APPENDIX D.

REPORT OF THE ADVISORY COMMITTEE ON THE FEDERAL APPELLATE RULES ON THE OPERATION OF RULE 30.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
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May 9, 1984

The Honorable Edward T. Gignoux
United States District Court
Post Office Box 8
Portland, Maine 04112

Dear Ed:

On a number of occasions we have discussed briefly the long-term project of the Advisory Committee on the Federal Rules of Appellate Procedure dealing with Rule 30, the appendix. As you heard at the last meeting of the FRAP Committee, we have completed our study and have prepared a report which sets forth in some detail the purpose, methodology and conclusions of the study. The report has been approved by the Committee, and I am enclosing the original thereof for filing with the Standing Committee.

You will recall that this study was undertaken by the Committee at the suggestion of the Chief Justice. His primary concern in suggesting this project to the Committee was with the escalating costs of litigation. Among other things we sought to determine whether the appendix requirement of the Appellate Rules was contributing significantly to the rising costs of appeals. One question which the Committee necessarily considered was whether bench and bar would be well served by recommending the elimination of the appendix requirement from the Rules.

The study was carried on in depth and the Committee learned of actual practices under Rule 30 from judges, clerks of courts of appeals and practicing attorneys. As an examination of the report reveals, the Committee concluded that Rule 30 as now applied does not contribute significantly to the costs of appeals and that only minor changes in the Rules are desirable at this time. The three rule changes recommended on page 23 of the report have been adopted in principle by the Committee and will be approved in final form and submitted to the Standing Committee in the near future.

Though the enclosed report is somewhat different from the sort of recommendation which the Advisory Committee normally submits to the Standing Committee, it is felt that the report should be filed with the Standing Committee and retained in its records.

If you have any questions about the report or the procedures followed, please feel free to contact the Reporter, Kenneth Ripple, or me.

With best regards, I am

Sincerely yours,

Pierce Lively

enc.
cc: Kenneth Ripple

Report of the Advisory Committee on the Federal Appellate Rules on the Operation of Rule 30

Report of the Advisory Committee on the Federal Appellate Rules on the Operation of Rule 30

I. Background

At the first meeting of the newly-reconstituted Advisory Committee on the Federal Appellate Rules, the Chief Justice invited the Committee's attention to the problem of ever-spiraling costs of litigation. He noted in particular the growing amount of unnecessary documentation which was becoming accepted as standard practice in appellate litigation. More specifically, he asked the Committee to investigate whether the present requirements of Rule 30[1] contribute to the unnecessary expense and, if so, to recommend a solution to the problem.[2]

In general terms, Rule 30 requires that counsel prepare and file a separate appendix to the brief that contains: (1) the relevant docket entries in the proceeding below; (2) those portions of the pleadings, charge, findings, or opinion of the Court below that are relevant to the appeal; (3) the judgment, order or decision of the lower court; and (4) "any other parts of the record to which the parties wish to direct the particular attention of the Court."[3] It is this last requirement which has the potential for inflating litigation costs. Although the record on appeal is already before the Court,[4] segments of it are included in multiple copies of this separate appendix.[5] Overdesignation[6] of those segments can considerably increase overall litigation costs.

II. The Committee's Investigation

In fulfilling the mandate of the Chief Justice,[7] the Committee undertook the following inquiries:

1) In order to understand the rationale of the present rule, it undertook an investigation of its history. The present rule was a deliberate choice from among several options considered by the original Advisory Committee. Therefore, respect for the work of its predecessors required that the present Committee, in reevaluating the rule, begin by understanding the reasons for that conscious choice. A summary of that investigation is set forth in Part III.

2) The Committee undertook an extensive survey of local circuit practice with respect to the separate appendix. In his dissenting opinion in New State Ice Company v. Liebmann, 285 U.S. 262, 311 (1932), Justice Brandeis described how a state may play the role of a laboratory in the development of a solution to a social or economic problem. Within the federal judiciary, the circuits often perform the same function as they try new approaches to judicial administration problems. Rule 30 affords a particularly good opportunity for such experimentation. Under subsection (f) of Rule 30, a circuit may "by rule applicable to all cases, to classes of cases, or by order in specific cases, dispense with the requirement of an appendix and permit appeals to be

heard on the original record, with such copies of the record, or relevant parts thereof, as the court may require." Most circuits have exercised this option and the Committee believed that their experimentation could contribute significantly to its understanding of the role of the appendix in federal appellate litigation and to possible solutions. The value of this experimentation was enhanced by the fact that some of the most radical departures from the separate appendix system had taken place in circuits with heavy caseloads, complex litigation, and wide geographic dispersion of judges. The results of this study of local rules are set forth in Part IV.

3) Since cost savings measures must be evaluated in light of their impact on the appellate process, the Committee next solicited the views of all active United States Circuit Judges. The judges were asked to evaluate their present system and the principal alternative approaches used in other circuits. This survey is described in Part V.

4) With the assistance of the Clerks of the Courts of Appeals, the Committee, through its Reporter, surveyed the costs and administrative burdens associated with each circuit's approach to the separate appendix. The results of this study were discussed with the Clerks by the Chairman and the Reporter and then discussed at a subsequent meeting of

the Committee. The results of this inquiry are contained in Part VI.

III. A Brief History of the Development of Federal Rule of Appellate Procedure 30

A. Introduction

In undertaking its review of FRAP 30, the Committee believed that respect for the long and careful work of its predecessor committees required that the origin of the Rule be identified and the reasons for its present form appreciated. This approach was especially important in the case of FRAP 30. Its present form is the product of a conscious choice after long and thoughtful consideration of several options.

B. Practice Before the Adoption of FRAP

Before the adoption of the Federal Rules of Appellate Procedure, most circuits (7) used an appendix. In six of these circuits, the appellant filed this document at the time of the filing of his brief. It contained those parts of the record which he deemed essential to an understanding of the questions presented in the brief. The appellee, if he believed that additional parts of the record were necessary for a fair consideration of the case, had to include those additional parts in a separate appendix to his brief.

A printed record was required in three circuits (5, 8, 10), although the Advisory Committee found that practice in those circuits made the difference between a printed record and the appendix "largely nominal."[8] The Ninth Circuit permitted litigants, if they wished, to proceed on the original record and two copies.[9]

C. The Advisory Committee's First Draft

The Preliminary Draft of the Advisory Committee, issued in March 1964, called for a "deferred appendix" to be constructed after the submission of both briefs.[10] In the opinion of the Committee, this system was preferable to the fragmentation which resulted when each party submitted its own appendix. Appellants had a tendency, noted the Committee, to underestimate what was necessary for a determination of the issues presented. The "no appendix" approach of the Ninth Circuit was rejected since the Committee decided against "any general dispensation from the requirement of submitting an appendix."[11] The Draft Rule did permit, however, an individual court to dispense with the requirement of submitting an appendix.[12]

D. Subsequent Drafts by the Advisory Committee

The Advisory Committee's initial draft met a good deal of opposition. Consequently, in December 1966, the Standing Committee on Rules of Practice and Procedure circulated three other drafts for comment:

1. Draft A[13] called for the use of a single appendix which would contain all the record material "which it is deemed by the parties essential for the judges to read."[14] Normally, this document was to be filed with the appellant's brief. By stipulation or order, it could be filed by the appellant within 21 days of service of the appellee's brief. Any circuit could opt to proceed on the original record.

The Advisory Committee, in a "special note," expressed its clear preference for this option:

> "[O]f all the methods suggested for the presentation to the several members of a court of material in a record, the one thus devised would best serve the purposes of accurate and expeditious disposition of cases."[15]

It also stressed that the deferred appendix option would produce "economy and clarity" because "the necessary parts of a record can be designated more certainly and easily after the legal points at issue have been defined."[16]

2. Draft B[17]- This option was the separate appendix system then employed in most circuits. The draft gave the circuits the option of requiring a joint appendix or of

dispensing with the appendix altogether by rule, order, or stipulation.

In an accompanying comment, the Advisory Committee noted that this "individual appendix" approach, while permitting each attorney to concern himself only with his own selection of the record, required the appellate judge to work with a fragmented presentation of the record.[18]

3. Draft C[19]- This approach was modeled on the Ninth Circuit approach of proceeding on the original record and two copies. Each circuit could dispense with the requirement for filing copies and "direct that the appeal be heard on the original record alone."[20]

The Advisory Committee gave the following reasons against adopting this procedure as a national rule:[21]

1) a busy court is entitled to the help of lawyers in finding those parts of the record essential to the disposition of the case;
2) selecting parts of the record will help lawyers in their own presentation;
3) the size of the original record will create problems in its transmittal;
4) insufficient copies will be available for simultaneous use by judges, law clerks and for deposit in law libraries.

The Committee did note, however, that this approach might

be appropriate "in certain types of appeals, particularly those with voluminous transcripts of which large portions require appellate consideration as when convictions are attacked as being without sufficient evidence or in appeals in forma pauperis."[22]

E. Final Adoption and Subsequent Amendments

The present FRAP 30 was based principally on "Draft A," although subsection (f) gave the circuits the option of adopting "Draft C" and proceeding on the original record.

In 1970, FRAP 30(a) was amended to shorten the time for filing the appendix when the Court of Appeals shortens the time for the filing of briefs under FRAP 31(a). FRAP 30(c) was also amended to permit deferral of the appendix only if the Court should provide by order or local rule. The litigants could no longer choose this option themselves. The purpose of the amendment was to prevent the practice of electing to defer filing of the appendix simply to obtain a 21 day delay. However, the Advisory Committee notes state specifically that this amendment "should not cause use of the deferred appendix to be viewed with disfavor."[23]

IV. Current Circuit Practice

The promulgation of Rule 30 hardly put an end to the diversity of views on the separate appendix issue. Over the years, the circuits have employed a variety of techniques to

formulate the appellate record and to deal with the problem of costs. The following subsections describe briefly the current practice.

A. The Local Rules Dealing Directly With The Separate Appendix

In examining current circuit practice under Rule 30, the local rules provide a logical and helpful starting point. The approaches of the circuits can roughly be divided as follows:

1. The "Separate Appendix" Circuit

The Fourth Circuit is the only circuit without a local rule on the matter of the separate appendix.

2. The "Specific Exception" Circuits

The First,[24] Second,[25] Third,[26] Sixth,[27] District of Columbia[28] and Federal Circuits,[29] while generally adhering to the requirement for a separate appendix, have eliminated the requirement in certain types of cases or have provided by local rule that the requirement may be waived in a given case. In many of these circuits, in forma pauperis cases are heard on the original record. In some, social security cases are treated in similar fashion.

3. The "Record Excerpt" Circuits

The Fifth,[30] Seventh,[31] Ninth[32] and Eleventh[33] Circuits have adopted a "record excerpt" method. The "record excerpt" is an abbreviated appendix.

There are significant variations in each circuit's rule.However, the basic approach is the same. The appeal is heard on the original appellate record as defined in FRAP 10. However, an additional document is prepared for the judges. It contains those parts of the appellate record which, by consensus, the judges of that circuit deem essential. The most abbreviated version appears to be that of the Fifth Circuit which contains: 1) the docket sheet; 2) the judgment or interlocutory order appealed from; 3) any other orders or rulings sought to be reviewed; 4) any supporting opinion, findings of fact or conclusions of law filed or delivered orally by the district court.[34] The Circuit's internal operating procedures permit the appellant to add "the pleadings, charge, transcript, or exhibits if they are essential to an understanding of the issues raised."[35] The Seventh Circuit rule, by comparison, requires that the document also contain "any other short excerpts from the record . . . important to a consideration of the issues raised on appeal."[36]

4. The "Original Record" Circuit

The Tenth Circuit hears most cases on the original record. Local Rules 10 and 11 provide that, with the exception of civil cases containing a transcript of 300 pages or more, the appeal will

proceed on the original record. All criminal appeals proceed on the original record.

5. The Eighth Circuit Approach

The Eighth Circuit has adopted another and somewhat unique approach.[37] Unless the parties agree to proceed on agreed statement of facts under FRAP 10(d), the appeal is on the appellate record (referred to as the "designated record"). The parties may choose between two methods of preparing the "designated record:"

a. the parties may prepare the "designated record" in accordance with FRAP 30(b). This form is called "the appendix."

b. the parties may request the district court clerk to compile and transmit to the Court of Appeals those portions of the original record on appeal which they designate.

Thus, the Eighth Circuit has combined the "appendix" and "original record" approach.

B. Other Rule Provisions Relating to the Appendix

In addition to describing the basic form of the separate appendix, other local rules further shape practice in this area.

1. Material for Inclusion in the Appendix

A few local rules contain additional guidance for counsel aimed at reducing the material contained in the appendix.

Two local rules set forth explicitly the material which ought not be included in the appendix.[38] The Second Circuit has admonished counsel not to include in the appendix extraneous material such as memoranda of counsel to the trial court.[39] One rule assures counsel that, if reference to such material is necessary in the decision of the case, the original record will be consulted.[40] By contrast, a First Circuit rule warns counsel that "notwithstanding the provisions of FRAP Rule 30 the court may decline to refer to portions of the record omitted from the Appendix, except by inadvertence, unless leave is granted prior to argument."[41]

Two other circuits affirmatively urge counsel to enter into stipulations which will reduce costs by reducing the size of the transcripts.[42]

2. Number of Copies

Several circuits have, by local rule, reduced the number of copies required.[43]

3. Method of Copying

Some circuits have explicit rules governing the method of copying the record and the amount recoverable for such copying.[44]

4. Sanctions for Over-Inclusion of Material

Some circuits have also reiterated and made more explicit the provision of FRAP 30(b) permitting the court to disallow

costs for the inclusion of unnecessary material in the record.[45] Two circuits now explicitly provide for the imposition of costs against counsel pursuant to 28 U.S.C. § 1927.[46] These rules also explicitly note that counsel can be subject to disciplinary proceedings for unreasonably and vexatiously increasing costs.

5. Leaving Record in District Court

Several circuits have also adopted the practice, either on a temporary or experimental basis, of leaving the appellate record in the District Court.[47] The Court of Appeals decides the appeal on the basis of the material in the appendix (or its equivalent) or by requesting that the appellate record, or parts of it, be forwarded to the Court of Appeals. While this procedure may well simplify the administrative burdens of the Court of Appeals, it would appear, at first glance, to have the potential of inducing counsel to include more material within the appendix. Knowing that the record is not immediately on hand during the consideration of the appeal, counsel could well decide not to rely on a busy court's taking the time to procure the necessary documentation. This supposition is not easy to verify. Moreover, the Committee's repeated inquiries have produced no evidence that overdesignation in appendices is attributable to this administrative practice.

V. Survey of the Judges of the Courts of Appeals

In Fall 1981, the Reporter, at the direction of the Committee, invited every active United States Circuit Judge to submit to the Committee a statement on the operation of Rule 30. Each judge was asked to comment on the practice currently in use in his or her circuit. Each was also afforded an opportunity to comment on the practices of the other circuits.

The responses received from the various judges demonstrated no clear nation-wide preference for any single approach to the separate appendix question. To the extent that any "trend" could be perceived, it was a tendency to preserve the status quo in each circuit. However, the responses - often quite long and thoughtful - were extremely helpful to the Committee because they revealed a good deal about the various roles which an appendix or its alternative plays in the methodology of appellate judges.

The most important message of the survey is that judges - like the judges at the time of the original formulation of Rule 30 - do not regard the question of the separate appendix as a simple "administrative" matter, but as quite central to the process of deciding cases. There are many styles of judging on the appellate bench and the question of what kind of appendix will be required is worked out among the judges, sometimes through trial and error. While most circuits have

achieved a fairly stable consensus on the matter, there is, beneath the surface, a significant disparity of views.

A. The "Pros and Cons"

1. - In Favor of the Separate Appendix

Those judges preferring the separate appendix tended to be more forceful in their answers to the survey. They stressed that the quality and quantity of judicial productivity were to be weighed against cost savings to the litigants. Their arguments may be summarized as follows:

a. A separate appendix is needed at oral argument to permit easy access to the record when questioning counsel.

b. Preparation of an appendix requires counsel to focus at an early stage on the essential points in the case.

c. The separate appendix permits earlier identification of those cases in which summary disposition is appropriate.

d. The separate appendix permits the judge to cast the tentative, but crucial, vote at conference immediately after argument on the basis of more of the record than would be available under a "record excerpt" approach.

e. A separate appendix permits more thorough preargument preparation. The non-resident judge or the judge who works at home can take a good deal of

the record along if he has an appendix. More than one judge must prepare for oral argument at the same time and often a judge and his law clerk must use the materials separately.

f. An appendix can also act as a check on attorney hyperbole in the brief and at oral argument since any member of the court can check the accuracy of a statement easily.

2. In Favor of the Record Excerpt

Judges in circuits using some variation of the "record excerpt" approach generally believe that their system also fulfills the objectives set forth by those who favor the appendix method. When the record excerpt does not suffice, the appendix will not suffice either is an oft-repeated claim.

Responses from these judges also exhibit a marked tendency to emphasize that the record excerpt must be flexible to the needs of the case and include material necessary for a resolution of the issues raised. Most frequently suggested additions are the inclusion of pertinent parts of the transcript and, when applicable, the jury charge.

Interestingly, most judges using the record excerpt method (and those where the case is heard on the original record) do not seem bothered by the necessity of transmitting

the record in the mail. On the other hand, judges in circuits which use the separate appendix often cite this problem as a major reason for not adopting the "record excerpt" method.

B. Common Ground

The survey also suggested some areas where there is a general consensus among the judges:

1. There is no disagreement on goals: 1) the quality and quantity of judicial productivity; 2) the reduction of litigant costs.
2. The difference of opinion between the "separate appendix" method and the "record excerpt" method centers on the pre-oral argument and oral argument stages of the appellate process. There is little dissent from the position that the entire record must be used in writing the opinion for the court.
3. There are certain cases which, because of their voluminous records or complex issues, need an appendix. (There is no unanimity, however, on how to describe this category.)

VI. Survey of the Clerks of the Courts of Appeals

In 1982, the Reporter, working with Mr. John Hehman, Clerk of the United States Court of Appeals for the Sixth Circuit, and Mr. Gilbert Gannucheau, Clerk of the United States Court of Appeals for the Fifth Circuit, formulated a

survey for the clerks of all the federal circuits designed to elicit information on the impact of the separate appendix requirement on their offices and upon counsel appearing before their courts. The Chairman and the Reporter later discussed the results of this survey with the Clerks at their annual meeting at the Federal Judicial Center. Mr. Leonard Green, Chief Deputy Clerk of the Sixth Circuit summarized the results for the Committee as follows:

> The survey suggests that the following conclusions can fairly be drawn:
>
> Each of the circuits has its own alternative to Rule 30. In that sense, the Rule plays an important role; it defines a document to serve as a supplement to the briefs, in which is to be distilled from the larger record on appeal only those items necessary to the adjudicative process. Rule 30, then, serves as a fixed point of reference for the circuits to use in fashioning for themselves that vehicle which will respond to their needs.
>
> There is a wide variation among the local alternatives, ranging from the "record excerpt" system in use in several circuits to the full-blown FRAP 30 appendix or something very closely akin to it, in use in other circuits.

Use of the deferred appendix procedure of 30(c) is negligible, even where use of that arrangement is given some encouragement.

There are several categories of cases, collectively comprising a significant portion of the docket, in which the appendix requirement is commonly waived. These categories include prisoner cases, especially without counsel, CJA cases, in forma pauperis cases, and social security cases.

The principal distinction among the courts as far as what parts of the record need to be included in the appendix is the transcript. The differences among the courts in this respect reflect differences and different judicial approaches to the adjudicative process.

Because of the nearly universal use of photocopy as the preferred method of reproduction, rather than costly printing, the actual cost of preparing the appendix is not high, certainly not when compared with other costs associated with litigation. The average

number of pages reported in an appendix range from seven to seven-hundred, but most commonly seems to be in the two-hundred to three-hundred page range; from four to ten copies of the appendix are required in the various courts.

The cost of the appendix requirement to the Clerks' offices is not great. Neither the investment of man hours required nor the storage requirements would seem to represent a significant burden to the offices.

All of the circuits except the Third and, in some cases, the Eighth, require that the district court proceedings be filed with the Court of Appeals.

There is a wide variation among the practices of the courts in circulating the record or parts of it to the court. Some will send the record automatically to the lead judge of the hearing panel or the writing judge while other courts will send the record only in response to a specific request from a judge.

VII. Conclusions and Recommendations

On the basis of the foregoing study, the Committee makes the following conclusions and recommendations:

1. Today, as at the time of the formulation of the Rules, most judges do not consider the form of the separate appendix a simple "administrative" matter. There are many styles of judging. On any Court, arriving at a decision as to the most appropriate form of appendix is a collegial decision aimed at accomodating the particular judging styles of the bench in question and, consequently, at maximizing the efficiency of the Court and the quality of its workproduct. While considerations of uniformity are important and doubtless will be taken into account by the judges of the respective circuits, the committee concludes that at this time the form of the separate appendix is not an appropriate subject for rigid national regulation.

2. Litigation costs remain, however, a significant concern. Each court has a responsibility to consider such costs in formulating its approach to the separate appendix issue. In this respect, current circuit practice evidences a general, although somewhat uneven, acknowledgment of this responsibility. Over recent years, there has been, even in many of those circuits which adhere to the "separate appendix approach," a "natural shrinkage" of the appendix or at least of its costs. Exceptions to the appendix requirement in many

cases and the replacement of "hot lead" printing by much less expensive copying methods have been the principal improvements. Other avenues must be explored more fully, however:

a. Local rules and internal operating procedures must articulate more precisely how the Court uses the separate appendix. It must be emphasized that the appendix is used principally in evaluating the briefs and in preparing for oral argument and that the entire record is normally used in writing an opinion. Furthermore, counsel must be assured that, throughout the appellate process, the Court will consult the entire record whenever it becomes necessary.

In addition to making such information available to the bar through local rules, the Court and its Clerk ought to communicate more informally and more regularly with the bar regarding the proper role of the appendix.

b. Through local rule and informal contact with the bar, the Court ought to communicate its continuing concern with litigation costs. Each circuit ought to have in its local rules a specific provisions fixing the maximum recoverable costs for copying of appendix material and noting the availability of sanctions for overdesignation of appendix material.

c. The application of sanctions against the litigant or counsel for abuse of the appendix process ought to be given sufficient dissemination to have a deterrent effect.

3. While the Committee believes that, at this time, no particular form of separate appendix ought to be mandated in a rule of national application, several changes to FRAP are desirable:

a. Rule 30(a) should be amended to specify that memoranda of law in the trial court are not to be included in the separate appendix. See United States v. Noall, 587 F.2d 123 (2d Cir. 1978).

b. Rule 30(b) ought to be amended to require that each circuit have a local rule specifically noting that, in addition to sanctions against the litigant, the court may, in an appropriate case, impose sanctions against counsel.

c. Rule 39(c) ought to be amended to require each circuit to fix by local rule the maximum allowable costs for copying appendix material.

4. Cost to the litigants must remain a matter for continuous and careful monitoring by the circuits. It is especially important that, in assessing innovations aimed at increasing administrative efficiency, the Court identify and weigh any resulting increase in costs to the litigants.

Advisory Committee on Federal Appellate Rules

Honorable Pierce Lively, Chairman
E. Milton Farley, III, Esquire
Honorable J. Smith Henley
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Honorable Edward A. Tamm
Honorable Eugene A. Wright

Professor Kenneth F. Ripple, Reporter

Footnotes

[1]Fed. R. App. P. 30 provides in pertinent part:

(a) DUTY OF APPELLANT TO PREPARE AND FILE; CONTENT OF APPENDIX; TIME FOR FILING; NUMBER OF COPIES. The appellant shall prepare and file an appendix to the briefs which shall contain: (1) the relevant docket entries in the proceeding below; (2) any relevant portions of the pleadings, charge, findings or opinion; (3) the judgment, order or decision in question; and (4) any other parts of the record to which the parties wish to direct the particular attention of the court. 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.

. . . .

(b) DETERMINATION OF CONTENTS OF APPENDIX; COST OF PRODUCING. The parties are encouraged to agree as to the contents of the appendix. In the absence of agreement, the appellant shall, not later than 10 days after the date on which the record is filed, serve on the appellee a designation of the parts of the record which he intends to include in the appendix and a statement of the issues which he intends to present for review. If the appellee deems it necessary to direct the particular attention of the court to parts of the record not designated by the appellant, he shall, within 10 days after receipt of the designation, serve upon the appellant a designation of those parts. The

appellant shall include in the appendix the parts thus designated. In designating parts of the record for inclusion in the appendix, the parties shall have regard for the fact that the entire record is always available to the court for reference and examination and shall not engage in unnecessary designation.

Unless the parties otherwise agree, the cost of producing the appendix shall initially be paid by the appellant, but if the appellant considers that parts of the record designated by the appellee for inclusion are unnecessary for the determination of the issues presented he may so advise the appellee and the appellee shall advance the cost of including such parts. The cost of producing the appendix shall be taxed as costs in the case, but if either party shall cause matters to be included in the appendix unnecessarily the court may impose the cost of producing such parts on the party.

. . . .

(f) HEARING OF APPEALS ON THE ORIGINAL RECORD WITHOUT THE NECESSITY OF AN APPENDIX. A court of appeals may by rule applicable to all cases, or to classes of cases, or by order in specific cases, dispense with the requirement of an appendix and permit appeals to be heard on the original record, with such copies of the record, or relevant parts thereof, as the court may require.

[2]See Burger, Annual Report on the State of the Judicary - 1980, Midyear Meeting of the American Bar Association (Feb. 3, 1980), 66 A.B.A.J. 295 (1980).

[3]Fed. R. App. P. 30(a)(4).

[4]Fed. R. App. P. 10, 11.

[5]Fed. R. App. P. 30 reads in pertinent part:

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

(e) REPRODUCTION OF EXHIBITS. Exhibits designated for inclusion in the appendix may be contained in a separate volume, or volumes, suitably indexed. Four copies thereof shall be filed with the appendix and one copy shall be served on counsel for each party separately represented. The transcript of a proceeding before an administrative agency, board, commission or officer used in an action in the district court shall be regarded as an exhibit for the purpose of this subdivision.

[6]See, e.g., Drewett v. Aetna Cas. & Sur. Co., 539 F.2d 496, 498-501 (5th Cir. 1976) (reproduction of entire trial transcript); Bernard v. Omaha Hotel, Inc. 482 F.2d 1222, 1225-26 (8th Cir. 1973)(inclusion of complete medical testimony that was totally irrelevant to appeal).

[7]For a description of the Committee's early work see Ainsworth and Ripple, The Separate Appendix in Federal Appellate Practice - Necessary Tool or Costly Luxury?, 34 S.L.J. 1159 (1981).

[8]Prop. Fed. R. App. P. 30, advisory committee note, March 1964 Preliminary Draft [hereinafter cited as Preliminary Draft], reprinted in 9 J. Moore, B. Ward and J. Lucas, Moore's Federal Practice § 100.01, at 9-10 (2d ed. 1983).

[9]J. Moore, B. Ward and J. Lucas, supra note 8, at 10. The Eighth Circuit dispensed with its printed record in criminal, habeas corpus, and 28 U.S.C. § 2255 cases.

[10]Id. at 7.

[11]Preliminary Draft, supra note 8, at 10.

[12]Prop. Fed. R. App. P. 30(a)(March 1964 Draft).

[13]J. Moore, B. Ward and J. Lucas, supra note 8, at 12-16.

[14]Letter from Judge Maris, Chairman of the Standing Committee, to the bench and bar (Dec. 20, 1966), reprinted in J. Moore, B. Ward and J. Lucas, supra note 8, at 10.

[15]Special Note to the December 30, 1966, Proposed Draft A by the Advisory Committee on Appellate Rules, reprinted in J. Moore, B. Ward and J. Lucas, supra note 8, at 18-20 [hereinafter cited as Special Note].

[16]Id. at 19.

[17]J. Moore, B. Ward and J. Lucas, supra note 8, at 20-23.

[18]Special Note, supra note 15, at 19.

[19]J. Moore, B. Ward and J. Lucas, supra note 8, at 25-27.

[20]Id. at 27.

[21]Special Note, supra note 15, at 20.

[22]Id. at 19-20.

[23]Fed. R. App. P. 30, advisory committee note to 1970 amendment.

[24]The First Circuit generally uses a separate appendix. However, 1st Cir. R. 11(i) provides that, absent order of the court, all in forma pauperis cases shall be considered on the record on appeal as certified by the district court without the necessity of filing an appendix.

[25]In the Second Circuit, 2d Cir. R. 30.2 authorizes appeals on the original record without printed appendix in: (1) all appeals under CJA; (2) all other in forma pauperis proceedings; (3) all appeals involving a social security decision. In such cases, the appellant files three legible copies of those portions of the transcript that he wants the court to read. To avoid additional expense, application may be made to file less than three copies.

[26]In the Third Circuit, 3d Cir. R. 10 permits hearing on original papers in applications for writs of habeas corpus and for relief under 28 U.S.C.§ 2255 when permission has been granted to proceed in forma pauperis. The appeal is heard on the original record, three copies of the opinion (if any), and the order from which the appeal is taken. In any other case, the court may dispense with the requirement of a record and proceed on the original record.

[27]In the Sixth Circuit, 6th Cir. R. 11 requires that only five (5) copies of the appendix be filed. When the entire record is 100 pages or less, three copies of the record may be filed. In Social Security Law cases, the United States Attorney files four (4) copies of the administrative record provided that the appellant files with his brief copies of the opinion and order of the District Court and the recommendation of the magistrate if the District Court relied upon it.

[28]D.C. Cir. R. 17(c)(3) permits in forma pauperis appeals on the original record without the necessity of an appendix. The appellant furnishes two copies of the relevant parts of the transcript with a list of the page numbers of the transcript so furnished. The findings of fact and conclusions of law and the opinion, if any, of the district court must always be included. The appellee furnishes two copies of any pages of the transcript to which he wishes to

call the court's attention and that were not furnished by the appellant.

[29] Fed. Cir. R. 12(j) provides that the Court may dispense with the requirement of an appendix on motion or sua sponte.

[30] 5th Cir. Rule 30.1 (described in text accompanying note 34 infra.).

[31] 7th Cir. R. 12 states that a full appendix is not required. The appellant files, either bound with his brief or as a separate document, an appendix containing the judgment or order under review, and any opinion, memorandum, findings of fact, or conclusions of law of the trial court or the administrative agency. The local rule also states that the court prefers that the brief appendix contain "any other short excerpts from the record . . . important to a consideration of the issues raised on appeal." The rule declares that "costs for a lengthy appendix will not be awarded." It is apparently fairly rare for these "other short excerpts" to exceed 15 pages.

[32] 9th Cir. R. 13 provides that the appellant file five (5) copies of the following documents:

(a) the complaint and answer(s) and, in criminal cases, the indictment;

(b) the pretrial order, if any;

(c) the judgment or interlocutory order from which the appeal is taken;

(d) other orders sought to be reviewed, if any;

(e) any supporting opinion, findings of fact or conclusions of law filed or delivered orally by the trial court (citations if opinion is published);

(f) the motion and response upon which the court rendered judgment, if any;

(g) the notice of appeal;

(h) the trial court docket sheet, and

(i) the parties' stipulation to a direct appeal to the U.S. Court of Appeals if the appeal is taken directly from a decision of the U.S. Bankruptcy Court.

With respect to administrative proceedings, the same rule requires the petitioner to file five copies of any order to be reviewed and of any supporting opinion, findings of fact or conclusions of law filed by the agency, board, commission, or officer.

33 11th Cir. Rule 22(a) requires that the following material be included in the "record excerpt:"

(1) the docket sheet;

(2) the indictment, information, or complaint as amended;

(3) the answer, counterclaim, cross-claim, and replies thereto;

(4) those parts of any pretrial order relative to the issues on appeal;

(5) the judgment or interlocutory order appealed from;

(6) any other order or orders sought to be reviewed;

(7) any supporting opinion, findings of fact and conclusions of law filed or delivered orally by the court, and

(8) if the correctness of a jury instruction is in issue, the instruction in question and any other relevant part of the jury charge.

[34] 5th Cir. R. 30.1

[35] 5th Cir. R. 30.1, internal operating procedures commentary.

[36] 7th Cir. R. 12(a).

[37] 8th Cir. R. 7.

[38] 8th Cir. R. 7(c)(2); Fed. Cir. R. 12(a).

[39] United States v. Noall, 587 F.2d 123 (2d Cir. 1978).

[40] 8th Cir. R. 7(c)(2).

[41] 1st Cir. R. 11(c).

[42] 1st Cir. R. 7; 10th Cir. R. 7(a).

[43] 1st Cir. R. 11(f); 3d Cir. R. 10(1); 5th Cir. R. 13.1; 6th Cir. R. 11(c),(f); 8th Cir. R. 7(d)(3); 9th Cir. R. 13(a)(1); 11th Cir. R. 22(a); D.C. Cir. R. 9(a)(1); Fed. Cir. R. 12(f).

[44] 4th Cir. R. 12; 5th Cir. R. 39; 6th Cir. R. 26(a); 8th Cir. R. 7 (f); 9th Cir. R. 14(b) & (d); 10th Cir. R. 18; 11th Cir. R. 28; D.C. Cir. R. 15(b).

[45] 6th Cir. R. 11(h); 7th Cir. R. 12(a); 8th Cir. R. 7(c)(2); D.C. Cir. R. 9(a)(3).

[46] 6th Cir. R. 11(h); 8th Cir. R. 7(c)(2).

[47] 3d Cir. R. 14(1); 8th Cir. R. 6(a). Two circuits urge counsel to endeavor to enter into stipulations that will avoid or reduce transcripts. 1st Cir. R. 7; 10th Cir. R. 7(a).