The question of whether Rule 32 should include a provision preempting all local rules dealing with brief length, printing and format was postponed until later discussion. Rule 47 says that a local rule cannot be inconsistent with the national rules. But a question remains with regard to local variations that are not squarely inconsistent with the national rule. For example, on the basis of the preceding discussion, Rule 32 will permit both monospaced and proportional typefaces but will not express a preference for either one. A local rule that expressed a preference for monospaced type would not be inconsistent with the national rule. Should the national rule, in the interest of nation-wide uniformity, prohibit any such local rule? That question was postponed for later discussion because it has broad-ranging impact.

Given the breadth of the changes approved by the Committee, the sense of the Committee was that Rule 32 should be republished for comment.

The chair thanked the Committee for its work on the rule and promised that he and the reporter would prepare a new draft that evening for the Committee's consideration the next morning.

The Committee adjourned for the evening at 5:15 p.m.

The Committee reconvened at 8:30 a.m. on April 18.

The chair and reporter had prepared the following redraft of Rule 32 for the Committee's consideration.

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

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

(1) *In General*. ~~Briefs and appendices~~ A brief may be produced by ~~standard typographic printing or by any duplicating or copying process which produces~~ any process that results in a clear black image on white paper, including typing, printing, or photocopying. The paper must be opaque and unglazed, and only one side may be used. Carbon copies ~~of briefs and appendices may not be submitted without~~ may be used only with the court's permission ~~of the court, except in behalf of parties allowed to proceed~~ or 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 with double spacing between each line of text. In patent cases the pages of briefs and appendices may be of such size as is necessary to utilize copies of patent documents.~~

(2) *Typeface*. Either a proportionately spaced typeface of 14 points or more, or a monospaced typeface of no more than 10-1/2 characters per inch may be used in a brief. A proportionately spaced typeface is one that has characters with different widths. The design must be in roman, non-script type. A monospaced typeface is a typeface in which all characters are the same width.

(3) *Paper Size, Line Spacing, and Margins*. A brief must be on 8-1/2 by 11 inch paper. The text must be double-spaced, but quotations more than two lines long may be indented and single-spaced. Headings and footnotes may be single-spaced. The side margins must be at least 1 inch, and the top and bottom margins must be at least 1-1/4 inch.

(4) *Length*.

(A) Proportionately spaced briefs. A principal brief must not exceed 14,000 words, and a reply brief must not exceed 7,000 words. No brief may have an average of more than 280 words per page, including headings, footnotes, and quotations.

(B) Monospaced or typewritten briefs. A brief prepared in a monospaced typeface must either:

(i) comply with the word counts, both total and average per page, for a proportionately spaced brief; or

(ii) not exceed 40 pages for a principal brief and 20 pages for a reply brief.

(C) Exclusions. Word and page counts do not include any of the following: corporate disclosure statement, table of contents, table of citations, certificate of service, or any addendum containing statutes, rules, regulations, etc.

(D) A party may move for permission to exceed the brief lengths established by this rule.

(5) *Certificate of Compliance.* The brief must be accompanied by a certificate of compliance with (A) or (B) above. A party preparing this certificate may rely on the word count of the word-processing system used to prepare the brief.

(6) *Appendix*. An appendix must be in the same form as a brief, but may include a legible photocopy of any document found in the record.

~~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.~~

(7) *Cover.* ~~If briefs are produced by commercial printing or duplicating firms, or, if produced otherwise and the covers to be described are available,~~ Except for filings of 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:

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

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

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

~~(3)~~ (D) 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)~~ (E) the title of the document, identifying the party or parties for whom the document is filed ~~(e.g., Brief for (Appellant, Appendix)~~; and

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

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

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

~~if they are legible.~~

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

(1) *Motion*. The form for a motion is governed by Rule 27(d).

(2) *Other Papers*. Other papers, including a petition for rehearing and a suggestion for rehearing in banc, and any response to such petition or suggestion, must be produced in a manner prescribed by subdivision (a), but paragraph (a)(6) does not apply, and

(A) consecutive sheets may be attached at the left margin; and

(B) a cover is not necessary if the paper has a caption that includes the case number, the name of the court, the title of the case, and a brief descriptive title indicating the purpose of the paper and identifying the party or parties for whom it is filed.

The Committee made several additional changes.

Because use of carbon paper is so rare, a motion was made to eliminate any reference to carbon copies. Because the rule prohibits the use of carbon copies unless the court grants permission to use them, some members of the Committee favored retention of the rule provision. The motion to eliminate the sentence at lines 7 through 10 of the redraft passed by a vote of 6 to 3.

With regard to the definitions of proportionately spaced typeface and monospaced typeface, it was noted that it is incorrect to omit the notion of advance width. Even in Courier the characters are different widths; an "i" is narrower than a "w". The real difference between monospaced and proportionately spaced typefaces is that a monospaced type advances the same width across the page for each letter regardless of the width of the character. The sentences at lines 22 through 25 were rewritten as follows:

"A proportionately spaced typeface has characters with different advance widths. . . . A monospaced typeface has characters with the same advance width."

The Committee asked that the Committee Note be amended to explain the notion of "advance width" and to make it clear that use of pica type on a standard typewriter is a monospaced typeface having 10 characters per inch. Although the Committee had voted to require that type be "roman" (meaning non-italic), the Committee also requested that the Note should make it clear that italics may be used for case names or occasional emphasis. Typographers agree that use of italics is preferable to underlining, which distracts the reader.

The Committee approved by divided vote (5 to 4) deletion of (a)(4)(D); it provides that a party may move for permission to exceed the length limits established in Rule 32. Several members of the Committee believed that inclusion of such language looks like an invitation to file such a motion and it is unnecessary. Although a motion may be filed without any such authorizing language, the dissenting members believed that retention of the language clarifies how one should seek permission to exceed the standard length. Although the Committee voted to delete the language, the consensus was that the

Committee Note should say that removal of the corollary language ("Except by permission of the court") from the current rule does not mean that the Committee intends to prohibit motions to deviate from the requirements of the rule.

With regard to the certificate of compliance required by (a)(5), it was pointed out that the draft does not require the certificate to indicate the manner of compliance. In contrast, Rule 25 requires a certificate of service to indicate the date and manner of service, the names of persons served, the addresses, etc. Rule 32 also should require specification of those items that the attorney knows but the clerk's office does not necessarily know and cannot ascertain by a cursory examination of the brief. Following discussion, the provision was renumbered as (a)(5) and was amended to read as follows:

(5) Certificate of Compliance. The attorney, or party proceeding pro se, shall include a certificate of compliance with Rule 32(a)(1)-(4) which states the brief's line spacing, and states either:

(i) that the brief is proportionately spaced, together with the typeface, point size, and word count; or

(ii) that the brief uses a monospaced typeface, together with the number of characters per inch, and word count or number of counted pages.

The person preparing this certificate may rely on the word count of the word-processing system used to prepare the brief.

The possibility of developing a standard form that could be included in the appendix to the rules was discussed. Use of the forms is not mandatory, but they are helpful to practitioners. The rule, however, should require inclusion of all information that the Committee wants in every certificate.

The Committee discussed the sufficiency of simply stating that a brief contains less than 14,000 words rather than specifying the exact word count. Some members said that a person who prepares a 15 page brief should not spend any time counting words. Whereas other members said that it is so simple to get a word count from the computer that requiring inclusion of a word count is not an imposition. In addition, even a 7 page proportionately spaced brief must comply with the average number of words per page requirement and requiring the exact word count can make it clear that the number of words per page is excessive. The specific requirement also helps to focus the lawyer's attention. Because the Committee contemplated that the rule will be republished, it decided (by a vote of 5 to 4) to publish the more stringent requirement because it is easier to back away from a stringent requirement than to insert one. Furthermore, inclusion of specific information in the brief, such as typeface, point size, word count, etc. will allow the courts to study and refine the requirements.

The Committee defeated (by a vote of 2 to 6) a motion to move to the Committee Note the statement that the person preparing the certificate may rely on the word count of the word-processing.

The Committee discussed whether Rule 28 should be amended to reflect the fact that every brief must include a certificate of compliance. The language just approved by the Committee requires that a brief "include" a certificate of compliance. One member suggested that it might not be necessary to amend Rule 28 if the rule simply required that a brief be "accompanied" by a certificate of compliance or if the

rule said that the certificate must be "attached" rather than "included." One member pointed out that although a certificate of service is required, Rule 28 does not list that as an essential part of a brief. Another member argued that it would be more helpful to a lawyer if Rule 28 listed everything that must be included. If that approach were taken, it might be necessary to also include mention in Rule 28 of the certificate of service. There is, however, a significant difference between a certificate of service and a certificate of compliance. Proof of service frequently is completed after the brief is completed and the proof of service may be filed after the brief; whereas, all the facts necessary for completion of the certificate of compliance are known at the time the brief is filed. It was concluded, therefore, that it would be inappropriate for Rule 28 to require that each brief "include" a certificate of service.

A motion was made to amend Rule 28 to require that each brief include a certificate of compliance. The motion passed by a vote of 5 to 3.

With regard to the binding provision in (a)(9), the words "stapled or" were deleted. Deletion of those words does not prohibit stapling. In fact, the new language would permit stapling a brief at the upper left-hand corner. The change makes it clear that however a brief is bound the binding must "be secure," "not obscure the text" and done in a manner that "permits the document to lie reasonably flat when open."

Subdivision (b) deals with the form of other papers. A number of stylistic changes in that subdivision were approved. The Committee also decided to delete (b)(2)(A) of the redraft. That subparagraph said that "consecutive sheets may be attached at the left margin." Because the rule amendments delete the requirement that a brief or appendix be bound along the left margin, that subparagraph is no longer necessary.

The Committee concluded the discussion of Rule 32 by returning to the question of the need to republish the rule. The Advisory Committee voted, 7 to 2, to recommend that Rule 32 be republished. The Committee concluded that the elimination of the pamphlet brief and the increased level of specificity being required in the certificate of compliance are substantial changes.

A suggestion was received that Rule 32 should specify the brief colors in a cross-appeal. The Committee decided to take no further action on that suggestion.

Style Changes to Rules 25 and 27

In response to Judge Logan's earlier request, Mr. Garner suggested additional style revisions to the rules considered the preceding morning prior to his arrival.

1. Rule 25

On page 46 Mr. Garner proposed eliminating the separate paragraphs (i) and (ii). The Committee voted, however, to retain the paragraphs and the indentations.

The published rule requires a party using the mailbox rule to file a certificate that the brief was mailed or dispatched to the clerk by commercial carrier on or before the last day for filing. The language on page 46, however, states that the brief is timely "if accompanied by a certification that" it was so mailed. Taking that language literally, a brief would be timely even if mailed after the deadline as long as it is accompanied by certificate (however false) that it was timely mailed. To avoid that problem, lines 24 and 25 were amended by dropping the words "accompanied by a certification that." It was proposed that the certification requirement be moved to a later section of the rule.

Consideration of the language on page 46 highlighted the fact that as to a brief or appendix, three separate "certificates" may be required. Rule 25(d) requires all papers to have proof of service in the form of either a certificate of service or an acknowledgement of service. Proposed Rule 32 requires a brief to "include" a certificate of compliance with Rule 32. Under proposed Rule 25(a)(2)(B), if a party makes use of the mailbox rule, there must be a certificate stating that the brief was mailed or dispatched by commercial carrier on or before the last day for filing.

In order to make it clear that Rule 25 has been amended to require a certificate of filing, a motion was made to amend the caption to the rule so that it includes mention of "proof of filing." The motion passed by a vote of 7 to 1. Another motion was made to amend 25(d) so that its heading reads "Proof of Service; Filing" and its text includes the following language:

When a brief or appendix is filed by mailing or dispatch in accordance with Rule 25(a)(2)(B), the proof of service must also state the date and manner by which the document was mailed or dispatched to the clerk.

That language combines the two certificates required by Rule 25. The motion passed unanimously.

2. Rule 27

Mr. Garner suggested that on page 92, lines 4-6 should be changed to active voice so that it would read: "unless these rules prescribe another form." The change was accepted.

On page 93, lines 26 through 29 were amended to remove an ambiguity. As amended the sentence states: "An affidavit must contain only factual information, not legal argument."

On page 98, lines 136 through 141, dealing with carbon copies, were deleted. The change was in keeping with the decision previously made to delete the language in Rule 32 dealing with carbon copies.

II. RULES FOR INITIAL PUBLICATION

At its meeting last October, the Advisory Committee approved several rule amendments but decided to delay a request for publication for two reasons. First, there already were a number of rules in the pipeline including the substantial package of rules published in September. The Committee did not want two sets of rules out for publication at the same time. Second, delay in publication would permit the Style Subcommittee to review the rules and make suggestions for improvement prior to publication.

Mr. Garner had reviewed the rules and was present to discuss his suggestions with the Committee.

Rule 26.1 - Corporate Disclosure

The proposed amendments to Rule 26.1 simplify the disclosures that must be made by a corporate party. The amendment deletes the requirement that a corporate party identify subsidiaries and affiliates that have issued shares to the public. The committee does not believe that it is necessary to make such disclosures. Instead, the amended rule requires disclosure only of a parent corporation and of any stockholders that are publicly held companies owning 10% or more of the party's stock.

Mr. Garner suggested a number of language changes. The Advisory Committee adopted his suggestions and made several changes of its own, including subdividing the rule into three subdivisions. As amended, the rule would read as follows:

Rule 26.1 Corporate Disclosure Statement

(a) *Who Shall File.* Any nongovernmental corporate party to a proceeding in a court of appeals shall file a statement identifying any parent corporation and listing stockholders that are publicly held companies owning 10% or more of the party's stock.

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

(c) *Number of Copies.* If the statement is filed before the principal brief, the party shall file an original and three copies, unless the court requires the filing of a different number by local rule or by order in a particular case.

Some local rules require much broader disclosure than Rule 26.1 requires. The Committee Notes make it clear that such local rules are not preempted by the national rule. The Advisory Committee had previously attempted to formulate a rule requiring broader disclosure but was unable to develop a consensus among the circuits for such a rule.

Judge Stotler recommended that the Committee submit the proposed amendments to the Judicial Conduct Committee for its review.

Rule 29 - Amicus Curiae Briefs

Mr. Garner suggested a number of language changes in Rule 29; they were approved by the Committee. The rule as amended reads as follows:

Rule 29. Brief of an Amicus Curiae

(a) *When Permitted.* The United States or its officer or agency, or a State, Territory or Commonwealth may file an amicus-curiae brief without consent of the parties or leave of court. Any other amicus curiae may file a brief only if:

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

(2) the court grants leave on motion; or

(3) the court so requests.

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

(1) the movant's interest;

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

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

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

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

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

(d) *Length.* An amicus brief may be no more than one-half the length of a principal brief as specified in Rule 32.

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

grant leave for later filing, specifying the time within which an opposing party may answer.

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

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

The Committee discussed the possibility of dividing (b)(2) into two paragraphs making it (b)(2) and (b)(3). By vote of 7 to 1, the Committee decided to leave it one paragraph. The majority of the Committee believed that the two ideas are interdependent and that it would be unwise to separate them.

With regard to oral argument, it was pointed out that if the party being supported cedes a portion of its time to an amicus, the court of appeals is likely to approve the participation of the amicus. It is only when an amicus seeks its own time that it is unusual for a court to grant the time. The Committee consensus, however, was that the language of subdivision (g) should remain as drafted.

Rule 35 - En Banc Proceedings

Rule 35 is amended to treat a request for a rehearing en banc like a petition for panel rehearing. As amended, a request for a rehearing en banc also will suspend the finality of the court of appeals' judgment and extend the period for filing a petition for writ of certiorari. The amendments delete the sentence stating that a request for a rehearing en banc does not affect the finality of the judgment or stay the issuance of the mandate. In order to affirmatively extend the period for filing a petition for writ of certiorari, however, Sup. Ct. R. 13.3 must be amended. In keeping with the intent to treat a request for a panel rehearing and a request for a rehearing en banc similarly, the term "petition" for rehearing en banc is substituted for the term "suggestion" for rehearing en banc.

The amendments add intercircuit conflict as a reason for determining that a proceeding involves a question of "exceptional importance" -- one of the traditional criteria for granting an en banc hearing.

The amendments also establish a 15 page limit on such petitions.

The first issue the Committee discussed was the use of "en" banc or "in" banc. Judge Logan recounted his extensive discussion with Judge Newman concerning the issue. The Committee voted 7 to 1 to use "en" banc.

Mr. Spaniol was troubled by the repetition in (b)(1)(A) and (B) of language in (a)(1) and (2). Several members of the Committee responded that the arrangement of that particular material in the rule was the result of much negotiating. The Solicitor General requested the addition of intercircuit conflict as a reason for granting an en banc hearing. The Advisory Committee was unwilling to expand the criteria for en banc consideration beyond two existing criteria set forth in subdivision (a): 1) the need to secure or maintain uniformity, and 2) a case involving a question of exceptional importance. The Committee was willing, however, to state that the existence of an intercircuit conflict may lead to the conclusion that the

proceeding involves a question of exceptional importance. The Committee concluded that the repetition may be necessary to preserve the carefully negotiated compromise.

Mr. Garner objected to the inclusion in (b)(1)(B) of two sentences when (b)(1)(A) and (B) are intended to be alternative portions of a single sentence. The Committee experienced difficulty in attempting to redraft (B) and asked Mr. Garner to work with the reporter to try to improve the structure of the subparagraphs.

Mr. Garner suggested additional language changes in Rule 35; the Committee approved those changes.

Rule 41 - Mandate

Mr. Garner suggested minor language changes, all of which were approved by the Committee.

In (a)(2) he would move the words "unless the court orders otherwise," to the beginning of the second sentence.

In (b) he suggested changing the words "A party may, by motion, request a stay of mandate . . ." to "A party may move to stay the mandate . . .." In that same subdivision, he would change language in the third sentence from "unless the period is extended for cause shown" to "unless the period is extended for good cause".

The meeting adjourned at 4:15 p.m. The Committee will reconvene in Washington, D.C. on October 19, 20, and 21. The fall meeting will be devoted solely to style revisions.

Respectfully submitted,

Carol Ann Mooney

Reporter